APPENDIX A

No. 23-1939

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 26, 2024
KELLY L. STEPHENS, Clerk

BILLY HAMMONDS,

Petitioner-Appellant,

v.

FREDEANE ARTIS, Warden,

Respondent-Appellee.

ORDER

Before: BATCHELDER, Circuit Judge.

Billy Hammonds, a Michigan prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Hammonds applies for a certificate of appealability ("COA").

A jury convicted Hammonds of third-degree criminal sexual conduct, *see* Mich. Comp. Laws § 750.520d(1)(a), for engaging in sexual intercourse with a 15-year-old girl, A.M. The trial court sentenced Hammonds as a fourth-offense habitual offender to 14 to 60 years' imprisonment. The Michigan Court of Appeals remanded the case so that Hammonds could move for a new trial and an evidentiary hearing on his claims of ineffective assistance of counsel. After a hearing, the trial court denied Hammonds's motion. The Michigan Court of Appeals affirmed the trial court's judgment, and the Michigan Supreme Court denied leave to appeal. *People v. Hammonds*, No. 336958, 2018 WL 6004694, at *1 (Mich. Ct. App. Nov. 15, 2018) (per curiam), *perm. app. denied*, 932 N.W.2d 619 (Mich. 2019).

In his § 2254 petition, Hammonds raised the following grounds for relief: (1) trial counsel was ineffective for failing to call Trisha Lavake as a witness; (2) the prosecutor improperly shifted the burden of proof during closing argument; (3) he was denied a fair trial by the prosecutor's repeated violation of the trial court's order to refer to A.M. as the complaining witness rather than

the victim; (4) the trial court was biased toward the prosecution; (5) the evidence did not support the trial court's scoring of offense variable 10 at sentencing; and (6) he was denied his right to due process when the State failed to arraign him in the circuit court. The district court[1] denied the petition, concluding that Hammonds's claims were either meritless or not cognizable on habeas review. The court declined to issue a COA.

In his COA application, Hammonds argues the merits of only his ineffective-assistance claim, but he states that he "is not waiving or abandoning review of the remaining issues." This is construed as a request for a COA as to all six of his claims.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims 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"), if a state court adjudicated a petitioner's claim on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim 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 "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); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). Where AEDPA deference applies, this court, in the COA context, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

[1] Both Hammonds and the State consented to proceed before a magistrate judge, pursuant to 28 U.S.C. § 636(c).

I. Ineffective Assistance of Counsel

In his first claim, Hammonds asserted that counsel was ineffective for failing to call Lavake to testify at trial.[2] Lavake, A.M.'s adult cousin, had an apartment where A.M. occasionally spent the night. *See Hammonds*, 2018 WL 6004694, at *1. Lavake and Hammonds were dating, and on the night of the incident, Hammonds and A.M. were staying at Lavake's apartment. *Id.* According to A.M., she and Hammonds were watching a movie with Lavake, and after Lavake went to bed alone, she and Hammonds had sex. *Id.*

Hammonds argued that counsel should have called Lavake to testify that, whenever Hammonds spent the night at her apartment, they always went to bed at the same time and slept together all night, as well as that A.M. "would flip flop . . . as to whether she had sex with [Hammonds] or not." At the evidentiary hearing on Hammonds's ineffective-assistance claims, trial counsel testified that she attempted to contact and subpoena Lavake several times before trial to no avail. Counsel stated, "[I]t was my understanding that [Lavake] wouldn't answer the door or she wouldn't accept the subpoena. I don't know. I couldn't get her served."

To establish ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

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[2] The district court also considered whether trial counsel was ineffective for failing to advise Hammonds of the possible penalty that would have resulted had he accepted the prosecutor's plea offer. But Hammonds raised this claim only on direct appeal, not in his § 2254 petition. This court therefore need not consider it.

Applying the *Strickland* standard, the Michigan Court of Appeals concluded that Hammonds failed to demonstrate that counsel's performance was deficient. *Hammonds*, 2018 WL 6004694, at *5. The court explained, "After defense counsel, county officials, and the police tried and failed to reach [Lavake], it was reasonable for defense counsel to believe that [Lavake] would not be available to provide testimony at trial." *Id.* At the evidentiary hearing, Lavake testified that she never received any subpoenas after the preliminary examination. But the trial court did not credit this testimony. That credibility determination is entitled to deference on habeas review. *See* 28 U.S.C. § 2254(e)(1); *Skaggs v. Parker*, 235 F.3d 261, 266 (6th Cir. 2000) (holding that credibility determinations made by state courts are presumed to be correct). On this record, reasonable jurists could not disagree with the district court's determination that the state appellate court's ruling was neither contrary to nor an unreasonable application of *Strickland*. *See Coe v. Bell*, 161 F.3d 320, 342 (6th Cir. 1998) (rejecting claim that counsel was ineffective for failing to interview alibi witnesses who "were unavailable or would not cooperate with counsel at the time of pre-trial preparation").

II. Prosecutorial Misconduct

In his second claim, Hammonds asserted that the prosecutor improperly shifted the burden of proof to the defense during her rebuttal argument. Specifically, Hammonds objected to the following argument:

> I presented you with a lot more evidence. I presented [defense counsel] with a lot more evidence. And she could [have] brought that evidence to trial. She says well what would Trisha have said? She could [have] called Trisha. She says what would Ricky have said? She could [have] called Ricky. I'm not the only one with the ability to call witnesses here. If they would [have] said something helpful to her case she could have called them.

Defense counsel objected that the prosecutor was mischaracterizing the burden of proof, and the prosecutor acknowledged that she bore the burden of proof. The court responded, "There's a jury instruction that addresses the burden of proof. We can move on."

When reviewing a prosecutorial-misconduct claim in a habeas proceeding, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the

resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Here, the district court concluded that the prosecutor's remarks were a fair response to defense counsel's argument that the State did not call these witnesses because their testimony would have been favorable to Hammonds and did not impermissibly shift the burden of proof. *See United States v. Farrow*, 574 F. App'x 723, 728 (6th Cir. 2014) ("[W]hen the defense has questioned why the prosecution has not called a particular witness, the prosecution may respond that the defense also could have called that witness to testify."). The district court also concluded that, as a result of the trial court's curative instruction, the remark did not render the trial fundamentally unfair. *See Joseph v. Coyle*, 469 F.3d 441, 474 (6th Cir. 2006) (concluding that any prejudice from prosecutor's comment on the defendant's failure to present evidence was remedied by the trial court's instruction to disregard the remark and its subsequent instruction about the state's burden of proof). The record supports these conclusions, and reasonable jurists could not disagree with the district court's resolution of this claim.

Hammonds's third claim is that he was prejudiced by the prosecutor's repeated reference to A.M. as the "victim" despite the trial court's order that she be referred to as a "complaining witness." The district court rejected this claim, concluding that the trial court's limiting instruction to the jury that A.M. be considered as a complaining witness "cured any error which may have occurred by the prosecutor referring to her as a victim." Because "[j]urors are presumed to follow instructions," *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011); *see also Greer v. Miller*, 483 U.S. 756, 765-66 & n.8 (1987), no reasonable jurist could disagree with the district court's rejection of this claim.

