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APPENDIX (A)

The Unpublished Decision of The

United States Court of Appeals for The

Sixth Circuit

June 4, 2024

Akram v. Corrigan

United States Court of Appeals for the Sixth Circuit

June 4, 2024, Filed

No. 23-1962

Reporter
2024 U.S. App. LEXIS 13524 *

ADRIAN MAHDEE AKRAM, Petitioner-Appellant, v. JAMES CORRIGAN, Warden, Respondent-Appellee.

Prior History: *Akram v. Horton, 2022 U.S. Dist. LEXIS 191712, 2022 WL 11964381 (E.D. Mich., Oct. 20, 2022)*

Core Terms

shooter, alibi witness, ineffective, shooting, funeral, jurist, witnesses, perjured testimony, time of the murder, defense counsel, district court, state court, inconsistencies, perjury, viewing, merits, murder

Counsel: [*1] ADRIAN MAHDEE AKRAM, Petitioner - Appellant, Pro se, Kincheloe, MI.

For JAMES CORRIGAN, Warden, Respondent - Appellee: John S. Pallas, Office of the Attorney General, Lansing, MI.

Judges: Before: CLAY, Circuit Judge.

Opinion

ORDER

Adrian Mahdee Akram, a pro se Michigan prisoner, applies for a certificate of appealability (COA) in his appeal from the denial of his *28 U.S.C. § 2254* petition for a writ of habeas corpus. *See 28 U.S.C. § 2253(c)(1)(B)*. For the reasons below, the COA application is denied.

In 2007, Orlando Miller was shot and killed around 5:30 p.m. in Detroit. Lawrence Archer witnessed the shooting and identified Akram as the shooter in a photo lineup. Damia Johnson was with Miller during the shooting. She first said that she did not know who the shooter was, but she later identified Akram. *See People v. Akram, No. 315402, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *1 (Mich. Ct. App. Apr. 21, 2015)* (per curiam), *perm. app. denied, 499 Mich. 861, 873 N.W.2d 591 (Mich. 2016)*. Akram was convicted of murder after a trial, but his conviction was overturned on appeal because the state court determined that his counsel was ineffective for failing to call alibi witnesses. Akram's second trial ended in a hung jury after Akram called two alibi witnesses—his brother Andre and sister-in-law Raquel—who testified that they saw him at a funeral viewing for his deceased brother at the time of [*2] the shooting. *See 2015 Mich. App. LEXIS 822, [WL] at *1 n. 1; Akram v. Horton, No. 16-11357, 2022 U.S. Dist. LEXIS 191712, 2022 WL 11964381, at *1-4 (E.D. Mich. Oct. 20, 2022)*. At the third trial, the same two alibi witnesses testified along with a third, Jamillah Gross-Caldwell. That jury convicted Akram of first-degree premeditated murder and gun charges, and the trial court sentenced him to life imprisonment plus two years. *Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *1*. His direct appeal did not succeed.

Akram then filed a *§ 2254* petition, claiming that his trial counsel was ineffective for failing to investigate and call alibi witnesses and that the State allowed Johnson to give perjured testimony. The district court denied those claims on the merits and declined to issue a COA. *Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *7-11*. Akram now seeks a COA from this court on both claims.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States, 578 U.S. 120, 127, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016)* (quoting *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L.*

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To prove ineffective assistance of counsel, as Akram first claimed, a habeas petitioner must show that his attorney's performance was objectively unreasonable and that it prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Akram claimed that his attorney was ineffective for not calling four alibi witnesses—Kamilah Helton, James Hunter, Antone Webb, and Adonis Akram—who would have testified that he was attending his brother's funeral viewing at the time of the murder. Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *2. But defense counsel called Raquel and Andre Akram as alibi witnesses at both the second and third trials. And counsel knew of Akram's preferred witnesses; they were listed in Akram's notice of alibi before the second and third trials. Id. As the district court noted, Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *8, calling these other witnesses could have enabled the prosecutor to point out inconsistencies with Raquel Akram's testimony, which was the most specific testimony about the times Akram was at the funeral. Finally, Helton, Hunter, and Webb could not place Akram at the funeral at the time of the murder, [*4] so their testimony could have been harmful, while Adonis Akram's affidavit was "threadbare," "unadorned, [and] conclusory." 2015 Mich. App. LEXIS 822, [WL] at *9. Given the "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance," Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689), and because "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," Strickland, 466 U.S. at 690, no reasonable jurist could debate the district court's resolution of Akram's ineffective-assistance claim.

Akram next claimed that Damia Johnson falsely testified, with the prosecutor's knowledge, that she saw the shooter's face. Akram noted that Johnson gave a statement just after the shooting in which she "never indicated that she saw the shooter's face," and testified along those lines at the first two trials. Yet at Akram's third trial, Johnson testified that she did see the shooter. He asserted that this statement was "provably false, but at no time did the prosecution correct her testimony."

"To prove that the prosecutor's failure to correct false testimony violated due process rights, a petitioner must demonstrate that: (1) the statement was actually false; (2) the statement [*5] was material; and (3) the prosecution knew it was false." McNeill v. Bagley, 10 F.4th 588, 604 (6th Cir. 2021) (quoting Rosencrantz v. Lafler, 568 F.3d 577, 583-84 (6th Cir. 2009)).

Akram did not make a substantial showing that Johnson's testimony was false or that the prosecutor knew that it was false. As the Michigan Court of Appeals held, "inconsistency in witness testimony does not automatically lead to the conclusion that the prosecution knowingly used perjured testimony," and thus Akram's "argument does not involve an issue of perjury, but rather concerns witness credibility." Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *10. Indeed, "defense counsel vigorously and relentlessly impeached Johnson with her prior testimony." Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *11. Because "'mere inconsistencies' in the testimony will not suffice" to prove that the prosecution testimony was "indisputably false," Monea v. United States, 914 F.3d 414, 421 (6th Cir. 2019) (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)), no reasonable jurist could debate the district court's resolution of Akram's claim about Johnson's alleged perjury.

Therefore, Akram's COA application is **DENIED**.

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Akram v. Corrigan

United States Court of Appeals for the Sixth Circuit

June 4, 2024, Filed

No. 23-1962

Reporter
2024 U.S. App. LEXIS 13524 *

ADRIAN MAHDEE AKRAM, Petitioner-Appellant, v. JAMES CORRIGAN, Warden, Respondent-Appellee.

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Counsel: [*1] ADRIAN MAHDEE AKRAM, Petitioner - Appellant, Pro se, Kincheloe, MI.

For JAMES CORRIGAN, Warden, Respondent - Appellee: John S. Pallas, Office of the Attorney General, Lansing, MI.

Judges: Before: CLAY, Circuit Judge.

Opinion

ORDER

Adrian Mahdee Akram, a pro se Michigan prisoner, applies for a certificate of appealability (COA) in his appeal from the denial of his *28 U.S.C. § 2254* petition for a writ of habeas corpus. *See 28 U.S.C. § 2253(c)(1)(B)*. For the reasons below, the COA application is denied.

In 2007, Orlando Miller was shot and killed around 5:30 p.m. in Detroit. Lawrence Archer witnessed the shooting and identified Akram as the shooter in a photo lineup. Damia Johnson was with Miller during the shooting. She first said that she did not know who the shooter was, but she later identified Akram. *See People v. Akram, No. 315402, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *1 (Mich. Ct. App. Apr. 21, 2015)* (per curiam), *perm. app. denied, 499 Mich. 861, 873 N.W.2d 591 (Mich. 2016)*. Akram was convicted of murder after a trial, but his conviction was overturned on appeal because the state court determined that his counsel was ineffective for failing to call alibi witnesses. Akram's second trial ended in a hung jury after Akram called two alibi witnesses—his brother Andre and sister-in-law Raquel—who testified that they saw him at a funeral viewing for his deceased brother at the time of [*2] the shooting. *See 2015 Mich. App. LEXIS 822, [WL] at *1 n. 1*; *Akram v. Horton, No. 16-11357, 2022 U.S. Dist. LEXIS 191712, 2022 WL 11964381, at *1-4 (E.D. Mich. Oct. 20, 2022)*. At the third trial, the same two alibi witnesses testified along with a third, Jamillah Gross-Caldwell. That jury convicted Akram of first-degree premeditated murder and gun charges, and the trial court sentenced him to life imprisonment plus two years. *Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *1*. His direct appeal did not succeed.

Akram then filed a *§ 2254* petition, claiming that his trial counsel was ineffective for failing to investigate and call alibi witnesses and that the State allowed Johnson to give perjured testimony. The district court denied those claims on the merits and declined to issue a COA. *Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *7-11*. Akram now seeks a COA from this court on both claims.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States, 578 U.S. 120, 127, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016)* (quoting *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L.*

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To prove ineffective assistance of counsel, as Akram first claimed, a habeas petitioner must show that his attorney's performance was objectively unreasonable and that it prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Akram claimed that his attorney was ineffective for not calling four alibi witnesses—Kamilah Helton, James Hunter, Antone Webb, and Adonis Akram—who would have testified that he was attending his brother's funeral viewing at the time of the murder. Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *2. But defense counsel called Raquel and Andre Akram as alibi witnesses at both the second and third trials. And counsel knew of Akram's preferred witnesses; they were listed in Akram's notice of alibi before the second and third trials. *Id.* As the district court noted, Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *8, calling these other witnesses could have enabled the prosecutor to point out inconsistencies with Raquel Akram's testimony, which was the most specific testimony about the times Akram was at the funeral. Finally, Helton, Hunter, and Webb could not place Akram at the funeral at the time of the murder, [*4] so their testimony could have been harmful, while Adonis Akram's affidavit was "threadbare," "unadorned, [and] conclusory." 2015 Mich. App. LEXIS 822, [WL] at *9. Given the "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance," Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689), and because "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," Strickland, 466 U.S. at 690, no reasonable jurist could debate the district court's resolution of Akram's ineffective-assistance claim.

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"To prove that the prosecutor's failure to correct false testimony violated due process rights, a petitioner must demonstrate that: (1) the statement was actually false; (2) the statement [*5] was material; and (3) the prosecution knew it was false." McNeill v. Bagley, 10 F.4th 588, 604 (6th Cir. 2021) (quoting Rosencrantz v. Lafler, 568 F.3d 577, 583-84 (6th Cir. 2009)).

Akram did not make a substantial showing that Johnson's testimony was false or that the prosecutor knew that it was false. As the Michigan Court of Appeals held, "inconsistency in witness testimony does not automatically lead to the conclusion that the prosecution knowingly used perjured testimony," and thus Akram's "argument does not involve an issue of perjury, but rather concerns witness credibility." Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *10. Indeed, "defense counsel vigorously and relentlessly impeached Johnson with her prior testimony." Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *11. Because "'mere inconsistencies' in the testimony will not suffice" to prove that the prosecution testimony was "indisputably false," Monea v. United States, 914 F.3d 414, 421 (6th Cir. 2019) (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)), no reasonable jurist could debate the district court's resolution of Akram's claim about Johnson's alleged perjury.

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Akram v. Corrigan

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June 4, 2024, Filed

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For JAMES CORRIGAN, Warden, Respondent - Appellee: John S. Pallas, Office of the Attorney General, Lansing, MI.

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Opinion

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Akram did not make a substantial showing that Johnson's testimony was false or that the prosecutor knew that it was false. As the Michigan Court of Appeals held, "inconsistency in witness testimony does not automatically lead to the conclusion that the prosecution knowingly used perjured testimony," and thus Akram's "argument does not involve an issue of perjury, but rather concerns witness credibility." Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *10. Indeed, "defense counsel vigorously and relentlessly impeached Johnson with her prior testimony." Akram, 2015 Mich. App. LEXIS 822, 2022 WL 11964381, at *11. Because "'mere inconsistencies' in the testimony will not suffice" to prove that the prosecution testimony was "indisputably false," Monea v. United States, 914 F.3d 414, 421 (6th Cir. 2019) (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)), no reasonable jurist could debate the district court's resolution of Akram's claim about Johnson's alleged perjury.

Therefore, Akram's COA application is **DENIED**.

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APPENDIX (B)

The Unplished Decision of the

United States District Court for the

Eastren District of Michigan

Southern Division

October 20, 2022

Akram v. Horton

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

October 20, 2022, Decided; October 20, 2022, Filed

Case No. 16-11357

Reporter
2022 U.S. Dist. LEXIS 191712 *; 2022 WL 11964381

ADRIAN AKRAM, Petitioner, v. CONNIE HORTON, Respondent.

Subsequent History: Certificate of appealability denied *Akram v. Corrigan, 2024 U.S. App. LEXIS 13524 (6th Cir., June 4, 2024)*

Motion denied by *Akram v. Corrigan, 2024 U.S. App. LEXIS 17728 (6th Cir., July 18, 2024)*

Core Terms

defense counsel, funeral home, alibi witness, viewing, murder, shooter, witnesses, arrived, ineffective, cross-examination, shooting, seeing, walked, identification, second trial, state court, jury trial, inconsistencies, assistance of counsel, court of appeals, trial court, exact time, presentation, certificate, attended, lobby, evidentiary hearing, trial strategy, habeas corpus, first trial

Counsel: [*1] Adrian Akram, Petitioner, Pro se, KINCHELOE, MI.

For Connie Horton, Respondent: Andrea M. Christensen-Brown, Michigan Department of Attorney General, Lansing, MI; Scott Robert Shimkus, Michigan Department of Attorney General, Lasnsing, MI.