III. Judicial Bias

Hammonds asserted that the trial court demonstrated bias toward the prosecution when it characterized A.M.'s inconsistent statements as "misunderstandings." During defense counsel's cross-examination of A.M., the following exchange took place:

> Q: Do you recall telling Detective Harp that it was Trish and Billy that were dating at the time?

A: They were sleeping together, yea.

Q: Do you recall testifying back in March that it was Kaldan and Trish that were dating at the time?

A: Yea.

Q: And now today it's they're both dating her?

A: No, I don't think that either one of them are dating her now. But back in the summer they were both bouncing around with her, yea.

Q: So that would be three inconsistent statements that you've given us.

The prosecutor objected and argued that defense counsel's statement was "improper." The trial court sustained the objection, explaining, "I don't think it's inconsistency but it might just be some misunderstanding. I don't think it's intentional. I think it's just mistaken so if you want to rephrase the question."

"Judicial misconduct is found where the judge's remarks clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties." *United States v. Ross*, 703 F.3d 856, 878 (6th Cir. 2012) (quoting *United States v. Blood*, 435 F.3d 612, 629 (6th Cir. 2006)). "To show constitutionally improper prejudice, a judge's comments must 'display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Bailey v. Smith*, 492 F. App'x 619, 630-31 (6th Cir. 2012) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *see Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013). Noting that defense counsel's cross-examination of A.M. was "somewhat confusing," the district court agreed with the state appellate court's finding that the trial court judge was merely trying to make sure that A.M.'s testimony was accurate and not showing bias toward the prosecution. Reasonable jurists could not disagree with the district court's denial of this claim.

IV. Sentencing

In his fifth claim, Hammonds challenged the trial court's scoring of offense variable 10 at sentencing. Reasonable jurists could not disagree with the district court's decision to deny relief

on this claim. Hammonds's challenge to the trial court's scoring of an offense variable under the state sentencing guidelines does not state a cognizable federal habeas claim. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Howard v. White*, 76 F. App'x 52, 53 (6th Cir. 2003) ("A state court's alleged misinterpretation of state sentencing guidelines and crediting statutes is a matter of state concern only."). And although due process requires that "a defendant be afforded the opportunity of rebutting derogatory information demonstrably relied upon by the sentencing judge, when such information can in fact be shown to have been materially false," *Stewart v. Erwin*, 503 F.3d 488, 495 (6th Cir. 2007) (quoting *Collins v. Buchkoe*, 493 F.2d 343, 345 (6th Cir. 1974)), Hammonds did not identify any materially false information that the trial court relied on in calculating his sentence.

V. Arraignment

Finally, Hammonds asserted that he was denied his right to due process when the State failed to arraign him on the charge that was ultimately levied against him in the circuit court. The Michigan Court of Appeals concluded that this claim lacked merit because the register of actions indicated that he waived arraignment on March 29, 2016, and therefore had notice of the charge against him. *Hammonds*, 2018 WL 6004694, at *5. As the district court noted, the record includes a "Waiver of Arraignment and Election to Stand Mute or Enter Not Guilty Plea" signed by defense counsel and filed in the circuit court. Reasonable jurists could not disagree with the district court's denial of this claim.

For these reasons, Hammonds's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

FILED
Apr 26, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1939

BILLY HAMMONDS,

Petitioner-Appellant,

v.

FREDEANE ARTIS, Warden,

Respondent-Appellee.

Before: BATCHELDER, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Billy Hammonds for a certificate of appealability.

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

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLY HAMMONDS,

Petitioner,

v.

DEWAYNE BURTON,

Respondent.
_____/

Case No. 1:20-cv-592

Hon. Ray Kent

ORDER

In accordance with the Opinion entered this day:

IT IS ORDERED that a certificate of appealability is **DENIED**.

Dated: September 28, 2023

/s/ Ray Kent
RAY KENT
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLY HAMMONDS,

Petitioner,

v.

DEWAYNE BURTON,

Respondent.
_____/

Case No. 1:20-cv-592

Hon. Ray Kent

JUDGMENT

In accordance with the opinion entered this day:

IT IS ORDERED that the petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE** under Rule 4 of the Rules Governing § 2254 Cases for failure to raise a meritorious federal clam.

Dated: September 28, 2023

/s/ Ray Kent
RAY KENT
United States Magistrate Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLY HAMMONDS,

Petitioner,

v.

DEWAYNE BURTON,

Respondent.
_____/

Case No. 1:20-cv-592

Hon. Ray Kent

OPINION

Billy Hammonds filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, the petition will be denied.

I. Background

A. Trial and conviction

A jury convicted Hammonds of third-degree criminal sexual conduct (CSC-III) (victim at least 13 and under 16 years of age), M.C.L. § 750.520d(1)(a). *People v. Hammonds*, No. 336958, 2018 WL 6004694 at *1 (Mich. App. Nov. 15, 2018). The court sentenced Hammonds as a fourth-offense habitual offender, M.C.L. § 769.12, to 14 to 60 years imprisonment. *Id.* at *2.

B. State court appeal

Hammonds filed a direct appeal which consisted of issues raised by his counsel and issues raised by Hammonds in a *pro se* Standard 4 brief.

Hammon's appellate counsel raised five claims on appeal:

> I. Was [Hammond] denied the effective assistance of counsel guaranteed by the federal and state constitutions (US CONST, AM VI; CONST 1963, ART 1, § 20) where trial counsel failed to call a witness who would have testified that whenever [Hammonds] slept at her house that they went to bed together at the same

> time and slept together all night. Further she would have testified that the complaining witness would flip flop to her on the issue as to whether she had had sex with [Hammonds] or not?
>
> II. Did the trial court abuse its discretion when it denied [Hammond's] Motion for a New Trial based on the prosecution's misconduct of shifting the burden of proof to [Hammond] during closing argument?
>
> III. Did the trial court abuse its discretion when it denied trial counsel's motion for a mistrial where the prosecution repeatedly violated the trial court's order that the complaining witness would not be referred to as a "victim," and [Hammonds'] ability to get a fair trial could not be cured by a limiting instruction?
>
> IV. Did the the [sic] Trial Court's interjection that the complaining witness' statements were not inconsistent statements but rather "misunderstandings" demonstrate the trial court's partiality toward the prosecution and improperly influence the jury by creating the appearance of advocacy and partiality against Mr. Hammonds?
>
> V. Must [Hammonds] be resentenced where the trial court abused its discretion when it scored 10 points rather than 0 points for Offense Variable 10 where the record did not support the allegation that [Hammonds] exploited [the minor, AM,] based on her age.

Hammonds, No. 336958 (Appellate Brief) (ECF No. 11-15, PageID.873-874).

Hammonds filed a Standard 4 Brief raising two issues:

> I. [Hammonds] must be arraigned in the circuit court in accordance to M.C.R. 6.113. [He] was scheduled to be arraigned on 3/29/16 in the circuit court and was not arraigned or notife [sic] after.
>
> II. [Hammonds] was denied the effective assistance of counsel guaranteed by the federal and state constitutions (US CONST, AM, VI; CONST 1963 ART 1, § 20 where the trial counsel failed to inform [Hammonds] of the proper plea agreement the prosecution offered/proper guidelines.

Id. at PageID.922-923. The Michigan Court of Appeals affirmed the conviction and denied Hammonds *pro se* motion for reconsideration. *See Hammonds*, 2018 WL 6004694 at *6; Order (Jan. 22, 2019) (ECF No. 11-15, PageID.791).

Hammonds filed a *pro se* application for leave to appeal to the Michigan Supreme Court. Hammonds identified the following issues raised in the Michigan Court of Appeals:

> I. [Hammond] was denied the effective assistance of counsel guaranteed by the federal and state constitution (US CONST, AM VI; CONST 1963, ART 1, § 20) where trial counsel failed to call a witness who would have testified that they went to bed together at the same time and slept together all night. Further she would have testified that the complaining witness would flip flop to her on the issue as to whether she had had sex with [Hammonds] or not.
>
> II. The trial court plainly erred when if failed to arraign [Hammonds] in Circuit Court once he was bound over.
>
> III. The Trial Court's interjection that the complaining witness statements were not inconsistent [sic] statements but rather "misunderstandings" demonstrated the trial court's partiality towards the prosecution and improperly influenced the jury by creating the apperence [sic] of advocacy and partiality against Mr. Hammonds.
>
> IV. The trial courts [sic] abused its discretion when it denied trials [sic] counsel's motion for a mistrial where the prosecution repeatedly violated the trial court's order that the complaining witness would not be referred to as a "victim"[.] [Hammonds'] ability to get a fair trial could not be cured by a limiting instruction.
>
> V. The trial court abused its discretion when it denied [Hammond's] Motion for a new trial based on the prosecution's misconduct of shifting the burden of proof to [Hammond] during closing argument.

Application for leave to appeal (ECF No. 11-16, PageID.1055-1077).

Hammonds raised one new issue before the Michigan Supreme Court:

> I. The trial courts [sic] abused its discretion when it denied trial counsel's motion for a directed verdict, when the prosecution failed to prove each element [of] Criminal Sexual Conduct 3rd degree MCL 750.520d1A.

Id. at PageID.1078-1080. The Michigan Supreme Court denied the application for leave to appeal and Hammonds' motion for reconsideration. *People v. Hammonds*, 504 Mich. 957 (Sept. 10, 2019); *People v. Hammonds*, 505 Mich. 979 (Feb. 4, 2020).

II. Habeas claims

This matter is now before the Court on Hammonds' petition seeking federal habeas review pursuant to 28 U.S.C. § 2254. *See* Petition (ECF No. 1). Hammonds has raised the following issues:

I. Petitioner was denied the effective assistance of counsel guaranteed by the federal and state constitutions (US CONST, AM VI; CONST 1963, ART 1, § 20) where trial counsel failed to call a witness who would have testified that whenever petitioner slept at her house that they went to bed together at the same time and slept together all night. Further she would have testified that the complaining witness would flip flop to her on the issue as to whether she had had sex with petitioner or not.

II. The trial court abused its discretion when it denied petitioner's motion for a new trial based on the prosecution's misconduct of shifting the burden of proof to defendant during closing argument.

III. The trial court abused its discretion when it denied trial counsel's motion for a mistrial where the prosecution repeatedly violated the trial court's order that the complaining witness would not be referred to as a victim and petitioner's ability to get a fair trial could not be cured by a limiting instruction.

IV. The trial court's interjection that the complaining witness' statements were not inconsistent statements but rather "misunderstandings" demonstrated the trial court's partiality toward the prosecution and improperly influenced the jury by creating the appearance of advocacy and partiality against Mr. Hammonds.

V. Petitioner must be resentenced where the trial court abused its discretion when it scored 10 points rather than 0 points for offense variable 10 where the record did not support the allegation that petitioner exploited [AM] based on her age.

VI. The petitioner must be arraigned in the Circuit Court in accordance with Mich. Ct. Rule 6.113, petitioner was scheduled to be arraigned on 3/29/2016 in the Circuit Court and was never arraigned at that or any other time thereafter, thereby denying him of his due process right to the compulsory process of an arraignment.

Petition at PageID.5-11.

III. Standard of review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). In this regard, 28 U.S.C. § 2254 provides that,

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

28 U.S.C. § 2254(d). Under this statute, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Williams v. Taylor*, 529 U.S. 362, 381-82 (2000); *Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37-38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially

indistinguishable facts. *Bell*, 535 U.S. at 694. "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

Determining whether a rule application was unreasonable depends on the rule's specificity. *Stermer v. Warren*, 959 F.3d 704, 721 (2020). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). "[W]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). In addressing a petitioner's habeas claims, "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *Sumner v. Mata*, 449 U.S. 539, 546-547 (1981).

Finally, § 2254(d) limits the facts a court may consider on habeas review. The reviewing court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). "[I]f the petitioner's claim was never adjudicated on the merits by a state court, 28 U.S.C. § 2254(d), AEDPA deference no longer applies." *Stermer*, 959 F.3d at 721. "Instead, the petitioner's claim is reviewed *de novo* as it would be on direct appeal." *Id.*

IV. Discussion

A. Ineffective assistance of trial counsel (Issue I)

Hammonds contends that he was denied the effective assistance of counsel for two reasons. First, trial counsel failed to call a witness who would have testified that they went to bed together at the same time and slept together all night, and that the victim would "flip flop to her" as to whether she had sex with Hammonds. Second, trial counsel did not advise Hammonds of the possible penalty associated with a plea offer.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test to determine whether counsel's assistance was so defective as to require reversal of a conviction. First, the defendant must show that counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "In this regard, the court will 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689).