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

Opinion by: MARK A. GOLDSMITH

Opinion

OPINION & ORDER

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

Petitioner Adrian Akram, a Michigan prisoner, filed this petition for a writ of habeas corpus under *28 U.S.C. § 2254*, challenging his Wayne County Circuit Court conviction of first-degree murder, Mich. Comp. L. § 750.316; felon in possession of a firearm, Mich. Comp. L. § 750.224f; and possession of a firearm during commission of a felony, Mich. Comp. L. § 750.227.

Petitioner challenges his convictions on two grounds:

> I. A writ of habeas corpus should issue where trial counsel rendered ineffective assistance when counsel failed to investigate and call any exculpatory 5:30 p.m. alibi witnesses or ask of any alibi witnesses the whereabouts of Petitioner at 5:30 p.m., [whose] testimony would have completely exonerated Petitioner.

II. Petitioner is entitled to habeas relief because he was denied due process to [*2] a fair trial when false, misleading, and perjured testimony, known by the prosecution, infiltrated the trial and the trial court allowed it to happen, thus, retrial should be barred under the double jeopardy provision of the constitution. Alternatively, if retrial is ordered it should be held without any in-court identification from prosecution's witness Damia Johnson.

Supp. Pet. at PageID.373-374 (Dkt. 21); see also Pet. Request at PageID.6936 (Dkt. 27) (confirming Petitioner's intention to raise only these two claims).

I. BACKGROUND

Orlando Miller was shot to death while walking along a residential street in Detroit between 5:30 and 5:40 p.m. on May 6, 2007. Police had information suggesting that Miller had been at the scene of the murder of Petitioner's brother, Avery Akram, a week earlier, so they suspected a connection between the two crimes.

About two months after the shooting, Lawrence Archer contacted the police. Archer told investigators that he witnessed Miller's shooting while he was inspecting a nearby house. Archer said a man ran past him and then quickly walked up to Miller and a woman. The man produced a revolver and shot Miller once in the chest, and then he shot Miller [*3] multiple times after Miller fell to the ground.

Archer was shown a photographic lineup, and he identified Petitioner as the shooter. Archer said he realized Petitioner was the shooter as he drove away from the scene, when he recalled that Petitioner was the man from whom he had bought DVDs on the street a few times. Archer initially did not want to get involved, but his wife eventually convinced him to go to the police.

Unlike Archer, Damia Johnson, who was the woman who had been walking with Miller, could not identify the shooter for police. Nevertheless, she claimed to later recognize Petitioner as the shooter shortly before trial when she replayed the incident in her memory. She explained that she was in shock at the time of the shooting and for a few days afterward.

Other than Archer's and Johnson's identification of Petitioner as the shooter, no evidence connected Petitioner to Miller's murder.

Petitioner was eventually tried three times. Because Petitioner claims that his counsel was ineffective for failing to call alibi witnesses at his third trial, it is necessary to summarize evidence presented at each trial.

At the first trial, held in 2007, the prosecution presented identification [*4] testimony from Archer and Miller. The prosecutor also attempted to present evidence of a motive. But evidence that Miller was at the scene of Avery Akram's murder was struck when the prosecutor failed to offer any evidence that Petitioner believed Miller to be involved in Avery's murder. The defense did not present any alibi witnesses. The jury found Petitioner guilty of the charged offenses.

On appeal, Petitioner's appellate counsel successfully moved for a remand to the trial court for an evidentiary hearing on the claim that Petitioner's trial counsel was ineffective for failing to call alibi witnesses.

At the evidentiary hearing, defense counsel Marlon Evans testified that Petitioner told Evans from the beginning of the case that, at the time of the incident, Petitioner was at a funeral home for his deceased brother's viewing. 2/11/2009 Hr'g Tr. at 6 (Dkt. 23-10). Petitioner provided names of several people who would corroborate the alibi, but Evans decided not to investigate the defense. Id. at 6-8. Evans explained that in his eighteen years of experience, he had never had much success with alibi defenses that relied on friends or family members. Id. at 15.

Raquel Akram, Petitioner's [*5] sister-in-law, testified that on May 6, 2007, she attended the viewing of Avery Akram's body at the Swanson Funeral Home in Detroit, which is six miles from the scene of Miller's murder. Id. at 44, 54. She arrived at the funeral home at about 4:45 p.m. Id. at 43-45. At 5:30 p.m. she followed a friend outside the funeral home and saw Petitioner near the lobby as she and her friend walked past him. Id. at 46-47. She saw

Petitioner again inside the front of the funeral home at about 6:00 p.m., when she walked another friend outside. Id. at 46.

Andre Akram, Raquel's husband and Petitioner's brother, made the arrangements for the viewing. Andre was inside the funeral home for most of the memorial service, which lasted from 3:00 to 7:00 p.m. Id. at 22, 25. Andre was primarily occupied with other friends and family members, but he recalled seeing Petitioner at the funeral home two or three times. Id. at 25-27. On cross-examination, Andre acknowledged that he did not "kee[p] tabs" on Petitioner. Id. at 29. Nor did Andre know the exact time Petitioner left the funeral home. Id.

Kamilah Helton, Avery's fiancée, also attended the viewing. She testified that she saw Petitioner at the funeral home [*6] when she arrived a little after 4:00 p.m. Id. at 35. She went outside about three times that evening, and each time she passed by Petitioner, who was standing in the lobby. Id. at 37. Petitioner was still there when Helton left, which was between 6:30 and 6:45 p.m. Id. On cross-examination, Helton testified that she did not "kee[p] tabs" on Petitioner the whole time that she was there. Id. at 39. At some point, Petitioner spoke to her briefly, but she did not know what time that happened. Id. She never saw Petitioner leave the funeral home. Id.

Antone Webb was a friend of the Akram family. He arrived at the viewing between 4:00 and 4:15 p.m., where he saw Petitioner inside the funeral home lobby. Id. at 54. Webb recalled that Petitioner was in the lobby in front of the chapel the entire time. Id. at 56.

James Hunter, Avery's best friend, arrived at the viewing at 4:15 or 4:20 p.m. Id. at 63. He saw Petitioner in the lobby when he arrived. Id. He spent the rest of the service outside with Webb. Id. at 64. He saw Petitioner standing in the lobby and doorway of the funeral home and never saw him leave. Id. at 65. On cross-examination, Hunter testified that Petitioner was in his line of [*7] sight most of the time that he was there. Id. at 66. But he denied that he watched Petitioner the whole time. Id. He testified that there were times that he did not see Petitioner because he was in a different part of the premises. Id.

The trial court denied Petitioner's motion for a new trial based on the alibi witnesses' testimony. The case then returned to the Michigan Court of Appeals, which reversed the trial court's decision, finding that Petitioner was deprived of the effective assistance of counsel for his attorney's failure to call alibi witnesses at trial. *People v. Akram, No. 315402, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *2—*3 (Mich. Ct. App. Apr. 21, 2015)*. The prosecutor appealed, but the Michigan Supreme Court denied leave to appeal. *People v. Akram, 488 Mich. 1037, 793 N.W.2d 240 (Mich. 2011)*.

Petitioner's second trial was held in August of 2011. Prior to trial, Petitioner's new trial counsel filed a notice of alibi that listed twelve witnesses, including the five who testified at the evidentiary hearing. Counsel called only two of the alibi witnesses at trial: Andre Akram and Raquel Akram.

Following the presentation of the prosecutor's case, Andre testified that he was at the viewing from 3:00 to 7:00 p.m. 8/16/11 Jury Trial Tr. at 199 (Dkt. 23-26). Petitioner arrived about an hour to an hour and one-half after Andre arrived. Id. [*8] at 200. Andre saw Petitioner two or three times between 4:30 and 7:00 p.m. Id. at 201. On cross-examination, Andre conceded that he knew his brother was on trial for murder, he knew the time of the murder, he knew who his brother's lawyer was, but he did not go to the attorney or police about the alibi. Id. at 202-206, 216-217. Andre thought about one hundred people might have attended the viewing. Id. at 213. Andre was not "keeping tabs" on Petitioner during the viewing. Id. at 214. He was not aware of Petitioner leaving, but he could not say that he saw Petitioner at 5:30 p.m. Id. at 214-215.

Raquel Akram testified that she arrived at the viewing around 4:45 p.m. Id. at 225. She saw Petitioner as she walked her friend out of the funeral home at about 5:30 p.m. Id. at 226-228. Petitioner was standing near the doorway. Id. at 227. Raquel saw him again later outside around 6:00 p.m. Id. at 228. On cross-examination, Raquel testified that she did not tell anyone about her brother's alibi at the time of his original trial because she assumed his lawyer would contact her. Id. at 234. She estimated that between 50 and 75 people attended the viewing. Id. at 236. She did not actually look [*9] at the time when her friend left, but her friend had told her that she had to leave at 5:30 p.m. Id. at 239.

The second trial ended with a hung jury. 8/31/11 Jury Trial Tr. at 21-22 (Dkt. 23-33).

Petitioner's third trial was held in May of 2012. Petitioner was represented by the same attorney who handled his second trial. Counsel again filed a notice of alibi that listed eleven of the witnesses listed in his previous notice of alibi. Notice of Alibi, in Mich. Ct. App. 315402 at PageID.5446-5447 (Dkt. 23-58). After the prosecutor rested, defense counsel presented the same two alibi witnesses, Raquel and Andre Akram, as well as a new witness, Jamillah Gross-Caldwell.

Gross-Caldwell testified that she was a college friend of Raquel and Andre. 5/15/12 Jury Trial Tr. at 96-97 (Dkt. 23-50). She recalled attending the viewing for Avery Akram. Id. at 98-99. The viewing was from 3:00 to 7:00 p.m., but she did not arrive until the later part of it. Id. at 99-100. She remembered seeing Petitioner at the funeral home. Id. at 104. On cross-examination, Gross-Caldwell testified that she did not know the exact time that she arrived at the viewing. Id. at 116. On questioning by the jury, Gross-Caldwell [*10] stated that she did not speak to Petitioner during the viewing, and she could not give a more exact time when she arrived or left. Id. at 120.

Andre Akram again testified that he saw Petitioner at the viewing two or three times between 3:00 and 7:00 p.m. Id. at 128. On cross-examination, he indicated that between 50 and 100 people attended the viewing. 5/16/12 Jury Trial Tr. at 32 (Dkt. 23-51). Andre was not "keeping tabs" on the comings and goings of individuals who attended. 5/17/12 Jury Trial Tr. at 11 (Dkt. 23-52). He acknowledged that he did not recall seeing Petitioner specifically at 5:30 p.m. Id. Andre did not tell Petitioner's first attorney about seeing Petitioner at the viewing or go to the police. Id. at 12-13. Andre remembered seeing Petitioner before 5:30 p.m., but he did not specifically recall seeing him after 5:30 p.m. Id. at 33.

Raquel Akram again testified that she arrived at the viewing around 4:45 p.m. Id. at 50. She did not see Petitioner when she first got there. Id. at 53. She did, however, see Petitioner twice between 4:45 and 7:00 p.m. Id. The first time was when she walked her friend Jamillah to Jamillah's car. Id. at 60. The second time was when she walked [*11] another friend, Juan, out to his car at around 6:00 p.m. Id. at 60-61. On cross-examination, Raquel acknowledged that she did not look at any clocks at the times that she saw Petitioner at the funeral home. Id. at 61-63.

The jury found Petitioner guilty of the charged offenses.

Following sentencing, Petitioner again filed a direct appeal. His appellate counsel filed a brief on appeal that raised four claims:

> I. Was Defendant denied the effective assistance of counsel when trial counsel failed to investigate and present alibi witnesses for the exact time of the murder?
>
> II. Was Defendant denied due process to a fair trial when perjured testimony, known by the prosecution, infiltrated the trial and the trial court allowed it to happen?
>
> III. Did the trial court err in denying the suppression of eyewitness identification when the eyewitness testimony was unreliable and the identification procedure unduly suggestive?
>
> IV. Was Defendant denied due process to a fair trial when the prosecution improperly withheld key evidence of the line-up procedure and withheld key evidence of witness(es)['] perjury?

Petitioner also filed pro se motions to remand for another hearing, as well as a supplemental brief [*12] that raised the following additional claims:

> I. The appeals court erred and denied Defendant due process when the court denied Defendant's motions for "Ginther," "Wade," "Giglio," and "Brady" evidentiary hearings.
>
> II. Was Defendant deprived of his constitutional rights under double jeopardy where prosecutor used in trial by second tribunal perjured testimony knowingly to avoid an acquittal she believed imminent?
>
> III. Was Defendant denied his constitutional rights under *confrontation clause* where trial court denied defense impeachment of prosecution's key witness with prior perjury?
>
> IV. Was Defendant denied due process and fair trial where trial court denied sequester of police officer witness to avoid any tailoring of witness' testimony?

The Michigan Court of Appeals affirmed in an unpublished opinion. *Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038*. Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, raising what now form his two habeas claims as well as a few additional claims. The Michigan Supreme Court denied the application by standard form order. *People v. Akram, 499 Mich. 861, 873 N.W.2d 591 (Mich. 2016)*.

Petitioner then filed his current habeas petition. He later filed a motion to stay proceedings so that he could return to state court to exhaust additional claims [*13] (Dkt. 10). The Court granted the motion (Dkt. 11). Following state post-conviction proceedings, Petitioner filed amended habeas petitions (Dkts. 13, 15). The Court reopened the case and ordered a response (Dkt. 17). Petitioner later filed documents clarifying that he wished to raise only the two issues referenced above. Supp. Pet. at PageID.373-374 (Dkt. 21); see also Pet. Request at PageID.6936 (confirming Petitioner's intention to raise only these two claims.)

II. STANDARD OF REVIEW

Title *28 U.S.C. § 2254(d)(1)* curtails a federal court's review of constitutional claims raised by a state prisoner in a habeas action if the claims were adjudicated on the merits by the state courts. *28 U.S.C. § 2254(d)(1)*. Relief is barred under this section unless the state court adjudication was "contrary to" or resulted in an "unreasonable application of" clearly established Supreme Court law. Id.

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [United States Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" [*14] *Mitchell v. Esparza, 540 U.S. 12, 15-16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003)* (quoting *Williams v. Taylor, 529 U.S. 362, 405-406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*).

"[T]he 'unreasonable application' prong of the statute permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (quoting *Williams, 529 U.S. at 413*).

"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, 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)*). "*Section 2254(d)* reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id. at 102-103* (internal quotation omitted). As a condition for obtaining habeas relief from a federal court, the state prisoner must 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." *Id. at 103*.

III. DISCUSSION

A. Habeas Petition

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

1. Ineffective Assistance of Counsel

Petitioner's lead claim [*15] asserts that his trial counsel was ineffective for failing to call four alibi witnesses—Kamilah Helton, Antonio Webb, James Hunter, and Adonis Akram—at his third trial to elicit testimony that he was

seen at the funeral home specifically at 5:30 p.m., the time of Miller's murder. He asserts that the three alibi witnesses who testified at his third trial were unable to testify that they saw him at the specific time of the murder, creating a hole in the defense that the additional witnesses would have closed.

After reciting the familiar standard governing claims of ineffective assistance of counsel, the Michigan Court of Appeals denied the claim on the merits as follows:

> Defendant contends that defense counsel was ineffective for failing to investigate and present alibi witnesses "for the exact time of the murder."
>
> After defendant's first trial, the trial court held a Ginther hearing in February 2009, during which defendant presented five alibi witnesses to show that at the time of the shooting he was attending a viewing for his brother, Avery, from 3:00 to 7:00 p.m. at the Swanson Funeral Home. Defendant presented: (1) his brother, Andre; (2) his sister-in- friend, James Hunter; (3) Avery's [*16] friend, Antone Webb; (4) Avery's and (5) Avery's fiancée, Kamilah Helton. All five witnesses testified that they saw defendant at the viewing at the time of the shooting. After the Ginther hearing, this Court ordered a new trial based on former defense counsel's failure to present an alibi defense. Defense counsel was not involved in the Ginther hearing. Defense counsel represented defendant at his second jury trial in August 2011. On June 27, 2011, defense counsel filed a notice of alibi, indicating that defendant was at the funeral home at the time of the shooting. The notice listed 12 witnesses, including the five who testified at the Ginther hearing. Ultimately, defense counsel called Andre and Raquel Akram at the second trial. The second trial ended in a mistrial, and a third trial was scheduled.
>
> Before defendant's third trial, defense counsel filed a notice of alibi and a witness list, both of which included the same witnesses listed in the previously filed notice of alibi, with the exception of Hunter (who had testified at the Ginther hearing and did not testify at defendant's second trial). During the third trial, defense counsel again called Andre and Raquel to testify in support [*17] of the alibi defense, as well as Gross—Caldwell—a college friend of André's and Raquel's. All three witnesses testified that they observed defendant at the funeral home, but no witness testified to observing defendant at the exact time of the shooting, i.e., between 5:30 and 5:40 p.m.
>
> Defendant now argues that defense counsel should have called additional alibi witnesses, who could have placed him at the funeral home at exactly 5:30 p.m. In his appellate brief, defendant does not provide the names of the additional witnesses he believes defense counsel should have called. In his related motion to remand, defendant named the three other witnesses who previously testified at the Ginther hearing, Helton, Hunter, and Webb. Defendant attached to his motion to remand affidavits of two of those three witnesses, Helton and Hunter, as well as his own affidavit and the affidavit of his nephew, Adonis Akram. In her affidavit, Helton averred that she was at the funeral home on May 6 and observed defendant at 5:30 p.m., which was the exact time of the shooting, she was able and willing to testify but was not contacted by defense counsel. Adonis averred in his affidavit that he observed defendant, [*18] his uncle, at the funeral home between 5:30 and 5:40 p.m. and was willing to testify that his uncle did not commit the murder. Hunter also averred that he observed defendant at the funeral home specifically from 5:30 to 5:40 p.m. and that he wanted to testify at defendant's trial, but was not interviewed by defense counsel. Finally, defendant submitted his own affidavit, averring that when he asked defense counsel "to call more witnesses" "to testify to the time of the incident," defense counsel responded, "Why, you already won."
>
> Defendant has not overcome the strong presumption that defense counsel chose not to call the additional witnesses as a matter of trial strategy. Counsel's decisions about whether to call witnesses are matters of trial strategy, *People v. Rockey, 237 Mich. App. 74, 76; 601 NW2d 887 (1999)*, and "this Court will not second-guess defense counsel's judgment on matters of trial strategy." *People v. Benton, 294 Mich. App. 191, 203; 817 NW2d 599 (2011)*. Defense counsel has wide discretion as to matters of trial strategy. *People v. Heft, 299 Mich. App. 69, 83; 829 NW2d 266 (2012)*. The failure to present a witness can constitute ineffective assistance only where it deprives the defendant of a substantial defense. *People v. Payne, 285 Mich. App. 181, 190; 774 NW2d 714 (2009)*.

> Defendant has not overcome the presumption that defense counsel purposely declined to call defendant's nephew, his deceased brother's [*19] fiancée, and two of his brother's friends as a matter of sound trial strategy. It is apparent that counsel was aware of these witnesses because counsel listed them on his notice of alibi that he filed before trial. It is also apparent that counsel was aware of the testimony of at least Helton, Webb, and Hunter because each of those witnesses testified at the previous Ginther hearing and counsel referred to the Ginther hearing testimony during the lower court proceedings. The failure to call an alibi witness does not constitute ineffective assistance of counsel if counsel reasonably believes that the purported alibi witness will not provide an effective alibi. *People v. McMillan, 213 Mich. App. 134, 141; 539 NW2d 553 (1995)*.
>
> Defense counsel reasonably may have believed that calling the four additional alibi witnesses would have been a risky proposition. It would have been reasonable for counsel to anticipate that the prosecutor would question the credibility of those witnesses, and counsel reasonably may have determined that the credibility issues that those witnesses would have presented would seriously undermine any progress defense counsel had made in presenting the alibi defense and discrediting the prosecution's witnesses. The testimony from [*20] the prior Ginther hearing supports that there were obvious credibility issues with the proposed witnesses, whose testimony sometimes contradicted each other regarding defendant's whereabouts. It was not objectively unreasonable for defense counsel to present those whom he believed were the strongest and most consistent alibi witnesses. Counsel reasonably may have believed that if the four proposed witnesses, who all claimed to have observed defendant's whereabouts at exactly 5:30 p.m., were perceived to be lying, the jury was more likely to disregard the other alibi testimony. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v. Stewart (On Remand), 219 Mich. App. 38, 42; 555 NW2d 715 (1996)*. Consequently, defendant has failed to overcome the presumption that defense counsel provided effective assistance at trial.

*Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *2—*3*.

This decision did not unreasonably apply clearly established Supreme Court law. In *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, the Supreme Court set forth a two-part test for determining whether a habeas petitioner received ineffective assistance of counsel. First, a petitioner must show that counsel's performance was deficient. *Id. at 687*. This requires showing that counsel made errors so serious that he or she was not [*21] functioning as the "counsel" guaranteed by the *Sixth Amendment*. Id. Second, a petitioner must establish that counsel's deficient performance prejudiced the defense. Id. This requires showing that counsel's errors were so serious that they deprived the petitioner of a fair trial or appeal. Id.

As to the first element, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" to prove deficient performance. *Id. at 690*. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id. at 689*. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id. at 690*. The petitioner bears the burden of overcoming the presumption that the challenged actions were sound trial strategy. *Id. at 689*. As to the second element, a petitioner proves prejudice by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so [*22] undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Id. at 686*.

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

The record reasonably supports the state court's determination that counsel did not perform deficiently. In light of the extensive record established at the evidentiary hearing and three trials, the appellate court laid out a plausible

rationale for counsel's decision to limit the presentation of the alibi defense in the manner that he did. See *Harrington, 562 U.S. at 105*. Defense counsel was not operating in a vacuum. Prior to the third trial, [*23] he had the benefit of five alibi witnesses' testimony from the evidentiary hearing. Counsel also had the benefit of knowing the alibi testimony of the two alibi witnesses who testified at the second trial and how they would be challenged on cross-examination. Perhaps more significantly, counsel knew that the presentation of the two alibi witnesses at the second trial resulted in a hung jury. Finally, contrary to Petitioner's assertions, counsel knew of the possibility of calling the additional alibi witnesses, as he listed their names (including the new witness, Adonis Akram) in the notice of alibi filed before both the second and third trials.

Petitioner argues that the failure to call the additional alibi witnesses was deficient because these witnesses, unlike Raquel and Andre Akram, would have testified to seeing Petitioner at the specific time of the murder. Petitioner therefore sees the choice whether to present these additional witnesses as an easy one to make, and that any competent attorney would have presented the witnesses. The record, however, shows that the situation was not nearly as cut and dried.

Three of the four uncalled witnesses testified at the evidentiary hearing. [*24] Contrary to Petitioner's assertion, and contrary to the statements in their terse affidavits, none of them testified to seeing Petitioner at the exact time of the murder. Helton testified that she was at the viewing between 4:00 p.m. and 6:30-6:45 p.m. and saw Petitioner about three times during that span. 2/11/2009 Hr'g Tr. at 35-38. But when asked what time it was that she saw Petitioner, Helton testified, "I can't say I was keeping tabs . . . I can't say. I don't remember the time. Exactly what time." Id. at 39.

Antone Webb testified that he arrived at the viewing around 4:00 p.m. and stayed until the end of the service. Id. at 54. He testified that he saw Petitioner throughout the whole time he was there and never saw Petitioner leave. Id. at 54, 56. But Webb clarified that while Petitioner stayed in the lobby of the chapel, Webb was with "a whole bunch" of people from the neighborhood outside in the parking lot. Id. at 54-56.

James Hunter also testified that he was at the viewing from about 4:15-4:20 p.m. until 7:00 p.m. Id. at 63. He saw the body and spoke to Petitioner soon after he arrived. Id. at 63-64. And though Hunter testified that he never saw Petitioner leave and saw Petitioner [*25] a "majority of the time," id. at 65-66, he clarified that he was in the parking lot with Webb, that he was not just watching Petitioner the whole time he was there, and that there were times he did not see Petitioner. Id. at 64-66.

Accordingly, the three uncalled witnesses who testified at the hearing and were subjected to even the briefest of cross-examinations left open the possibility that they did not observe Petitioner at the funeral home at the specific time of the murder. While they all claimed to see Petitioner during the course of the three- to four-hour viewing, none of them testified to any specific observation or event at the time of the murder during which they could say they also saw Petitioner.

Consequently, Raquel Akram was such an important witness for the defense. Of all the witnesses to testify, only Raquel testified to a basis for remembering why she saw Petitioner at the specific time of the murder. She explained that she knew her friend had to leave the viewing around 5:30 p.m. When she walked her friend out to her friend's car, she recalled passing Petitioner in the front of the funeral home. While this testimony suffered from the fact that Raquel conceded that [*26] she believed it be 5:30 p.m. only because her friend told her in advance that was the time she had to leave, at least this testimony connected a particular event with someone's observation of Petitioner at the time of the murder. None of the other alibi witnesses offered that sort of connection.

Calling the additional alibi witnesses opened the door for the prosecutor to point out inconsistencies between their testimony and Raquel's recollection. For example, Hunter testified at the hearing that Raquel escorted her to see the body somewhere between 4:15 p.m. and 4:20 p.m. Id. at 63. Raquel, however, testified that she took Hunter (known to her as "Blue") to see the body around 5:30 p.m., just after she walked her friend to her car. Id. at 45-46. Presenting Hunter's testimony, therefore, would have carried the risk of calling into question Raquel's recollection that it was around 5:30 p.m.—and not an hour earlier—when she walked her friend to her friend's car. Similarly, Helton and Webb testified that Petitioner remained inside the lobby, while Raquel testified that she saw Petitioner

outside the funeral home at around 6:00 p.m. Id. at 47. Presenting the additional witnesses might have [*27] presented opportunities for the prosecutor to further challenge Raquel, whom defense counsel likely considered the key alibi witness, or at least considered a witness who helped prevent a guilty verdict after the second trial.

This leaves the threadbare affidavit of Adonis Akram, Petitioner's nephew, which was executed over six years after the murder. Adonis does not explain in his affidavit why he did not come forward earlier. The affidavit merely states that Adonis saw Petitioner "at 5:30 thru 5:40 p.m.," that Petitioner "never left the funeral home," and that Adonis was "looking at him" at the time of the murder. Supp. Pet. at PageID.469. Unlike Raquel, Adonis gives no explanation as to why or how he could recall that he saw his uncle during a specific ten-minute window (that just happened to be the time a murder was being committed) during a crowded viewing at a funeral home six years earlier. In fact, the affidavit includes nothing but unadorned, conclusory assertions. The affidavit does not present compelling or persuasive evidence that counsel performed deficiently by failing to call Adonis in addition to the three alibi witnesses that were called at the third trial.

Defense counsel [*28] apparently believed that a jury was unwilling to convict Petitioner after Raquel and Andre presented their alibi testimony. It was reasonable for him to stick with this trial strategy and opt against including several additional alibi witnesses whose testimony might have been as risky as potentially beneficial. In fact, the third alibi witnesses added by defense counsel for the final trial, Gross-Caldwell, did not contradict anything testified to by Raquel or Andre, suggesting a deliberate and selective strategy on whom to call.