Second, the defendant must show that counsel's deficient performance prejudiced the defense, *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "Even if a [petitioner] shows that particular errors of counsel were unreasonable, therefore, the [petitioner] must show they actually had an adverse effect on the defense." *Id.* The appropriate test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Id.* at 694. In making this determination, the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Under *Strickland*, the reviewing court's scrutiny of counsel's performance is highly deferential, and the court is to presume that counsel rendered adequate assistance and made decisions with reasonable professional judgment. *Id.* at 689-690. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult," because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential', and when the two apply in tandem, review is 'doubly' so[.]" *Harrington*, 562 U.S. at 105 (internal citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable," but rather "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

1. Failure to call a witness

The Michigan Court of Appeals addressed this claim as follows:

> *Ineffective Assistance of Counsel.* Defendant claims that his defense counsel was constitutionally deficient. A preserved claim of ineffective assistance of counsel is "a mixed question of law and fact." *People v. Hunter*, 493 Mich. 1015; 829 N.W.2d 871 (2013). We review questions of law de novo and "the trial court's factual findings for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v. Armstrong*, 490 Mich. 281, 289; 806 N.W.2d 676 (2011) (cleaned up).
>
> An appellate court is required to reverse a defendant's conviction when defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687; 104 S.Ct.2052; 80 L.Ed. 2d 674 (1984). A defendant requesting reversal of an otherwise valid conviction bears the burden of proving "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the

> outcome of the proceedings would have been different." *People v. Sabin (On Second Remand)*, 242 Mich. App. 656, 659; 620 N.W.2d 19 (2000).
>
> To prove the first prong, "[t]he defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v. Stanaway*, 446 Mich. 643, 687; 521 N.W.2d 557 (1994). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v. Rockey*, 237 Mich. App. 74, 76; 601 N.W.2d 887 (1999). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v. Russell*, 297 Mich. App. 707, 716; 825 N.W.2d 623 (2012). Regarding the second prong, a defendant is prejudiced if there is a reasonable probability that, "but for defense counsel's errors, the result of the proceeding would have been different." *People v. Heft*, 299 Mich. App. 69, 81; 829 N.W.2d 266 (2012).
>
> Defendant first argues that he was denied his right to effective assistance of counsel when defense counsel failed to call TL as a witness at trial. Defendant asserts that TL's testimony would have corroborated his version of the facts and cast significant doubt on the veracity of AM's allegations. The record shows, however, the defendant [sic] counsel attempted to contact and subpoena TL several times for trial. After defense counsel, county officials, and the police tried and failed to reach TL, it was reasonable for defense counsel to believe that TL would not be available to provide testimony at trial. Thus, defendant has failed to show that his defense counsel's performance was deficient.

Hammonds, 2018 WL 6004694 at *4-5.

Here, the Michigan Court of Appeals applied the appropriate standard in determining Hammonds' claim of ineffective assistance of trial counsel. As that court observed, the proposed witness, TL, could not be located by defense counsel, county officials, and the police. Counsel is not ineffective for failing to call a witness who cannot be found. *See Coe v. Bell*, 161 F.3d 320, 342 (6th Cir. 1998) (counsel was not ineffective when he failed to interview numerous alibi witnesses, where "most of these witnesses were unavailable or would not cooperate with counsel at the time of pre-trial preparation"). Accordingly, this habeas claim is denied.

2. Failure to inform Hammonds of the possible penalty that would have followed from accepting an offered guilty plea

Next, Hammonds contends that defense counsel informed him that his minimum sentencing range under a plea offer would have been between 78 and 162 months of imprisonment. Hammonds contends that the correct guidelines range would have been 51 to 106 months and that if counsel had advised him of the lesser range he would have accepted the offered guilty plea. The Michigan Court of Appeals addressed this claim as follows:

> Defendant, in his Standard 4 brief, also argues that defense counsel was ineffective for failing to inform him of the possible penalty that would have followed from accepting an offered guilty plea. Specifically, defendant alleges that he was offered a plea for one count of CSC-III as a second-offense habitual offender, and that defense counsel informed him that his minimum sentencing range under that plea would have been between 78 and 162 months of imprisonment. Defendant contends that the correct range would have been 51 to 106 months, and that if defense counsel had advised him accordingly, he would have accepted the offered guilty plea.
>
> Assuming arguendo that defense counsel did advise defendant of a 78-to-162-month guidelines range, were [sic] are unable to conclude that such advice was unreasonable. Indeed, the record shows that, given the resolution of certain factual questions at issue, defendant's guidelines range could have been 78 to 162 months. Defendant was assessed 47 points for prior record variables and 10 points for offense variables. We have already concluded that the trial court properly scored OV 10 at 10 points. Moreover, an argument could be made for an assessment of an additional 60 OV points. OV 4 could have been scored at 10 points for the psychological injury AM suffered after being bullied by her classmates for the encounter, MCL 777.34(2); OV 11 could have been scored at 25 points given evidence that defendant penetrated AM during the encounter, MCL 777.41(1)(b); and OV 13 could have been scored at 25 points given that evidence existed that defendant was charged with committing three other crimes within five years of committing the instant offense, MCL 777.43(1)(c). Had the trial court not resolved these determinations in defendant's favor, defendant's guidelines range would have been 78-to-162 months. *See* MCL 777.63; MCL 777.21(3)(a). Thus, defendant's second ineffective-assistance claim is also without merit.

Hammonds, 2018 WL 6004694 at *5.

"In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence[.]" *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Id. at 59.

Here, Hammonds' claim failed at the first *Strickland* requirement. As the Michigan Court of Appeal's explained, assuming that Hammonds' counsel advised that the plea offer included a guidelines range of 78 to 161 months imprisonment, such advice was not unreasonable. In this regard,

> A "mere inaccurate prediction, standing alone, [does] not constitute ineffective assistance." *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir.1990) (internal quotation marks omitted). *See generally, Barker v. United States*, 7 F.3d 629, 633 (7th Cir.1993) ("[m]isinformation from a defendant's attorney, such as an incorrect estimate of the offense severity rating, standing alone, does not constitute ineffective assistance of counsel[']).

Sivley v. Romanowski, No. 1:06-cv-711, 2010 WL 565120 at *11 (W.D. Mich. Feb. 10, 2010).

Accordingly, this habeas claim is denied.

B. Prosecutorial misconduct

Petitioner raised two claims of prosecutorial misconduct.

1. Denial of motion for a new trial based on the prosecution's misconduct during closing argument (Issue II)

The Michigan Court of Appeals addressed the claims as follows:

> *Prosecutorial Misconduct.* On appeal, defendant first raises two claims of prosecutorial misconduct. Prosecutorial misconduct issues are decided on a case-by-case basis. *People v. Grayer*, 252 Mich. App. 349, 357; 651 N.W.2d 818 (2002). "We review the prosecutor's statements in context to determine whether the defendant was denied a fair and impartial trial." *Id.* The prosecutor's statements "are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *People v. Dobek*, 274 Mich. App. 58, 64; 732 N.W.2d 546 (2007). Generally, prosecutors are given great latitude regarding their arguments and are "free to argue the evidence and reasonable

inferences from the evidence as they relate to their theory of the case." *People v. Seals*, 285 Mich. App. 1, 22; 776 N.W.2d 314 (2009).

First, defendant contends that the prosecutor improperly shifted the burden of proof to defendant during her rebuttal closing argument. Defense counsel argued in her closing argument that the prosecutor's failure to present TL or defendant's cousin as a witness meant that they would testify in defendant's favor. The prosecutor responded in her rebuttal that, if TL or the cousin had testimony that could help defendant's case, he could have called them as witnesses.