Given this extensive record, and applying the appropriate habeas standard of review, the Court finds that the Michigan Court of Appeals did not unreasonably apply the Strickland standard by finding that Petitioner failed to overcome the presumption of effective performance. Therefore, Petitioner fails to demonstrate entitlement to relief based on his ineffective assistance of counsel claim.

2. False Evidence

Petitioner's second claim asserts that the prosecutor knowingly presented false testimony from Damia Johnson. Supp. Pet. at PageID.413. Specifically, he claims that Johnson testified at the first trial that she did not look at the face of the man who shot [*29] Miller. Petitioner notes that Johnson also told police officers after the shooting that she did not see the shooter's face. Petitioner alleges that the prosecutor presented false testimony at the third trial by eliciting contradictory and false testimony from Johnson that she saw the shooter's face. Petitioner states that, in its opinion, the Michigan Court of Appeals failed to address this particular allegation, which was part of a broader false evidence claim, entitling him to de novo review.[1] Id. at PageID.413-417.

The Michigan Court of Appeals rejected the claim on the merits:

> Defendant highlights instances where Johnson's testimony about the circumstances surrounding her identification of him at his third trial differed from her testimony in prior trials or was contradicted by another witness, Detroit Police Sgt. Kevin Hanus, to argue that the prosecutor knowingly used perjured testimony at trial. The inconsistencies identified by defendant do not establish that the prosecutor knowingly used perjured testimony to obtain defendant's convictions. *Gratsch, 299 Mich. App. at 619*; *People v. Parker, 230 Mich. App. 677, 690; 584 NW2d 753 (1998)*. Although Johnson's testimony regarding certain details differed from her prior testimony, there is no indication that the prosecutor [*30] sought to conceal these inconsistencies from defendant. In fact, the prosecutor noted some of the inconsistencies during trial and, at one point, Johnson admitted that she was not able to remember "everything" after five years.

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[1] Petitioner raised this particular predicate to his false evidence claim in his pro se supplemental brief filed in the Michigan Court of Appeals. See Mich. Ct. App. 315402 at PageID.5753-5758. Appellate counsel's brief also attacked Johnson's testimony as false, but it contained a broader factual basis, i.e., it argued that Johnson's testimony changed over the course of the three trials and contradicted testimony from police officers. The brief stated that Johnson testified at the first trial that she did not see the shooter's face, but, in contradiction to officer testimony, she testified at the third trial that she identified Petitioner in the first of several photographic line-ups that occurred prior to the first trial. Id. at PageID.5713-5720.

> The prosecutor also questioned Sgt. Hanus about Johnson's "mistaken" testimony regarding a pretrial identification procedure in order to correct Johnson's testimony. In addition, testimony that conflicts with another witness's testimony does not automatically lead to the conclusion that the prosecution knowingly used perjured testimony. See *People v. Lester, 232 Mich. App. 262, 278-279; 591 NW2d 267 (1998)*, overruled in part on other grounds, *People v. Chenault, 495 Mich. 142; 845 NW2d 731 (2014)*. Defendant's argument does not involve an issue of perjury, but rather concerns witness credibility. Defense counsel fully explored the inconsistencies with Johnson's testimony, as well as other prosecution witnesses. The jury was free to believe or disbelieve all or any portion of their trial testimony. *People v. Wolfe, 440 Mich. 508, 514; 489 NW2d 748 (1992)*, amended *441 Mich. 1201 (1992)*.

*Akram, 2015 Mich. App. LEXIS 822, 2015 WL 1814038, at *4*.

As an initial matter, the Court rejects Petitioner's argument that he is entitled to de novo review of the claim because the state court did not adjudicate the claim on the merits. While the state court did not specifically discuss Johnson's testimony regarding whether she [*31] saw the shooter's face, the court indicated it was reviewing Petitioner's challenge to "Johnson's testimony about the circumstances surrounding her identification of him at his third trial," which Petitioner argued "differed from her testimony in prior trials or was contradicted by another witness." Id. There is a presumption that a state court adjudicated a claim on the merits. *Harrington, 562 U.S. at 98-99*; *Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013)*. Johnson's testimony in the third trial that she saw the shooter's face was part of her identification testimony. Petitioner has not overcome the presumption of a merits adjudication where the state court clearly indicated in its opinion that it was addressing Petitioner's challenge to the presentation of Johnson's identification testimony.

The state court decision did not unreasonably apply clearly established Supreme Court law. Prosecutors "may not knowingly present false evidence." *United States v. Fields, 763 F.3d 443, 462 (6th Cir. 2014)*. The Supreme Court has stated that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)* (quoting *Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935)*). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)*. But [*32] "[t]o prove that the prosecutor's failure to correct false testimony violated due process rights, a petitioner must demonstrate that: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Rosencrantz v. Lafler, 568 F.3d 577, 583-584 (6th Cir. 2009)*. Petitioner must demonstrate that the testimony in question was "indisputably false" and that the alleged perjury was not harmless error. *Monea v. United States, 914 F.3d 414, 421 (6th Cir. 2019)*.

At Petitioner's first trial, Johnson initially testified that she was not looking at the shooter's face when the victim was shot. 11/5/2007 Jury Trial Tr. at 173, 176 (Dkt. 23-4). She testified that the first time she was able to identify the shooter was at the trial itself. Id. at 161. When asked on cross-examination how she was able to identify Petitioner if she did not see his face, Johnson said, "'cause I remember what happened." Id. at 178. Johnson then attempted to explain that in the first few days after the shooting, she could not identify Petitioner because she was in shock, but at trial she was no longer in shock. Id. at 185, 213-214, 216. Sometime prior to trial, she was able to better think about what happened and could identify the shooter based on his eyes and nose. Id. at 226-227.

Then, [*33] at Petitioner's third trial, Johnson testified that as the shooter approached, he did not have anything obstructing his face. 5/9/12 Jury Trial Tr. at 114 (Dkt. 23-47). She testified that she looked at the shooter and the victim. Id. at 117. She identified Petitioner as the person she saw shoot the victim. Id. at 122. She testified she was in shock and just guessed at a general description of the shooter when questioned by police. Id. at 124. And she acknowledged that she was unable to identify Petitioner in a photo array a few days after the shooting because she was scared. Id. at 133-136. But Johnson stated that she now recognized Petitioner from his face. Id. at 134-135. She was now better able to visualize what had happened. Id. at 172-173; 5/10/12 Jury Trial Tr. at 4-5 (Dkt. 23-48). On cross-examination, defense counsel vigorously and relentlessly impeached Johnson with her prior testimony

that she did not look at the shooter's face at the time of the incident and with her inability to describe or identify the shooter for police. Id. at 31-40.

On a surface level, Johnson's testimony at the first trial seems internally inconsistent. She testified both that she did not see the shooter's [*34] face but also that she later recalled the shooter's face when the shock of the event wore off. The apparent inconsistency was somewhat resolved by Johnson at the first trial when questioned by defense counsel, and it became clearer during the third trial what Johnson was trying to describe, however inarticulately. Reading all her testimony together, it appears Johnson was attempting to say that she simply could not recall seeing the shooter's face until after time had passed, the shock wore off, and she was better able to reflect on the event. Indeed, when defense counsel challenged her on the inconsistency, that is how she attempted to respond. Therefore, although Johnson's credibility and the accuracy of her memory were obviously called into serious question by her uncertain and apparently equivocal testimony, the apparent inconsistency does not compel the conclusion that the prosecutor knew any particular part of her testimony was false. Mere inconsistencies in a witness' testimony do not establish the knowing use of false testimony. See *United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)*. The prosecutor might have reasonably believed that Johnson's prior testimony referred to her failure to remember seeing the shooter's face until [*35] after she reflected back on the incident shortly before the first trial.

Petitioner has, therefore, not shown that Johnson's testimony was "indisputably false," *Monea, 914 F.3d at 421*, or that the prosecutor knowingly presented false testimony. The record reasonably allowed the Michigan Court of Appeals to reject Petitioner's claim consistent with the requirements of clearly established federal law. Petitioner is not entitled to habeas relief on his false evidence claim.

Petitioner fails to demonstrate entitlement to habeas relief with respect to either of his claims. Therefore, the Court denies the petition for writ of habeas corpus.

B. Certificate of Appealability

Before Petitioner may appeal this decision, the Court must determine whether to issue a certificate of appealability. See *28 U.S.C. § 2253(c)(1)(A)*; *Fed. R. App. P. 22(b)*. 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 satisfy *§ 2253(c)(2)*, 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." *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)* (punctuation modified). [*36] The Court finds that reasonable jurists would not debate the resolution of any of Petitioner's claims. Therefore, the Court denies a certificate of appealability.

C. Leave to Proceed In Forma Pauperis on Appeal

While a certificate of appealability may be granted only if a petitioner makes a substantial showing of the denial of a constitutional right, a court may grant an application for leave to proceed in forma pauperis on appeal if it finds that an appeal can be taken in good faith. *28 U.S.C. § 1915(a)(3)*; *Fed. R. App. P. 24(a)(2)*. "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. *Foster v. Ludwick, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002)*. Although jurists of reason would not debate the Court's resolution of Petitioner's claims, the issues are not frivolous. Therefore, an appeal could be taken in good faith, and Petitioner may proceed in forma pauperis on appeal. Id.

IV. CONCLUSION

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

SO ORDERED.

Dated: October 20, 2022

Detroit, Michigan

/s/ Mark A. Goldsmith

MARK A. GOLDSMITH

United States [*37] District Judge

JUDGMENT

Judgment is entered in accordance with the Opinion and Order entered on today's date. The petition for writ of habeas corpus is denied, a certificate of appealability is denied, and leave to proceed in forma pauperis on appeal is granted.

APPROVED:

/s/ Mark A. Goldsmith

MARK A. GOLDSMITH

UNITED STATES DISTRICT JUDGE

Dated: October 20, 2022

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APPENDIX (C)

The Order of the Michigan Supreme Court

Denying Petitioner's Application for Leave to Appeal

February 3, 2016

Order

Michigan Supreme Court
Lansing, Michigan

February 3, 2016

Robert P. Young, Jr.,
Chief Justice

151817 & (141)

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 151817
COA: 315402
Wayne CC: 07-012443-FC

ADRIAN MAHDEE AKRAM,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the April 21, 2015 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 remand for evidentiary hearings 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.

February 3, 2016

Clerk

p0127

APPENDIX (D)

The Unpublished Order and Opinion of the

Michigan Court of Appeals

Denying Relief

April 21, 2015

Denying Defendant's Motions to Remand

People v. Akram

Court of Appeals of Michigan

April 21, 2015, Decided

No. 315402

Reporter
2015 Mich. App. LEXIS 822 *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ADRIAN MAHDEE AKRAM, 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 *People v. Akram, 2015 Mich. LEXIS 1817 (Mich., Sept. 1, 2015)*

Leave to appeal denied by, Motion denied by *People v. Akram, 499 Mich. 861, 873 N.W.2d 591, 2016 Mich. LEXIS 223 (Feb. 3, 2016)*

Habeas corpus proceeding at, Stay denied by, Request denied by *Akram v. Woods, 2016 U.S. Dist. LEXIS 128485 (E.D. Mich., Sept. 21, 2016)*

Prior History: [*1] Wayne Circuit Court. LC No. 07-012443-FC.

People v. Akram, 2010 Mich. App. LEXIS 1634 (Mich. Ct. App., Aug. 31, 2010)

Core Terms

defense counsel, second trial, trial court, witnesses, criminal history, identification, perjury, convictions, shooting, perjured testimony, ineffective, exclude evidence, prior conviction, alibi witness, funeral home, criminal record, inconsistencies, credibility, knowingly, assistance of counsel, prior testimony, trial strategy, reliability, eyewitness, photograph, contends, identification procedure, witness testimony, defendant argues, due process

Counsel: For PEOPLE OF MI, PLAINTIFF-APPELLEE: THOMAS M. CHAMBERS, DETROIT, MI.

For ADRIAN MAHDEE AKRAM, DEFENDANT-APPELLANT: RONALD D. AMBROSE, LIVONIA, MI.

Judges: Before: MARKEY, P.J., and MURRAY and BORRELLO, JJ.

Opinion

PER CURIAM.

At defendant's third trial, a jury convicted him of first-degree premeditated murder, *MCL 750.316(1)(a)*, felon in possession of a firearm, *MCL 750.224f*, and possession of a firearm during the commission of a felony, *MCL*

750.227b.[1] The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent terms of life imprisonment for the murder conviction, and 38 months to 10 years' imprisonment for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

A. FACTS

Defendant was convicted of fatally shooting 23-year-old Orlando Miller [*2] at approximately 5:30 p.m. on May 6, 2007, in Detroit. The prosecution presented two eyewitnesses who identified defendant as the shooter. Damia Johnson testified that she and Miller were walking down the street when defendant, armed with a gun, approached them. According to Johnson, Miller asked defendant, "What's up, what are you looking at?" Defendant then responded, "You know what's up" and proceeded to shoot Miller several times. Lawrence Archer, who was in the area looking for homes, testified that he observed defendant emerge from an alley, go up to Miller, say something to Miller, and then shoot him. Archer identified defendant in a photographic array and was 100-percent certain of his identification. Johnson failed to identify defendant in a photographic lineup days after the shooting and first identified defendant in court during defendant's first trial in November 2007. Johnson testified that she was certain of her identification. She explained that she recognized defendant in the earlier photographic lineup, but fear stopped her from selecting defendant's photo. The defense theory at trial was that defendant was misidentified as the shooter and that the eyewitnesses were [*3] unreliable. Defendant presented three witnesses to support his alibi defense that at the time of the shooting he was at a funeral home attending his younger brother's viewing, which lasted from 3:00 to 7:00 p.m. on May 6, 2007.

B. ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to call additional alibi witnesses at trial.

Because defendant failed to move for a new trial or request a *Ginther*[2] hearing in the trial court, our review is limited to mistakes apparent on the record. People v Sabin (On Second Remand), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). A claim of ineffective assistance of counsel involves issues of law and fact. People v Brown, 294 Mich App 377, 387; 811 NW2d 531 (2011). "This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *Id.*

To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. Id. at 387-388. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Id. at 388. Second, defendant must show that but for counsel's deficient performance, it is reasonably probable that the [*4] result of the proceeding would have been different. People v Armstrong, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." People v Gioglio (On Remand), 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds *493 Mich. 864, 820 N.W.2d 922 (2012)*. "[A] reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." Id. at 22-23.

---

[1] Defendant was originally convicted of these same offenses in 2007. In a prior appeal, this Court reversed defendant's convictions on the basis of ineffective assistance of counsel and remanded for a new trial. *People v Akram*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 2010 (Docket No. 283161), 2010 Mich. App. LEXIS 1634 . Defendant's second trial in August 2011 ended in a mistrial after the jury could not reach a verdict.

[2] People v Ginther, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant contends that defense counsel was ineffective for failing to investigate and present alibi witnesses "for the exact time of the murder."

After defendant's first trial, the trial court held a *Ginther* hearing in February 2009, during which defendant presented five alibi witnesses to show that at the time of the shooting he was attending a viewing for his brother, Avery, from 3:00 to 7:00 p.m. at the Swanson Funeral Home. Defendant presented: (1) his brother, Andre; (2) his sister-in-law, [*5] Raquel; (3) Avery's friend, Antone Webb; (4) Avery's friend, James Hunter; and (5) Avery's fiancée, Kamilah Helton. All five witnesses testified that they saw defendant at the viewing at the time of the shooting. After the *Ginther* hearing, this Court ordered a new trial based on former defense counsel's failure to present an alibi defense. Defense counsel was not involved in the *Ginther* hearing. Defense counsel represented defendant at his second jury trial in August 2011. On June 27, 2011, defense counsel filed a notice of alibi, indicating that defendant was at the funeral home at the time of the shooting. The notice listed 12 witnesses, including the five who testified at the *Ginther* hearing. Ultimately, defense counsel called Andre and Raquel Akram at the second trial. The second trial ended in a mistrial, and a third trial was scheduled.

Before defendant's third trial, defense counsel filed a notice of alibi and a witness list, both of which included the same witnesses listed in the previously filed notice of alibi, with the exception of Hunter (who had testified at the *Ginther* hearing and did not testify at defendant's second trial). During the third trial, defense counsel again [*6] called Andre and Raquel to testify in support of the alibi defense, as well as Gross-Caldwell--a college friend of André's and Raquel's. All three witnesses testified that they observed defendant at the funeral home, but no witness testified to observing defendant at the exact time of the shooting, i.e., between 5:30 and 5:40 p.m.

Defendant now argues that defense counsel should have called additional alibi witnesses, who could have placed him at the funeral home at exactly 5:30 p.m. In his appellate brief, defendant does not provide the names of the additional witnesses he believes defense counsel should have called. In his related motion to remand, defendant named the three other witnesses who previously testified at the *Ginther* hearing, Helton, Hunter, and Webb. Defendant attached to his motion to remand affidavits of two of those three witnesses, Helton and Hunter, as well as his own affidavit and the affidavit of his nephew, Adonis Akram. In her affidavit, Helton averred that she was at the funeral home on May 6 and observed defendant at 5:30 p.m., which was the exact time of the shooting, she was able and willing to testify but was not contacted by defense counsel. Adonis averred [*7] in his affidavit that he observed defendant, his uncle, at the funeral home between 5:30 and 5:40 p.m. and was willing to testify that his uncle did not commit the murder. Hunter also averred that he observed defendant at the funeral home specifically from 5:30 to 5:40 p.m. and that he wanted to testify at defendant's trial, but was not interviewed by defense counsel. Finally, defendant submitted his own affidavit, averring that when he asked defense counsel "to call more witnesses" "to testify to the time of the incident," defense counsel responded, "Why, you already won."

Defendant has not overcome the strong presumption that defense counsel chose not to call the additional witnesses as a matter of trial strategy. Counsel's decisions about whether to call witnesses are matters of trial strategy, *People v Rockey, 237 Mich App 74, 76; 601 NW2d 887 (1999)*, and "this Court will not second-guess defense counsel's judgment on matters of trial strategy." *People v Benton, 294 Mich App 191, 203; 817 NW2d 599 (2011)*. Defense counsel has wide discretion as to matters of trial strategy. *People v Heft, 299 Mich App 69, 83; 829 NW2d 266 (2012)*. The failure to present a witness can constitute ineffective assistance only where it deprives the defendant of a substantial defense. *People v Payne, 285 Mich App 181, 190; 774 NW2d 714 (2009)*.

Defendant has not overcome the presumption that defense counsel purposely declined to [*8] call defendant's nephew, his deceased brother's fiancée, and two of his brother's friends as a matter of sound trial strategy. It is apparent that counsel was aware of these witnesses because counsel listed them on his notice of alibi that he filed before trial. It is also apparent that counsel was aware of the testimony of at least Helton, Webb, and Hunter because each of those witnesses testified at the previous *Ginther* hearing and counsel referred to the *Ginther* hearing testimony during the lower court proceedings. The failure to call an alibi witness does not constitute ineffective assistance of counsel if counsel reasonably believes that the purported alibi witness will not provide an effective alibi. *People v McMillan, 213 Mich App 134, 141; 539 NW2d 553 (1995)*.

Defense counsel reasonably may have believed that calling the four additional alibi witnesses would have been a risky proposition. It would have been reasonable for counsel to anticipate that the prosecutor would question the credibility of those witnesses, and counsel reasonably may have determined that the credibility issues that those witnesses would have presented would seriously undermine any progress defense counsel had made in presenting the alibi defense and discrediting [*9] the prosecution's witnesses. The testimony from the prior *Ginther* hearing supports that there were obvious credibility issues with the proposed witnesses, whose testimony sometimes contradicted each other regarding defendant's whereabouts. It was not objectively unreasonable for defense counsel to present those whom he believed were the strongest and most consistent alibi witnesses. Counsel reasonably may have believed that if the four proposed witnesses, who all claimed to have observed defendant's whereabouts at exactly 5:30 p.m., were perceived to be lying, the jury was more likely to disregard the other alibi testimony. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand), 219 Mich App 38, 42; 555 NW2d 715 (1996)*. Consequently, defendant has failed to overcome the presumption that defense counsel provided effective assistance at trial.

II. PERJURED TESTIMONY

Defendant next argues that he is entitled to a new trial because the prosecution knowingly presented and allowed perjured testimony by Johnson and Archer to go forward throughout the trial.

We review claims of prosecutorial error on a case by case basis, examining the challenged conduct in context to determine [*10] whether the defendant received a fair and impartial trial. *People v Bahoda, 448 Mich 261, 266-267; 531 NW2d 659 (1995)*.

A defendant's right to due process "is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony." *People v Gratsch, 299 Mich App 604, 619; 831 NW2d 462 (2013)*, vacated in part on other grounds *495 Mich. 876, 838 N.W.2d 686 (2013)*. Thus, a prosecutor has "an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility." *Id.*

i. DAMIA JOHNSON

Defendant highlights instances where Johnson's testimony about the circumstances surrounding her identification of him at his third trial differed from her testimony in prior trials or was contradicted by another witness, Detroit Police Sgt. Kevin Hanus, to argue that the prosecutor knowingly used perjured testimony at trial. The inconsistencies identified by defendant do not establish that the prosecutor knowingly used perjured testimony to obtain defendant's convictions. *Gratsch, 299 Mich App at 619*; *People v Parker, 230 Mich App 677, 690; 584 NW2d 753 (1998)*. Although Johnson's testimony regarding certain details differed from her prior testimony, there is no indication that the prosecutor sought to conceal these inconsistencies from defendant. In fact, the prosecutor noted some of the inconsistencies during trial and, at one point, Johnson admitted that she [*11] was not able to remember "everything" after five years.

The prosecutor also questioned Sgt. Hanus about Johnson's "mistaken" testimony regarding a pretrial identification procedure in order to correct Johnson's testimony. In addition, testimony that conflicts with another witness's testimony does not automatically lead to the conclusion that the prosecution knowingly used perjured testimony. See *People v Lester, 232 Mich App 262, 278-279; 591 NW2d 267 (1998)*, overruled in part on other grounds, *People v Chenault, 495 Mich 142; 845 NW2d 731 (2014)*. Defendant's argument does not involve an issue of perjury, but rather concerns witness credibility. Defense counsel fully explored the inconsistencies with Johnson's testimony, as well as other prosecution witnesses. The jury was free to believe or disbelieve all or any portion of their trial testimony. *People v Wolfe, 440 Mich 508, 514; 489 NW2d 748 (1992)*, amended *441 Mich. 1201 (1992)*.

ii. LAWRENCE ARCHER

Defendant argues that the "testimony of the other eye witness, Lawrence Archer, was perjured." To support this claim, defendant relies on testimony that Archer gave during defendant's second jury trial. During cross-examination, defense counsel asked Archer whether he had intentionally given the police an incorrect year of birth, and Archer twice answered that "maybe [the police] heard it wrong." The following exchange then [*12] occurred:

Q. But your birthday is '45?

A. January 19--1949.

Q. Right. And if someone was looking into your criminal history--

A. I don't have a criminal history.

Q. You don't?

A. Come on at (ph).

The prosecutor: Judge, and I am going to ask to approach.

The court: Parties approach. [(Emphasis added).]

At the third trial, the trial court excluded evidence of Archer's criminal record and the statements Archer made at the second trial concerning his criminal record. In an order denying defendant's motion for a new trial, the trial court summarized what occurred during the second trial and its ruling in the third trial as follows:

> This Court could have struck the question and answer from the record and ordered the jury to disregard both. The Court felt that Defense Counsel's question was clearly an attempt to place evidence about the [sic] Mr. Archer's criminal history before the jury, which is not admissible pursuant to *MRE 609*. Prior hearings revealed that Defense Counsel already had information about Mr. Archer's criminal history. Over the prosecutor's objection, this Court exercised its discretion and ordered the Prosecutor to produce Mr. Archer's entire LEIN criminal history. The Prosecutor immediately, [*13] but unsuccessfully, appealed to the Court of Appeals.
>
> Upon receipt of the criminal history, this Court, over the Prosecutor's objection, again exercised its discretion and compelled Mr. Archer to testify in front of the jury to his entire criminal history, which would ordinarily be inadmissible under *MRE 609*. The Court did this despite Mr. Archer's insistence that he did not mean to mislead the Court but believed, based on his interviews with the Prosecutor, that he did not have a criminal history because his convictions were greater than ten years old. The Court also allowed Defense Counsel to question Mr. Archer over approximately nine pages of transcripts about whether his August 3, 2011 answer about not having a criminal history to the jury was a lie or an answer he believed to be true based on his conversation with the Prosecutor. This Court took action because it felt that it was necessary to overcome the impression the jury might have that Mr. Archer did not have a criminal history.
>
> Before and during Defendant's third trial, the Court ruled that it would not admit Mr. Archer's criminal history as it did at the second trial. Similarly, the Court chose not to allow Defense Counsel to ask [*14] Mr. Archer about the statement he made during the second trial that he did not have a criminal history or that he committed perjury. The witness's criminal history was no[t] admissible pursuant to *MRE 609*. While *MRE 608(b)* gives the Court discretion to allow inquiry into specific instances of conduct on cross examination, if probative for truthfulness or untruthfulness, this Court decided not to allow it. The probative value of Mr. Archer's prior convictions are minimal and inquiry into this area would confuse the jury, and, in effect, create a trial within a trial. The collateral matter as to whether Mr. Archer committed perjury in the second trial or had a criminal history could confuse the jury about the real issue at hand.

Defendant essentially raises three arguments in that he contends that: (1) the prosecutor committed misconduct by introducing Archer's "perjured testimony;" (2) the trial court erred in excluding evidence of Archer's criminal record, and (3) the trial court erred in excluding the statements Archer made at the second trial.

With respect to defendant's argument concerning the prosecution's introduction of Archer as a witness, defendant's perjury claim is misplaced. Perjury consists of [*15] a willful false statement made under oath. *People v Lively, 470 Mich 248, 253; 680 NW2d 878 (2004)*. During defendant's second trial, Archer explained that his testimony denying that he had a prior criminal history was based on his conversations with the prosecutor regarding what constitutes a

prior conviction under the court rules. Thus, whether Archer knowingly made a false statement was open to question. But regardless of how Archer's testimony at the second trial is characterized because the issue of Archer's prior criminal history was not introduced or explored at defendant's third trial, there is no basis for concluding that the prosecutor knowingly presented false testimony at the third trial. Defendant's complaint here does not involve an issue of perjury but rather his apparent discontent with the trial court's decision to prohibit, at the third trial, evidence of Archer's prior convictions and inquiry into whether Archer attempted to conceal those convictions during the second trial. These arguments also lack merit.