Ordinarily, "a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *People v. Fyda*, 288 Mich. App. 446, 464; 793 N.W.2d 712 (2010). A prosecutor's comment on a defendant's failure to call a witness, however, does not shift the burden of proof unless the prosecutor's comment implicates the defendant's right not to testify. *People v. Fields*, 450 Mich. 94, 112; 538 N.W.2d 356 (1995). Rather, such comments merely point out weaknesses in the defendant's case. *Id.* The *Fields* Court explained that

> The defendant's decisions about evidence other than his own testimony do not implicate the privilege [against self-incrimination], and a comment on the defendant's failure to call a witness does not tax the exercise of the privilege. It simply asks the jury to assess the value of the existing evidence in light of the countermeasures that were (or were not) taken. [*Id.* at 114-115 (cleaned up).]

In this case, the prosecutor's comment regarding defendant's failure to call a witness did not impinge defendant's right not to testify at trial. No statements were offered by either party that brought defendant's right not to testify before the jury's attention, and, regardless, defendant ultimately did testify in his own defense. The challenged statement was not an improper attempt to shift the burden of proof; rather, it was a proper explanation of the parties' rights to present witnesses in response to defense counsel's closing argument. *People v. Watson*, 245 Mich. App. 572, 593; 629 N.W.2d 411 (2001). Moreover, the trial court properly instructed the jury that the prosecutor bore the burden of proof, meaning that defendant cannot show prejudice from the challenged comment. *People v. Unger*, 278 Mich. App. 210, 237; 749 N.W.2d 272 (2008). Thus, defendant's first claim of prosecutorial misconduct is without merit.

Hammonds, 2018 WL 6004694 at *2.

In order for a petitioner to be entitled to habeas relief on the basis of prosecutorial misconduct, the petitioner must demonstrate that the prosecutor's improper conduct " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v.*

Wainwright, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "[T]he touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). In evaluating the impact of the prosecutor's misconduct, a court must consider the extent to which the claimed misconduct tended to mislead the jury or prejudice the petitioner, whether it was isolated or extensive, and whether the claimed misconduct was deliberate or accidental. *See United States v. Young,* 470 U.S. 1, 11-12 (1985). The court also must consider the strength of the overall proof establishing guilt, whether the conduct was objected to by counsel and whether a curative instruction was given by the court. *See id.* at 12-13; *Darden*, 477 U.S. at 181-82; *Donnelly*, 416 U.S. at 646-47; *Berger v. United States*, 295 U.S. 78, 84-85 (1935).

"Claims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004) (citing *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003)). Indeed, "[t]he Supreme Court has clearly indicated that the state courts have substantial breathing room when considering prosecutorial misconduct claims because 'constitutional line drawing [in prosecutorial misconduct cases] is necessarily imprecise.' " *Slagle v. Bagley*, 457 F.3d 501, 516 (6th Cir. 2006) (quoting *Donnelly*, 416 U.S. 637, 645). Thus, in order to obtain habeas relief on a prosecutorial misconduct claim, a habeas petitioner must show that the state court's rejection of his prosecutorial misconduct claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker v. Matthews*, 567 U.S. 37, 47 (2012) (internal quotation omitted).

Here, defense counsel faulted the government for failing to call the missing witnesses, while on rebuttal the prosecutor pointed out that the defense failed to call the missing

witnesses.[1] The gist of Hammonds' claim is that the prosecution improperly shifted the burden of proof by pointing that Hammonds could have called missing witnesses to help his defense. The Sixth Circuit addressed this issue in *United States v. Farrow*, 574 Fed. Appx. 723 (6th Cir. 2014):

> Farrow argues that by faulting the defense for not calling Lockhart as a witness, the prosecution shifted the burden, making it appear that Farrow was obligated to call witnesses to prove his innocence. However, when the defense has questioned why the prosecution has not called a particular witness, the prosecution may respond that the defense also could have called that witness to testify. *United States v. Reynolds*, 534 Fed. Appx. 347, 368 (6th Cir.2013) (citing *United States v. Gonzalez*, 512 F.3d 285, 292 (6th Cir. 2008)); *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir.1998) ("[I]t is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness." (internal quotation marks omitted)).The prosecution's statements in closing rebuttal that Farrow had the same subpoena powers to bring Lockhart to testify were in response to defense counsel's statements in closing criticizing the prosecution for not putting Lockhart on the stand. The statements did not shift the burden and do not otherwise constitute plain error.

Farrow, 574 Fed. Appx. at 728.

Furthermore, the jury was aware that Hammonds did not have the burden of proof. The trial court gave the jury an instruction on the prosecutor's burden to prove the crime beyond a reasonable doubt:

---

[1] During closing argument defense counsel stated:

> Why didn't the prosecutor bring in Trish, Kalden, Greg or Rickey? Everyone that was supposedly there that night. Where are they? They would of [sic], in their opinion, corroborated [AM].

Trans. (ECF No. 11-10, PageID.624). On rebuttal the prosecutor stated:

> All of this time that [defense counsel is] stating that I did not provide you with the evidence you need to make a decision in this case, the very first thing the jury instructions states [sic] that if you belief [AM] than [sic] I don't need to present you with any other evidence.
>
> But I presented you with a lot more evidence. I presented [defense counsel] with a lot more evidence. And she could of [sic] brought any of that evidence to trial. She says well what would Trisha have said? She could of [sic] called Trisha. She says what would Ricky have said? She could [sic] called Rickey. I'm not the only one with the ability to call witnesses here. If they would of [sic] said something helpful to her case she could have called them. . ."

Id. at PageID.632-633.

> Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or do anything. If you find the prosecutor has not proven every element beyond a reasonable doubt then you must find the defendant not guilty.

Trans. (ECF No. 11-11, PageID.682). "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Accordingly, this habeas claim is denied.

2. Trial court's denial of a motion for a mistrial where the prosecution repeatedly referred to the complaining witness as a victim (Issue III)

The Michigan Court of Appeals addressed the second claim of prosecutorial misconduct as follows:

> Defendant also argues that the prosecutor engaged in misconduct when she and her witnesses repeatedly referred to AM as "the victim" despite an order from the trial court to refer to her as "the complaining witness" instead. We disagree.
>
> In this case, the trial court made a pretrial ruling that the parties and their witnesses were to refrain from using the word "victim" as opposed to "complaining witness." Over the course of trial, the prosecutor used the word "victim" four times when specifically referencing AM and three more times without specifically referencing AM. Moreover, two of the prosecutor's witnesses—both police officers—referred to AM as "the victim" in their testimonies.
>
> Having reviewed the record, we are unable to conclude that the use of the term "victim" denied defendant a fair trial. Although the prosecutor did refer to AM as the victim on occasion, she usually quickly corrected herself to use a different moniker. There is no indication that the prosecutor knew that her witnesses would refer to AM as the victim or that she intentionally elicited such a response and, although the term victim was used at other points at trial, these references were not directed towards AM. Moreover, the trial court specifically instructed the jury that AM was to be referred to as the "complaining witness" rather than the "victim." This instruction cured any prejudice to defendant, rendering his second claim of prosecutorial misconduct without merit. *People v. Mahone*, 294 Mich. App. 208, 212; 816 N.W.2d 436 (2011).