The trial court did not err in excluding evidence of Archer's criminal record at the third trial. Evidence of prior convictions under *MRE 609* is "not admissible if a period of more than ten years has elapsed since the date [*16] of the conviction []." *MRE 609(c)*. Defendant does not contend that less than ten years elapsed since the date of the convictions, and he fails to otherwise articulate how the trial court erred in concluding that the convictions were inadmissible under *MRE 609*. Accordingly, defendant cannot show that the court abused its discretion in excluding evidence of the convictions. See *People v Starr, 457 Mich 490, 494; 577 NW2d 673 (1998)* (a trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion).

In both his brief submitted by counsel and in his amended Standard 4 brief, defendant also appears to contend that the trial court erred in excluding evidence that Archer committed "perjury" about his criminal record in the second trial. In reviewing this issue we note that "[b]ecause an abuse of discretion standard contemplates that there may be more than a single correct outcome, there is no abuse of discretion where the evidentiary question is a close one." *People v Smith (On Remand), 282 Mich App 191, 194; 772 NW2d 428 (2009)*. First, contrary to defendant's contention in his Standard 4 brief, Archer's statements at the second trial were not admissible under *MRE 609* because the statements did not result in a conviction for perjury. *MRE 609* governs admissibility of prior convictions for impeachment purposes, not prior [*17] statements. Second, the trial court's determination that inquiring into Archer's statements at the second trial would cause jury confusion did not amount to an abuse of discretion. Under *MRE 403*, a trial court has discretion to exclude evidence that has a tendency to cause "confusion of the issues." In this case, given that Archer's underlying convictions were not admissible under *MRE 609*, it was reasonable for the trial court to conclude that inquiry into Archer's prior testimony would confuse the jury in that it would result in an inquiry into Archer's criminal record--which was not admissible under *MRE 609*. This inquiry would have resulted in a "trial within a trial" to determine whether Archer committed perjury. The court could have reasonably concluded that Archer did not willfully intended to commit perjury given that he explained that he was under the impression that he did not have to disclose a criminal conviction over ten years old. Archer's misunderstanding was reasonable given that, under *MRE 609*, evidence of his prior convictions there were more than ten years old were in fact inadmissible. See *MRE 609(e)*.

In short, the trial court's exclusion of Archer's prior criminal convictions and prior statements from [*18] the second trial did not fall outside the range of reasonable and principled outcomes. *Starr, 457 Mich at 494*.

III. DENIAL OF MOTION TO SUPPRESS JOHNSON'S IDENTIFICATION

Defendant next argues that the trial court erred in denying his motion to suppress Johnson's identification testimony. Defendant argues that Johnson's in-court identification was tainted by an impermissibly suggestive pretrial identification procedure, which he contended below occurred when Sgt. Hanus supposedly showed defendant's photograph to Johnson before trial. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Harris, 261 Mich App 44, 51; 680 NW2d 17 (2004)*. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams, 244 Mich App 533, 542; 624 NW2d 575 (2001)*. "Most eyewitness identifications involve some element of suggestion." *Perry v New Hampshire, 565 U.S. 228; 132 S Ct 716, 727; 181 L Ed 2d 694 (2012)*. But "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its [*19] creditworthiness." *Id. at 728*. Therefore, the "*Due Process Clause* does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not

procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id. at 729*. Where a judicial inquiry is appropriate, the defendant bears the burden of showing that in light of the totality of the circumstances that the procedure used was so impermissibly suggestive that it led to a substantially likelihood of misidentification. *People v Kurylczyk, 443 Mich 289, 302; 505 NW2d 528 (1993)*; *People v Hornsby, 251 Mich App 462, 466; 650 NW2d 700 (2002)*.

Defendant has not identified any act by law enforcement officers that improperly suggested that defendant was the perpetrator. We are not left with a definite and firm conviction that the trial court erred in finding that there was no police misconduct related to Johnson's identification of defendant, and that defendant's arguments instead related to the reliability of Johnson's identification testimony. *Harris, 261 Mich App at 51*. Defendant conceded at the hearing on his motion to suppress that there was no police misconduct. Defendant's later claim of police misconduct was based on Johnson's trial testimony that Sgt. Hanus showed her defendant's photograph before the first trial, after defendant [*20] had been arrested, but that testimony was contrary to her prior testimony. Additionally, Sgt. Hanus consistently testified that Johnson was not shown defendant's photograph after defendant's arrest, which was consistent with Johnson's prior testimony. In fact, the sergeant explained that both he and the prosecutor were surprised when Johnson identified defendant in court at the first trial.

Defendant's arguments regarding Johnson's inconsistent testimony relate to the reliability of Johnson's identification testimony, which is a question for the jury. See *People v Johnson, 202 Mich App 281, 286; 508 NW2d 509 (1993)*. The jury was aware that Johnson had not identified defendant as the perpetrator from a photographic array, and that there were inconsistencies in her description of the perpetrator and her testimony. Defendant was not prevented from exploring these issues at trial, and defense counsel did so. It was up to the jury to determine whether Johnson's identification testimony was reliable and credible in light of the factors identified by defendant. See *People v Davis, 241 Mich App 697, 700; 617 NW2d 381 (2000)*. Because there is no record evidence of any pretrial identification procedure that was unduly suggestive, the trial court did not err in denying defendant's motion to suppress.

IV. *BRADY [*21]* VIOLATIONS

Next, defendant argues that he was denied his right to due process because the prosecutor failed to produce vital evidence, contrary to *Brady v Maryland, 373 U.S. 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)*. We review due process claims, such as those involving allegations of a *Brady* violation, de novo .*People v Schumacher, 276 Mich App 165, 176; 740 NW2d 534 (2007)*.

A criminal defendant has a due process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *Lester, 232 Mich App at 280*, citing *Brady, 373 U.S. 83; 83 S. Ct. 1194; 10 L. Ed. 2d 215*. "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Lester, 232 Mich App at 281* (citation omitted). To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the prosecution suppressed the favorable evidence; and (3) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Chenault, 495 Mich at 150*.

Defendant has not established that the prosecutor committed a *Brady* violation. Defendant appears to base his claims on past incidents during his earlier trials. Defendant does not identify [*22] any new information that was not provided to the defense before his third trial. With regard to defendant's first claim, the record discloses that the defense possessed all of the composite sketches that were created by the police artist. The sergeant in charge of the case turned them over to the prosecution as soon as he located them, which was well before the third trial. The prosecution presented as witnesses both the sergeant who drove Johnson to meet with the police graphic artist, as well as the police graphic artist himself, who testified about the development of the composite sketches. The record further supports that the composites were turned over to the defense. Defense counsel used them to question witnesses throughout the third trial. Thus, the record does not support defendant's claim that the prosecution

withheld the composites, any information surrounding their development, or any other information related to an identification procedure.

Defendant has not identified what evidence and information related to Archer's alleged "perjury about his criminal record" was withheld by the prosecution. The fact that Archer had prior convictions was disclosed during the second trial, [*23] and the matter was discussed and revisited before and throughout the third trial. During defendant's second trial, the prosecution was ordered to produce Archer's criminal history, and it did so. Defendant has not indicated what additional information about Archer's prior convictions was not produced. Likewise, defendant has not indicated what "evidence and information involving the [alleged] perjury behind the alleged eyewitness stories of the incident" was withheld. Defendant has not offered any proof beyond his mere supposition that any such evidence exists, let alone that the prosecution concealed any information. Defendant's speculative claims based on a *Brady* violation necessarily fail.

V. DEFENDANT'S STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant invites this Court to revisit its prior decision denying on the merits his four motions to remand.[3] The law of the case doctrine precludes this Court from revisiting these same issues. *People v White, 307 Mich. App. 425, 429, 862 N.W.2d 1 (2014)*; *People v Hayden, 132 Mich App 273, 297; 348 NW2d 672 (1984)*. If defendant disagreed with the prior decision, he should have filed an application for leave to appeal that decision [*24] to the Supreme Court. *People v Douglas, 122 Mich App 526, 529; 332 NW2d 521 (1983)*.

In a late-filed motion in this Court, defendant moved to add three additional issues to his Standard 4 brief and this Court granted the motion.[4] We address those issues below.

Defendant contends that his conviction violated the *Double Jeopardy Clause of the United States Constitution.* This argument lacks merit.

"The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt, 469 Mich 565, 574; 677 NW2d 1 (2004)*. Here, defendant was not acquitted for the charged offense, and double jeopardy "does not bar reprosecution after a defendant's original conviction has been reversed on appeal" unless the reversal is for insufficiency of the evidence. *Payne, 285 Mich App at 201*, citing *Green v United States, 355 U.S. 184, 189; 78 S Ct 221; 2 L Ed 2d 199; 77 Ohio Law Abs. 202 (1957)*. In this case, although defendant's conviction following the first trial was reversed on appeal, it was not reversed for insufficient evidence; therefore, the prosecution [*25] was free to reprosecute defendant for the same offense. *Payne, 285 Mich App at 201*.

Similarly, the hung jury in the second trial did not preclude defendant from being tried in the third trial. "If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *People v Mehall, 454 Mich 1, 4-5; 557 NW2d 110 (1997)*. "One circumstance that constitutes a manifest necessity is the jury's failure to reach a unanimous verdict. When this occurs, and the trial court declares a mistrial, a retrial is not precluded because the original jeopardy has not been terminated, i.e., there has not been an assessment of the sufficiency of the prosecution's proofs." *Id.* Here, the second trial ended in a mistrial after the jury deadlocked. Accordingly, retrial was not precluded. *Id.*

In his double jeopardy analysis, defendant repeatedly asserts that Johnson offered "perjured" testimony at his third trial by citing inconsistencies in her testimony. As discussed above, this argument is devoid of merit. An inconsistency in witness testimony does not automatically lead to the conclusion that the prosecution knowingly used perjured testimony. See *Lester, 232 Mich App at 278-279*. Defendant's argument [*26] does not involve an

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[3] *People v Akram*, unpublished order of the Court of Appeals, entered July 22, 2014 (Docket No. 315402).

[4] *People v Akram*, unpublished order of the Court of Appeals, entered March 6, 2015 (Docket No. 315402).

issue of perjury, but rather concerns witness credibility and as noted above, the jury was free to believe or disbelieve all or any portion of Johnson's trial testimony. *Wolfe, 440 Mich at 514*.

Next, defendant contends that he was denied his *Sixth Amendment* right of confrontation because the trial court excluded evidence that Archer mischaracterized his criminal record at the second trial. "The *Confrontation Clause* prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers, 277 Mich App 1, 11; 742 NW2d 610 (2007)*. Here, the trial court did not admit any out-of-court testimonial statements in violation of the *Confrontation Clause*. To the extent that defendant contends that he had a constitutional right to present Archer's prior testimony during cross-examination, we conclude this argument lacks merit. A defendant's right to present a defense is "not unlimited and subject to reasonable restrictions," and an "accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v King, 297 Mich App 465, 473; 824 NW2d 258 (2012)*. As discussed above, the trial court did not abuse its discretion in excluding evidence [*27] of Archer's prior testimony under the rules of evidence. Thus, defendant was not denied his right to present a defense.

Finally, defendant argues that he was denied his right to due process and a fair trial when the trial court refused to sequester a police officer who testified for the prosecution. Defendant's argument is incoherent. Specifically, the majority of defendant's argument appears to be based on the trial court's rulings during his first or second trials. Because these rulings are wholly unrelated to the third trial that gave rise to this appeal, defendant's arguments are devoid of legal merit. To the extent that defendant contends that the trial court refused to sequester a witness in the third trial, we conclude defendant fails to cite anywhere in the record where the court denied a motion to sequester a witness and otherwise fails to develop a coherent argument. Thus, defendant has abandoned this aspect of his appeal. See *People v Kelly, 231 Mich App 627; 588 NW2d 480 (1998)* ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.") Moreover, defendant cannot [*28] show that the failure to sequester the police officer resulted in prejudice; accordingly, defendant is not entitled to any relief on this issue.

Affirmed.

/s/ Jane E. Markey

/s/ Christopher M. Murray

/s/ Stephen L. Borrello

End of Document

APPENDIX (E)

The Order of the Michigan Supreme Court

Denying the State Leave to Appeal

Febrary 4, 2011

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DWB

Order

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

February 4, 2011

141882 & (119)(121)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/
Cross-Appellee,

v

SC: 141882
COA: 283161
Wayne CC: 07-012443-FC

ADRIAN MAHDEE AKRAM,
Defendant-Appellee/
Cross-Appellant.

/

On order of the Court, the motion for miscellaneous relief is GRANTED. The application for leave to appeal the August 31, 2010 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

HATHAWAY, J., I recuse myself from this matter pursuant to MCR 2.003(C)(1)(a). I have previously expressed statements on the record as a Circuit Court Judge that could demonstrate personal bias against defense trial counsel.

I, Corbin R. Davis, 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.

February 4, 2011

Corbin R. Davis
Clerk

p0201

APPENDIX (F)

The Unpublished Order and Opinion of the

Michigan Court of Appeals

Granting Relief (weth instructions)

Remanding for a New Trial

August 31, 2010

People v. Akram

Court of Appeals of Michigan

August 31, 2010, Decided

No. 283161

Reporter
2010 Mich. App. LEXIS 1634 *; 2010 WL 3418913

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ADRIAN MAHDEE AKRAM, 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, Leave to appeal denied by *People v. Akram, 488 Mich. 1037, 793 N.W.2d 240, 2011 Mich. LEXIS 412 (Feb. 4, 2011)*

Decision reached on appeal by *People v. Akram, 2015 Mich. App. LEXIS 822 (Mich. Ct. App., Apr. 21, 2015)*

Motion denied by *People v. Akram, 2019 Mich. LEXIS 194 (Mich., Feb. 4, 2019)*

Prior History: [*1] Wayne Circuit Court. LC No. 07-012443-FC.

Core Terms

trial court, funeral home, shooting, alibi witness, ineffective, retaliation, defense counsel, deliberations, credibility, identification, witnesses, shooter, instructions, photograph, viewing, killed, murder, opening statement, alibi defense, arrived, misconduct, walked, shot, reasonable probability, asserts, streets, counsel's performance, counsel's failure, bad faith, new trial

Judges: Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ. SAAD, P.J. (concurring in part and dissenting in part).

Opinion

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, *MCL 750.316(1)(a)*, felon in possession of a firearm, *MCL 750.224f*, and possession of a firearm during the commission of a felony, *MCL 750.227b*. Defendant appeals as of right. Even though we find defendant's other issues without merit, because we conclude that defendant was prejudiced by trial counsel's failure to investigate or present an alibi defense, we reverse and remand for a new trial.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

This Court granted defendant's motion to remand for a *Ginther* [1] hearing on defendant's claim that defense counsel rendered ineffective assistance when he failed to investigate and pursue an alibi defense. [2] The trial court ruled that defense counsel's performance was deficient because, despite defendant's urging that he pursue the defense, counsel did not contact or interview any of the witnesses defendant had offered to establish his alibi. The trial court ultimately held, however, that defendant failed to show that he suffered [*2] prejudice as a result of counsel's performance. Defendant argues that the trial court's decision requires reversal and that he is entitled to a new trial. We agree.

To establish a claim for ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. *People v Payne, 285 Mich App 181, 188-189; 774 NW2d 714 (2009)*; *People v Matuszak, 263 Mich App 42, 57-58; 687 NW2d 342 (2004)*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin, 463 Mich 590, 600; 623 NW2d 884 (2001)* (quotation omitted). "[T]he test for prejudice is an objective test," and a trial court's determination of prejudice is reviewed de novo. *People v Dendel, 481 Mich 114, 132 n 18; 748 NW2d 859 (2008)*. A trial court's credibility determinations following a *Ginther* hearing are reviewed for clear [*3] error. *Id. at 130*; see also *MCR 2.613(C)*.

A defendant is entitled to have trial counsel investigate, prepare, and present all substantial defenses. *People v Chapo, 283 Mich App 360, 371; 770 NW2d 68 (2009)*; see also *People v Grant, 470 Mich 477, 486-487; 684 NW2d 686 (2004)* (counsel is required to make an independent examination of the facts and pursue all relevant leads). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly, 186 Mich App 524, 526; 465 NW2d 569 (1990)*. "[A] substantial alibi defense would be one in which defendant's proposed alibi witnesses verified his version." *Id. at 527*. In this case, despite defendant's good faith effort to bring the alibi defense to defense counsel's attention, counsel did not contact the alibi witnesses or conduct any investigation into their potential testimony. Thus, we agree with the trial court that counsel's performance fell below an objective standard of reasonableness. *Payne, 285 Mich App at 188*. Indeed, plaintiff states that it "readily agree[s]" that defense counsel's performance was deficient. The only disputed issue concerning defendant's claim of ineffective assistance of counsel [*4] is whether counsel's deficient performance prejudiced defendant. We conclude that defendant was prejudiced.

The evidence at trial established that the victim was shot at approximately 5:30 p.m. on May 6, 2007, near 3200 Collingwood Street in Detroit. Evidence presented at the *Ginther* hearing showed that on the same day there was a viewing for defendant's brother, Avery Akram, from 3:00 to 7:00 p.m. at the Swanson Funeral Home, located at 14751 W. McNichols Road. According to Google Maps, the funeral home is 5.8 miles from 3200 Collingwood, and from the funeral home it would take someone approximately 13 minutes to drive to 3200 Collingwood. Defendant presented five alibi witnesses at the *Ginther* hearing: his brother and sister-in-law, Andre and Raquel Akram; two friends of Avery, Antone Webb and James Hunter; and Avery's fiance, Kamilah Helton. All five witnesses testified that they saw defendant at the viewing.

The trial court found that because the time travel between the funeral home and 3200 Collingwood was short and because the killing did not take long to commit, "[i]t would not even have been difficult, let alone impossible," for defendant to slip away from and return to the viewing [*5] unnoticed. Moreover, the trial court did not find that "the testimony of the alibi witnesses, that five of the six [sic] saw [defendant] at the viewing the entire time, from 3:00 p.m. to 7:00 p.m., to be convincing or credible." It further stated, "The declaration of the witnesses that they had [defendant] under their constant eye, in different places at the funeral home and saw [defendant] in different places ('hallway,' 'foyer,' 'porch,' 'parking lot') was not credible. The testimony was at best general, vague, nebulous and conclusory." It did, however, find Andre Akram, who indicated that defendant was present at the viewing but did not

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[1] *People v Ginther, 390 Mich 436; 212 NW2d 922 (1973)*.

[2] *People v Akram*, unpublished order of the Court of Appeals, entered January 6, 2009 (Docket No. 283161).

know defendant's whereabouts the whole time, to be credible. It ultimately concluded that nothing in the testimony of the alibi witnesses "was so substantial that it would have changed the outcome of the trial."

We find no clear error with the trial court's credibility findings regarding the alibi witnesses. We also find no clear error with the court's finding that defendant could have slipped away from the viewing, driven to Collingwood Street, shot the victim, and returned to the funeral home unnoticed. However, on de novo review, *Dendel, 481 Mich at 132 n 18*, [*6] and in light of all the circumstances, we conclude that defendant established the requisite showing of prejudice and is therefore entitled to a new trial.

Initially, we note that the viewing of Avery Akram, where the alibi witnesses placed defendant, was an event that would be reasonable and logical for defendant to attend, as Avery was defendant's brother. Indeed, the trial court found Andre Akram, also a brother of defendant, to be credible, and Andre's testimony placed defendant at the funeral home 20 to 50 minutes before the shooting. Specifically, the shooting occurred around 5:30 p.m., and Andre testified that he arrived at the funeral home at 3:10 p.m. and that defendant arrived approximately an hour and a half to two hours later. Andre also testified that he may have seen defendant two or three times at the viewing. Based on Andre's testimony, the testimony of the other alibi witnesses, although it may have been "general, vague, nebulous and conclusory," as found by the trial court, cannot be said to be void of all probative value, as each, similar to Andre, testified that he or she saw defendant at the viewing. In addition, even though, as found by the trial court, it may have [*7] been possible for defendant to have left and returned to the funeral home unnoticed, the trial court's finding presupposes that upon leaving the funeral home, defendant knew of the victim's whereabouts and could, therefore, quickly and efficiently proceed to that location, shoot the victim, and return to the funeral home. However, when the victim was killed, he was walking with Damia Johnson, after having stopped at a Coney Island restaurant. Nothing in the record suggests that defendant would have known of the victim's whereabouts on the late afternoon of May 6, 2007.

Further, we note that after the first day of deliberations, the jury announced that it was deadlocked. The next day, after a juror failed to appear and was replaced by an alternate juror, the jury, instructed to begin its deliberations anew, announced that it was deadlocked after a few hours of deliberations. These deadlocks call into question the strength of the prosecution's case. At trial, there was never any question that the shooting of the victim was deliberate and premeditated. The only question for the jury was the identity of the shooter. The prosecution claimed that defendant walked up to the victim and Johnson, [*8] pulled out a gun that was tucked into his pants, and shot the victim. In support of its claim that defendant was the perpetrator of the killing, the prosecution presented two witnesses, Johnson and Lawrence Archer, who identified defendant as the shooter. However, Johnson's identification was extensively impeached. She had never previously identified defendant as the perpetrator. In fact, a week and a half after the victim was killed, Johnson failed to identify defendant as the shooter in a photo array. Johnson also admitted that she did not realize that defendant was the person who shot the victim until a week before trial, while at the same time admitting that the sister of the victim was her supervisor at work, the sister had told her about a reward for information leading to the person who shot the victim, and the sister drove her to the police department to inform the police that she wanted to testify at trial. Archer's identification of defendant as the shooter, while stronger than Johnson's, was also subject to attack. Archer did not speak to the police and identify defendant as the perpetrator until almost two months after the killing. In addition, the prosecution's failure [*9] to offer evidence of a motive for the killing undermines the strength of the identifications of defendant as the shooter. [3]

In light of the strengths and weaknesses of the competing identification testimony and the alibi evidence, we conclude that defense counsel's failure to investigate or present defendant's alibi defense undermines confidence in the outcome of defendant's trial. *Carbin, 463 Mich at 600*. We believe that had the jury heard the testimony of defendant's alibi witnesses, along with learning of the distance between the funeral home and the location of the shooting, there is a reasonable probability that the result of defendant's trial would have been different. *Matuszak, 263 Mich App at 57-58*. We therefore reverse defendant's convictions. Defendant is entitled to a new trial,

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[3] The testimony of Officer Edward Williams, which the prosecutor sought to use to establish that defendant shot the victim in retaliation for the murder of Avery Akram, was struck by the trial court.

unimpeded by trial counsel's failure to present an alibi defense, where all the evidence is heard and weighed by the trier of fact.

II. DEFENDANT'S REMAINING ISSUES

A. PROSECUTORIAL MISCONDUCT

Defendant contends [*10] that the prosecutor committed misconduct when, during his opening statement, he referred to evidence that the victim was killed in retaliation for the murder of Avery Akram.

Although defense counsel objected to the retaliation evidence on hearsay grounds, he did not assert that the prosecutor's reference constituted misconduct. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer (After Remand), 256 Mich App 33, 34-35; 662 NW2d 117 (2003)*. Review of a claim of prosecutorial misconduct is "precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon, 256 Mich App 312, 329-330; 662 NW2d 501 (2003)*. An unpreserved claim of prosecutorial misconduct is reviewed for plain, outcome-determinative error. *Id.*

"'It is a rule that where in an opening statement the prosecutor makes statements which [] [are] not [] substantiated at trial by the evidence, we will not reverse for that fact alone in the absence of a showing of bad faith on the part of the prosecutor *or prejudice to [*11] the defendant*.'" *People v Wolverton, 227 Mich App 72, 77; 574 NW2d 703 (1997)*, quoting *People v Davis, 343 Mich 348, 357; 72 NW2d 269 (1955)* (emphasis in *Wolverton*).

We hold that defendant has failed to establish bad faith with respect to the prosecutor's opening statement. *Wolverton, 227 Mich App at 77*. Though the prosecutor asserted that the evidence would show that Officer Edward Williams obtained the retaliation information from Manar Akram, defendant's mother, the prosecutor did not specifically inform the jury that Manar told police that the victim was at the scene of her son Avery's murder. The prosecutor also never told the jury that defendant was aware of this information. Rather, the prosecutor's comments were vague and merely indicated that Manar gave the police information about "people who were at the scene[.]" This statement was ultimately supported by Williams's testimony, although that testimony was later stricken. Defendant asserts that because the prosecutor later asked Williams on direct examination the question, "Was there a time when you received more information . . ." in the passive voice, the information regarding the victim must have come from someone other [*12] than Manar, and thus, the prosecutor was acting in bad faith during his opening statement. We decline to indulge defendant's speculation that the prosecutor engaged in such manipulation. The record reflects that the prosecutor believed the evidence of a retaliation theory was admissible and that there was a sufficient "link" between the information and defendant's motive because of the family relationship between defendant and Manar and the information he gathered from Williams. The prosecutor listed Williams and Manar on the witness list. Manar was subpoenaed and appeared on the first day of trial, but she failed to appear on the second day of trial. Further, although the trial court ultimately disagreed with the prosecutor regarding the admissibility of Williams's testimony and the retaliation motive evidence, and decided to strike Williams's testimony, we decline to find bad faith on that basis. See *People v Taylor, 275 Mich App 177, 179, 185; 737 NW2d 790 (2007)* (finding no misconduct where the prosecutor made an assertion in opening statement and the trial court later ruled that the evidence relating to the assertion was inadmissible because the prosecutor did not establish that [*13] the evidence related to the defendant).

Defendant also asserts that if there was no "bad faith" on the part of the prosecutor, he nevertheless suffered prejudice such that reversal is required. *Wolverton, 227 Mich App at 77*. However, we find no prejudice requiring reversal under the circumstances. Defendant failed to object to the prosecutor's statement or Williams's testimony on prosecutorial misconduct grounds and he did not request a curative instruction regarding the prosecutor's statement. *Callon, 256 Mich App at 329-330*. Further, the trial court twice instructed the jury, once after Williams's testimony, and again during the final instructions, that Williams's stricken testimony was not to be considered at all. Defense counsel approved of the first instruction and requested a second instruction at the end of the trial. The trial court also instructed the jury that the lawyers' statements were not evidence. Because the trial court issued curative instructions, any prejudicial effect was alleviated. *Id.* "[T]he jury must be presumed to have based their verdict upon the evidence, and not upon the statement of counsel." *People v Fowler, 104 Mich 449, 452; 62 NW 572 (1895)*;

Wolverton, 227 Mich App at 76. [*14] The prosecutor did not mention the retaliation motive during his closing argument, and we note that defense counsel actually used the prosecutor's opening statement strategically. He argued that "the whole theory was because his brother got killed [sic] then obviously this was some kind of--that was his opening argument, some kind of retaliation or whatever. Whatever. People dying [sic] in Detroit everyday. And just because one die don't [sic] mean that the other one got nothing [sic] to do with it. But when you get the streets talking, or the streets to make it out--because the streets ain't [sic] reliable-- that's all hearsay." Defense counsel asserted that the only evidence against defendant was unreliable "street talk and police hunches." In ruling, we note that defense counsel also explored the retaliation issue during his case in chief in examining Sergeant Kevin Hanus regarding why he included a photograph of a family member of defendant's in the photographs shown to witnesses, and Hanus responded, "Because I thought that the Akram family had something to do with [the victim's] murder." On the record, defendant has failed to establish plain, outcome-determinative error. *Callon, 256 Mich App at 329-330*.