Hammonds, 2018 WL 6004694 at *3.

Here, immediately before the jury began deliberations, the trial judge gave them a limiting instruction regarding references to AM as a "victim" during the trial:

> And just for the clarification of the limiting instruction I'll just do it orally on the record ladies and gentlemen. The limiting instruction that [defense counsel] is referring to is at several times throughout the trial [AM has] been referred to as the victim. She should officially be referred to as the complaining witness. That's the limiting instruction. So please when you're considering her, she is at this point a complaining witness. I think that satisfies the limiting instruction.

Trans. (ECF No. 11-11, PageID.728). This limiting instruction clarified AM's status during the trial, advised the jury to consider her as a complaining witness rather than a victim, and cured any error which may have occurred by the prosecutor referring to her as a victim. Accordingly, this habeas claim is denied.

C. Trial court was biased (Issue IV)

Hammonds contends that the trial judge showed partiality toward the prosecution and improperly influenced the jury by creating the appearance of partiality against him. The Michigan Court of Appeals addressed Hammonds' claim as follows:

> *Judicial Partiality.* Defendant next argues that reversal is warranted because the trial court demonstrated that it was biased in favor of the prosecutor when it held that AM's responses to defense counsel's questions were "misunderstandings" rather than inconsistencies. Criminal defendants have a right to a fair and impartial jury trial. *People v. Stevens*, 498 Mich. 162, 170; 869 N.W.2d 233 (2015). "A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality." *Id.* at 170-171. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id.* at 171.
>
> During the first day of trial, defense counsel began questioning AM about her prior statements, attempting to emphasize inconsistencies. While cross-examining AM, the following exchange took place:
>
> > Q. Do you recall telling Detective Harp that it was [TL] and [defendant] that were dating at the time?
> >
> > A. They were sleeping together, yea.
> >
> > Q. Do you recall testifying back in March that it was [another person] and [TL] that were dating at the time?

> A. Yea.
>
> Q. And now today it's they're both dating her?
>
> A. No, I don't think that either one of them are dating her now. But back in the summer they were both bouncing around with her, yea.
>
> Q. So that would [be] three inconsistent statements that you've given us.

The prosecutor objected, arguing that defense counsel's statement was improper and that AM's last statement did not constitute an inconsistency. The trial court sustained the objection, stating,

> I don't think it's inconsistency but it might just be some misunderstanding. I don't think it's intentional. I think it's just mistaken so if you want to rephrase the question. I know what you're trying to get at . . . . But for that point I'll sustain the objection.

Defense counsel then asked whether AM's previous indication that TL and defendant were dating was consistent with a previous indication that TL and another person were dating. AM stated that she did not recall testifying that TL and the other person were "dating." Rather, she remembered stating that they were sleeping together.

Having reviewed the challenged ruling, we are unable to conclude that the trial court pierced the veil of judicial impartiality. The trial court was not ruling definitively that the witness did not testify inconsistently. Rather, taken in context, the trial court was merely pointing out that defense counsel and the minor witness appeared to be misunderstanding each other, specifically with regard to the use of the word "today." The trial court did not preclude the line of questioning altogether, but rather encouraged defense counsel to continue exploring the issue. Defense counsel did so, specifically targeting the alleged inconsistency between AM's trial testimony and previous statements. Thus, it is clear that the trial court was merely attempting to ensure accuracy in the proceedings and did not abandon its veil of impartiality. Defendant's claim is without merit.

Hammonds, 2018 WL 6004694 at *3-4.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "Fairness of course requires an absence of actual bias in the trial of cases." *Id.* Here, Hammonds contends that he did not receive a fair trial because the

judge was biased in favor of the prosecution and against him. The basis for Hammonds' claim is that the trial judge sustained an objection by the prosecution with respect to a somewhat confusing cross-examination of the victim by defense counsel. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Here, the state appellate court correctly pointed out that the trial judge "was merely attempting to ensure accuracy in the proceedings" with respect to defense counsel's cross-examination of a minor. Accordingly, this habeas claim is denied.

D. State court sentencing error (Issue V)

Hammonds contends that the trial court erred in calculating his sentencing guidelines because 10 points were improperly assessed under offense variable (OV) 10. The Michigan Court of Appeals concluded that, "Ten points are properly scored under OV 10 where '[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.' MCL 777.40(1)(b)." *Hammonds*, 2018 WL 6004694 at *4.

This claim does not present an issue cognizable under § 2254. Federal habeas review is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Federal habeas corpus relief does not lie for errors of state law, which includes the state's computation of a petitioner's prison term. *Kipen v. Renico*, 65 Fed. Appx. 958, 959 (6th Cir. 2003), citing *Estelle*, 502 U.S. at 68. *See Austin v. Jackson,* 213 F.3d 298, 300 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief). "As long as the sentence remains within the statutory limits, trial courts have historically been given wide

discretion in determining 'the type and extent of punishment for convicted defendants.'" *Id.* at 301, *quoting Williams v. New York*, 337 U.S. 241, 245 (1949).

As discussed, the trial court sentenced Hammonds to a term of 14 to 60 years imprisonment. There is no evidence that petitioner's sentence exceeded the statutory limits. The jury convicted petitioner of CSC-III which "is a felony punishable by imprisonment for not more than 15 years." *See* M.C.L. § 750.520d(2). The Court enhanced petitioner's sentence because he was a fourth habitual offender pursuant to M.C.L. § 769.12 which provides in pertinent part that, "If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court . . . may sentence the person to imprisonment for life or for a lesser term." M.C.L. § 769.12(1)(b). Accordingly, this habeas claim is denied.

E. Request for an arraignment (Issue VI)

Finally, Hammonds contends that he was scheduled to be arraigned on March 29, 2016, in the Circuit Court, that he was never arraigned at that or any other time thereafter, and that he was denied his due process right to the compulsory process of an arraignment. Hammonds' contention is without merit. The Michigan Court of Appeals addressed this issue as follows:

> Finally, defendant, in his Standard 4 brief, argues that the trial court failed to arraign him on the charge ultimately levied against him. The register of actions in this case indicates that defendant was arraigned on March 29, 2016, at which time he stood mute to the charge against him. The record makes clear that defendant had notice of the charge and defendant's claim that the trial court lacked jurisdiction over him because of the alleged failure to arraign is without merit.

Hammonds, 2018 WL 6004694 at *5. The appellate court's factual finding is presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Sumner*, 449 U.S. at 546-547. Petitioner has failed to rebut this presumption. In this regard, the record includes Hammonds' "Waiver of arraignment and Election to stand mute or enter not guilty plea" in the 50th Circuit Court (Chippewa County) (March 29, 2016) (ECF No. 11-5, PageID.285). The waiver reflects that Hammonds "stands mute

to the charge(s) and requests the court to enter a plea of not guilty" and that the Judge entered a plea of not guilty on behalf of Hammonds. *Id.* Accordingly, this habeas claim is denied.

V. Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if the petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *See Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Hammonds' claims under the *Slack* standard. To warrant a grant of the certificate under *Slack*, 529 U.S. at 484, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.*

Here, the Court finds that reasonable jurists could not conclude that this Court's dismissal of Hammonds' claims was debatable or wrong. Therefore, the Court will deny Hammonds a certificate of appealability. Finally, although Hammonds has failed to demonstrate that he is in custody in violation of the Constitution and has failed to make a substantial showing

of the denial of a constitutional right, the Court does not conclude that any issue he might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

VI. Conclusion

The Court will enter a judgment dismissing the petition and an order denying a certificate of appealability.

Dated: September 28, 2023

/s/ Ray Kent
RAY KENT
United States Magistrate Judge

APPENDIX C

Order

Michigan Supreme Court
Lansing, Michigan

September 10, 2019

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

159084 & (67)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 159084
COA: 336958
Chippewa CC: 16-002031-FH

BILLY JOE HAMMONDS,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the November 15, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to issue a writ of superintending control is DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 10, 2019

Clerk

b0904

APPENDIX D

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY JOE HAMMONDS,

Defendant-Appellant.

UNPUBLISHED
November 15, 2018

No. 336958
Chippewa Circuit Court
LC No. 16-002031-FH

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for third-degree criminal sexual conduct (CSC-III) (victim at least 13 and under 16 years of age), MCL 750.520d(1)(a). We affirm.

I. BACKGROUND

AM was 15 years old in the summer of 2015. At that time, AM was enrolled in a driver's education course that was taught across the street from the apartment of her adult cousin, TL. As a result, AM spent occasional nights at TL's apartment to reduce the travel time necessary to attend the course. TL had an on-again, off-again romantic relationship with defendant, who was 26 years old.

According to AM, she met defendant while staying with TL. AM testified that defendant would flirt with her and put his hand on her knee and that she liked his tattoos. Approximately one week after they met, defendant and AM were watching a movie with TL, who eventually went to bed alone. Defendant laid on the couch and asked AM to lie next to him. When AM complied, defendant put his hands down her pants and she put her hands down his. The two then engaged in sexual intercourse.

Sometime after the act, defendant and AM exchanged communications via Facebook's Messenger application. AM sent a message to defendant saying that she was "legal" and attached a picture of her driver's permit. Defendant responded, "Not for sex though." AM replied, "Just because I ain't legal doesn't mean shit." Defendant sent the message "ha ha" in response. AM then followed up with, "Just saying didn't stop us before." Defendant replied, "Ha ha, yup." Defendant told AM to keep their sexual encounter a secret. Even so, AM became

aware that defendant was telling others of the incident. AM sent defendant a message confronting him and defendant replied, "[W]ell there ain't shit to tell."

AM told a friend, MC, of her encounter with defendant. AM also confessed to TL, who indicated to AM that she was already aware of the encounter. MC told her mother, and AM's mother was alerted. AM's mother confronted AM and TL in the presence of defendant's cousin, who also occasionally stayed at the apartment. AM initially denied having sex with defendant, and explained at trial that she did not want to admit the act to her mother. Nevertheless, AM's mother examined AM's phone and discovered screenshots of the communications exchanged between the two. Eventually, AM admitted that the encounter did occur.

AM, her mother, and her mother's husband filed a police report. After AM's classmates learned about the encounter and investigation, AM was bullied to the point where she refused to go to school. Defendant was interviewed by the police, and denied having sex with AM. Later, an arrest warrant was issued for defendant. When police arrived to execute the warrant, defendant was spotted leaving the building with a woman. Defendant was arrested and placed in the back seat of a police cruiser, where he volunteered information without being questioned. Defendant explained that he was attempting to leave his apartment because he heard that the police were on their way by using a police scanner and "didn't want to deal with the police." Defendant also stated that he thought the police were called only because he and the woman were making too much noise. When defendant was informed that he was being arrested on the basis of an arrest warrant for CSC charges, defendant stated that a 16-year-old girl that he did not know said that they had sex.

The jury found defendant guilty of CSC-III, and he was sentenced as a fourth-offense habitual offender, MCL 769.12, to 14 to 60 years of imprisonment. Following his conviction, defendant moved this Court to remand this case for presentation of his claims of ineffective assistance of counsel at an evidentiary hearing. This Court granted the motion.[1] The trial court then held an evidentiary hearing and denied defendant's claims of ineffective assistance of counsel.

This appeal followed.

II. ANALYSIS

Prosecutorial Misconduct. On appeal, defendant first raises two claims of prosecutorial misconduct. Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "We review the prosecutor's statements in context to determine whether the defendant was denied a fair and impartial trial." *Id.* The prosecutor's statements "are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Generally, prosecutors are given great latitude regarding

[1] *People v Hammonds*, unpublished order of the Court of Appeals, issued October 23, 2017 (Docket No. 336958).

their arguments and are "free to argue the evidence and reasonable inferences from the evidence as they relate to their theory of the case." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

First, defendant contends that the prosecutor improperly shifted the burden of proof to defendant during her rebuttal closing argument. Defense counsel argued in her closing argument that the prosecutor's failure to present TL or defendant's cousin as a witness meant that they would testify in defendant's favor. The prosecutor responded in her rebuttal that, if TL or the cousin had testimony that could help defendant's case, he could have called them as witnesses.

Ordinarily, "a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010). A prosecutor's comment on a defendant's failure to call a witness, however, does not shift the burden of proof unless the prosecutor's comment implicates the defendant's right not to testify. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Rather, such comments merely point out weaknesses in the defendant's case. *Id.* The *Fields* Court explained that

> The defendant's decisions about evidence other than his own testimony do not implicate the privilege [against self-incrimination], and a comment on the defendant's failure to call a witness does not tax the exercise of the privilege. It simply asks the jury to assess the value of the existing evidence in light of the countermeasures that were (or were not) taken. [*Id.* at 114-115 (cleaned up).]

In this case, the prosecutor's comment regarding defendant's failure to call a witness did not impinge defendant's right not to testify at trial. No statements were offered by either party that brought defendant's right not to testify before the jury's attention, and, regardless, defendant ultimately did testify in his own defense. The challenged statement was not an improper attempt to shift the burden of proof; rather, it was a proper explanation of the parties' rights to present witnesses in response to defense counsel's closing argument. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001). Moreover, the trial court properly instructed the jury that the prosecutor bore the burden of proof, meaning that defendant cannot show prejudice from the challenged comment. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). Thus, defendant's first claim of prosecutorial misconduct is without merit.

Defendant also argues that the prosecutor engaged in misconduct when she and her witnesses repeatedly referred to AM as "the victim" despite an order from the trial court to refer to her as "the complaining witness" instead. We disagree.

In this case, the trial court made a pretrial ruling that the parties and their witnesses were to refrain from using the word "victim" as opposed to "complaining witness." Over the course of trial, the prosecutor used the word "victim" four times when specifically referencing AM and three more times without specifically referencing AM. Moreover, two of the prosecutor's witnesses—both police officers—referred to AM as "the victim" in their testimonies.

Having reviewed the record, we are unable to conclude that the use of the term "victim" denied defendant a fair trial. Although the prosecutor did refer to AM as the victim on occasion,

she usually quickly corrected herself to use a different moniker. There is no indication that the prosecutor knew that her witnesses would refer to AM as the victim or that she intentionally elicited such a response and, although the term victim was used at other points at trial, these references were not directed towards AM. Moreover, the trial court specifically instructed the jury that AM was to be referred to as the "complaining witness" rather than the "victim." This instruction cured any prejudice to defendant, rendering his second claim of prosecutorial misconduct without merit. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

Judicial Partiality. Defendant next argues that reversal is warranted because the trial court demonstrated that it was biased in favor of the prosecutor when it held that AM's responses to defense counsel's questions were "misunderstandings" rather than inconsistencies. Criminal defendants have a right to a fair and impartial jury trial. *People v Stevens*, 498 Mich 162, 170; 869 NW2d 233 (2015). "A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality." *Id.* at 170-171. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id.* at 171.

During the first day of trial, defense counsel began questioning AM about her prior statements, attempting to emphasize inconsistencies. While cross-examining AM, the following exchange took place:

> *Q.* Do you recall telling Detective Harp that it was [TL] and [defendant] that were dating at the time?
>
> *A.* They were sleeping together, yea.
>
> *Q.* Do you recall testifying back in March that it was [another person] and [TL] that were dating at the time?
>
> *A.* Yea.
>
> *Q.* And now today it's they're both dating her?
>
> *A.* No, I don't think that either one of them are dating her now. But back in the summer they were both bouncing around with her, yea.
>
> *Q.* So that would [be] three inconsistent statements that you've given us.

The prosecutor objected, arguing that defense counsel's statement was improper and that AM's last statement did not constitute an inconsistency. The trial court sustained the objection, stating,

> I don't think it's inconsistency but it might just be some misunderstanding. I don't think it's intentional. I think it's just mistaken so if you want to rephrase the question. I know what you're trying to get at .... But for that point I'll sustain the objection.

Defense counsel then asked whether AM's previous indication that TL and defendant were dating was consistent with a previous indication that TL and another person were dating. AM stated that she did not recall testifying that TL and the other person were "dating." Rather, she remembered stating that they were sleeping together.

Having reviewed the challenged ruling, we are unable to conclude that the trial court pierced the veil of judicial impartiality. The trial court was not ruling definitively that the witness did not testify inconsistently. Rather, taken in context, the trial court was merely pointing out that defense counsel and the minor witness appeared to be misunderstanding each other, specifically with regard to the use of the word "today." The trial court did not preclude the line of questioning altogether, but rather encouraged defense counsel to continue exploring the issue. Defense counsel did so, specifically targeting the alleged inconsistency between AM's trial testimony and previous statements. Thus, it is clear that the trial court was merely attempting to ensure accuracy in the proceedings and did not abandon its veil of impartiality. Defendant's claim is without merit.

Offense Variable 10. Defendant next argues that 10 points were improperly assessed under offense variable (OV) 10. Ten points are properly scored under OV 10 where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b).

At the time of the encounter, AM was 15 years old and was temporarily staying with her young-adult cousin, TL. Defendant was 11 years AM's senior and groomed AM by flirting with her and touching her while she was outside of her parent's care. Defendant waited to pursue the sexual encounter until after TL had gone to bed, when AM would be without any other immediate means of leaving the apartment. Aware of his wrongful conduct, defendant instructed AM not to tell anyone about the encounter. Thus, the record is clear that defendant intentionally pursued AM and was successful in doing so in large part because AM was a vulnerable minor. See *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). The trial court properly assessed 10 points under OV 10.

Ineffective Assistance of Counsel. Defendant claims that his defense counsel was constitutionally deficient. A preserved claim of ineffective assistance of counsel is "a mixed question of law and fact." *People v Hunter*, 493 Mich 1015; 829 NW2d 871 (2013). We review questions of law de novo and "the trial court's factual findings for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011) (cleaned up).

An appellate court is required to reverse a defendant's conviction when defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant requesting reversal of an otherwise valid conviction bears the burden of proving "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To prove the first prong, "[t]he defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Regarding the second prong, a defendant is prejudiced if there is a reasonable probability that, "but for defense counsel's errors, the result of the proceeding would have been different." *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012).

Defendant first argues that he was denied his right to effective assistance of counsel when defense counsel failed to call TL as a witness at trial. Defendant asserts that TL's testimony would have corroborated his version of the facts and cast significant doubt on the veracity of AM's allegations. The record shows, however, the defendant counsel attempted to contact and subpoena TL several times for trial. After defense counsel, county officials, and the police tried and failed to reach TL, it was reasonable for defense counsel to believe that TL would not be available to provide testimony at trial. Thus, defendant has failed to show that his defense counsel's performance was deficient.

Defendant, in his Standard 4 brief, also argues that defense counsel was ineffective for failing to inform him of the possible penalty that would have followed from accepting an offered guilty plea. Specifically, defendant alleges that he was offered a plea for one count of CSC-III as a second-offense habitual offender, and that defense counsel informed him that his minimum sentencing range under that plea would have been between 78 and 162 months of imprisonment. Defendant contends that the correct range would have been 51 to 106 months, and that if defense counsel had advised him accordingly, he would have accepted the offered guilty plea.

Assuming arguendo that defense counsel did advise defendant of a 78-to-162-month guidelines range, were are unable to conclude that such advice was unreasonable. Indeed, the record shows that, given the resolution of certain factual questions at issue, defendant's guidelines range could have been 78 to 162 months. Defendant was assessed 47 points for prior record variables and 10 points for offense variables. We have already concluded that the trial court properly scored OV 10 at 10 points. Moreover, an argument could be made for an assessment of an additional 60 OV points. OV 4 could have been scored at 10 points for the psychological injury AM suffered after being bullied by her classmates for the encounter, MCL 777.34(2); OV 11 could have been scored at 25 points given evidence that defendant penetrated AM during the encounter, MCL 777.41(1)(b); and OV 13 could have been scored at 25 points given that evidence existed that defendant was charged with committing three other crimes within five years of committing the instant offense, MCL 777.43(1)(c). Had the trial court not resolved these determinations in defendant's favor, defendant's guidelines range would have been 78-to-162 months. See MCL 777.63; MCL 777.21(3)(a). Thus, defendant's second ineffective-assistance claim is also without merit.

Arraignment. Finally, defendant, in his Standard 4 brief, argues that the trial court failed to arraign him on the charge ultimately levied against him. The register of actions in this case indicates that defendant was arraigned on March 29, 2016, at which time he stood mute to the

charge against him. The record makes clear that defendant had notice of the charge and defendant's claim that the trial court lacked jurisdiction over him because of the alleged failure to arraign is without merit.

Affirmed.

/s/ Michael J. Riordan
/s/ Amy Ronayne Krause
/s/ Brock A. Swartzle