B. [*15] STANDARD 4 BRIEF

Defendant first asserts that the prosecutor violated his confrontation rights when Williams and Hanus testified about statements made to them by other people. *Crawford v Washington, 541 U.S. 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004)*. Because defendant did not make a Confrontation Clause objection at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Bauder, 269 Mich App 174, 180; 712 NW2d 506 (2005)*, citing *People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999)*.

With respect to Williams, the trial court ultimately struck Williams's testimony in its entirety and gave limiting instructions that the jury should disregard it. The prosecutor did not reiterate the retaliation theory or evidence in closing. The jury is "presumed to follow [its] instructions, and instructions are presumed to cure most errors." *People v Abraham, 256 Mich App 265, 279; 662 NW2d 836 (2003)*. We therefore decline to find that plain, outcome-determinative error occurred. *Carines, 460 Mich at 763-764*. In ruling, we note that Williams's testimony about information that others provided him was not offered for its truth, but to establish a retaliation [*16] motive. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford, 541 U.S. at 59 n 9*. Further, the prosecutor's opening statement did not violate defendant's confrontation rights. The prosecutor was not testifying as a witness at trial; he was giving his opening statement. Moreover, the jury was specifically instructed that the lawyers' statements were not evidence. [4]

With respect to Hanus's testimony, we similarly hold that defendant's confrontation rights were not violated. Defense counsel called Hanus as a witness and elicited [*17] the challenged testimony that Hanus believed that the "Akram family is retaliating for the murder of [defendant's] brother." Error requiring reversal cannot be predicated on error to which an appellant contributed either by plan or negligence. *People v Gonzalez, 256 Mich App 212, 224; 663 NW2d 499 (2003)*. The record reflects that defense counsel purposely elicited this information in order to show that the police investigation and evidence against defendant consisted of little more than "a hunch."

Defendant next argues that the prosecutor presented false testimony to the jury with respect to Williams, in violation of *Giglio v United States, 405 U.S. 150; 92 S Ct 763; 31 L Ed 2d 104 (1972)*. Because he failed to preserve this alleged constitutional error, it is reviewed for plain error. *Carines, 460 Mich at 763-764*.

If the prosecution obtains a conviction by knowingly using perjured testimony, the conviction must be set aside where there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v Aceval, 282 Mich App 379, 389; 764 NW2d 285 (2009)* (quotation omitted). However, we hold that the

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[4] Defendant also argues that counsel was ineffective for failing to object on Confrontation Clause grounds. Defendant did not include this issue in his statement of the question presented and it is therefore not properly before this Court. *MCR 7.212(C)(5)*; *People v Brown, 239 Mich App 735, 748; 610 NW2d 234 (2000)*. Moreover, because we find that there was no error, defense counsel did not render ineffective assistance when he approved the trial court's instructions with respect to the stricken testimony. *People v Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000)*.

prosecutor did not present false testimony [*18] to the jury. [5] Williams did not specifically testify that Manar gave him information regarding defendant or that defendant knew that the victim was present when Avery was killed. The prosecution acknowledges on appeal that the prosecutor represented to the trial court that Manar Akram gave the police the information that the victim was present during Avery's murder. However, the prosecutor's statements to the trial court occurred outside the presence of the jury. Defendant also emphasizes that the prosecutor presented false testimony that the victim was present during Avery's murder because the victim had actually run away before the murder. However, Williams clearly testified that the victim "was in the van at the time of the homicide prior to the shooting. He jumped out and fled the area."

Defendant [*19] also claims that the prosecutor lied when he stated that he intended to present Manar as a witness. However, the record reflects that the prosecutor listed Manar as a witness, subpoenaed her, and she appeared on the first day of trial. Notably, Manar failed to appear in court on the second day of trial and she was never presented by defendant as a witness at the *Ginther* hearing.

Even if defendant could somehow establish that false information was presented to the jury, defendant cannot show that there was any reasonable likelihood that it affected the jury's judgment. *Aceval, 282 Mich App at 389*. The trial court struck Williams's testimony and issued limiting instructions. [6]

Defendant also argues that he was denied effective assistance of counsel at numerous times throughout his trial. The remand for a *Ginther* hearing was limited to the issue of the alibi witnesses. *People v Akram*, unpublished order of the Court of Appeals, entered February 25, 2009 (Docket No. 283161). Review of his claim is limited to any errors that are apparent on the available record. *Matuszak, 263 Mich App at 48*.

Defendant contends that counsel was ineffective for failing to present an expert witness on eyewitness identification. Defendant offers no proof that an expert witness would have testified favorably for him, and has therefore failed to establish the factual predicate for his claim. *People v Hoag, 460 Mich 1, 6; 594 NW2d 57 (1999)*. Further, whether to present expert testimony regarding eyewitness identification is a matter of trial strategy and this Court defers to trial counsel's strategic decisions. *People v Cooper, 236 Mich App 643, 658; 601 NW2d 409 (1999)*. Counsel "may reasonably have been concerned that the jury would [*21] react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *Id.* As in *Cooper*, instead of presenting an expert on eyewitness identification, defendant's lawyer made significant efforts to point out reasons to doubt Archer's and Johnson's identifications of defendant. *Id.* Further, because defendant presented the defense of misidentification, defendant was not deprived of a substantial defense. *People v Rockey, 237 Mich App 74, 76; 601 NW2d 887 (1999)* (failure to call a witness or present evidence constitutes ineffective assistance when it deprives the defendant of a substantial defense, i.e., one that might have affected the outcome of the trial).

Defendant claims that defense counsel was ineffective for failing to move for a *Wade* [7] hearing regarding the photographic identification procedures used by the police. However, defendant fails to argue that the photographic

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[5] Defendant briefly argues that the retaliation information was more prejudicial than probative and was hearsay. Defendant has abandoned these claims on appeal because he fails to further discuss them, other than to cite a string of evidentiary rules. A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Kelly, 231 Mich App 627, 640-641; 588 NW2d 480 (1998)*.

[6] Defendant also asserts that Williams subsequently murdered his wife, citing to information outside the lower court record. This has no relevance to whether Williams presented false testimony at defendant's trial. In addition, because a party cannot expand the record on appeal, this information may not be considered. *People v Powell, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999)*. Defendant further notes that he reported "the detectives" to the Attorney General's Office. Even if true, this claim, which is not supported [*20] by evidence in the lower court record, does not establish that the prosecutor knowingly presented perjured testimony that was material to defendant's guilt.

[7] *United States v Wade, 388 U.S. 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)*.

lineup procedures were suggestive. *People v Gray, 457 Mich 107, 111; 577 NW2d 92 (1998)*. He merely notes that there were "different descriptions, stories, what was said, how the process went, etc. . ." Defendant has presented [*22] no basis upon which to find that a *Wade* hearing was warranted or would have resulted in a finding that the lineup procedures were constitutionally suggestive. Again, he has failed to establish the factual predicate for his claim. *Hoag, 460 Mich at 6*. Because there is no indication that a *Wade* hearing would have been successful, counsel cannot be deemed ineffective for failing to make a meritless motion. *People v Snider, 239 Mich App 393, 425; 608 NW2d 502 (2000)*.

Defendant asserts that counsel should have requested a mistrial regarding the retaliation evidence. Defendant cites no authority to support that a mistrial was warranted, and he has therefore abandoned this claim. *People v Kelly, 231 Mich App 627, 640-641; 588 NW2d 480 (1998)*. Moreover, a mistrial is appropriate only where there was an irregularity that prejudiced defendant's rights and impaired his right to a fair trial. *People v Haywood, 209 Mich App 217, 228; 530 NW2d 497 (1995)*. We have fully discussed the effect of Williams's testimony and the prosecutor's statements. See section II.A, *supra*. There was no prejudicial error where Williams's testimony [*23] was stricken, the trial court issued curative instructions, and defense counsel used the retaliation theme strategically to defendant's advantage. Thus, even if defendant had not abandoned this claim, it would be meritless, and counsel is not ineffective for failing to advocate a meritless position. *Snider, 239 Mich App at 425*.

Defendant maintains that counsel was ineffective because he "backed down" and expressed satisfaction regarding the trial court's erroneous reasonable doubt instruction. Defendant cites no legal authority to support his claim that the trial court's instruction was erroneous, and he has therefore abandoned this claim. *Kelly, 231 Mich App at 640-641*. Nonetheless, we note that the jury requested a reasonable doubt instruction during deliberations, and defendant now challenges the trial court's responsive statement that the prosecutor was not required to remove every doubt in a case. However, the trial court also instructed the jury that the prosecutor must prove defendant's guilt beyond a reasonable doubt. The instructions were sufficient to inform the jury that the prosecutor bore the burden of proof and what constituted a reasonable doubt. *People v Hubbard (After Remand), 217 Mich App 459, 487; 552 NW2d 493 (1996)*. [*24] Counsel was not ineffective for failing to object to the trial court's correct instructions. *Snider, 239 Mich App at 425*.

Defendant asserts that counsel was ineffective because, according to defendant, the trial court essentially coerced the jury's verdict and counsel "backed down" when the trial court refused to declare a hung jury. We find nothing in the record to support defendant's claim that the trial court coerced the jury verdict. *People v Vettese, 195 Mich App 235, 244; 489 NW2d 514 (1992)*. The jury deadlocked on the first day of deliberations, but a replacement juror was seated on the second day and the jury began deliberations anew. The jury deadlocked that afternoon, but then resumed deliberations. The trial court denied defense counsel's request to declare a hung jury, noting that it would be inappropriate because the new jury had not yet deliberated for a full day nor indicated any problems during deliberations that morning. The jury then agreed on a verdict. There is no indication that the trial court's actions were threatening or coercive. *People v Hardin, 421 Mich 296, 312, 315; 365 NW2d 101 (1984)*. Further, there was nothing coercive or threatening in the trial court's [*25] statements during jury selection regarding how many days it expected the trial would last and that the length of the jury deliberations would depend on the jury. *Id.* And, because there was no error in continuing to allow the jury to deliberate, counsel cannot be deemed ineffective for failing to pursue a meritless argument. *Snider, 239 Mich App at 425*.

Lastly, defendant claims that the cumulative errors of counsel deprived him of a fair trial. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Unger, 278 Mich App 210, 258; 749 NW2d 272 (2008)* (quotation and alteration omitted). However, other than counsel's failure to investigate and present an alibi defense, defendant has failed to establish that any errors occurred. [8]

Reversed and remanded for a new trial. We do not retain jurisdiction.

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[8] Defendant also asserts that counsel should have requested a hearing on "disclosure." He cites no law for this assertion and fails to further elaborate. This issue has therefore been abandoned. *Kelly, 231 Mich App at 640-641*.

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto

Concur by: Henry William Saad (In Part)

Dissent by: Henry William Saad (In Part)

Dissent

SAAD, P.J. (*concurring [*26] in part and dissenting in part).*

Though I concur with the analysis in part II of the majority opinion on defendant's remaining issues, I respectfully dissent from the majority's holding that defendant established that he was prejudiced by his counsel's failure to present his alibi defense. Because I would hold that defendant failed to establish prejudice, I would affirm his convictions.

In *People v Dendel, 481 Mich 114, 130; 748 NW2d 859 (2008)*, amended *481 Mich 1201 (2008)*, our Supreme Court reiterated that, to establish prejudice, "a defendant 'must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" *Id. at 125 n 9*, quoting *People v Carbin, 463 Mich 590, 600; 623 NW2d 884 (2001)*. Prejudice is not presumed if counsel's conduct prevented the presentation of a defense. Rather, the defendant must show a reasonable probability that he would have been acquitted if defense counsel had presented the disputed evidence. *Id.*

The trial court did not clearly err when it found defendant's alibi witnesses incredible. Evidence at trial showed that the shooting occurred at around 5:30 p.m. Raquel Akram, defendant's sister-in-law, [*27] testified at the *Ginther* hearing that she saw defendant in the hallway outside of a visitation room at a funeral home when she walked past him to get to James Hunter, a family friend, who was on the porch of the funeral home. She indicated this took place at 5:30, and that she then walked Hunter from the porch to the visitation room and back again. She did not indicate whether she saw defendant on these other trips. She testified that she saw defendant again at about 6:00 p.m. when she walked outside to the parking lot. Hunter's testimony contradicted Raquel's testimony with respect to time. Hunter testified that he arrived at the funeral home at about 4:15 or 4:20 p.m., saw defendant in the lobby, and Hunter remained "in the lobby for a minute. Then Raquel had escorted me to the body." Further, none of the other alibi witnesses who testified at the *Ginther* hearing specifically placed defendant at the funeral home at around the time of the shooting. Rather, they indicated that they saw defendant at the funeral home upon their arrival, and saw him in various locations of the funeral home throughout the visitation. The witnesses' testimony also varied regarding what time defendant first [*28] arrived at the funeral home. Andre Akram, defendant's brother, indicated that defendant arrived at 4:30 or 4:40 p.m., or as late as 5:10 p.m., but Kamilah Helton, Antone Webb, and Hunter testified that they saw defendant when they arrived at the funeral home around 4:00 or 4:15 p.m. Although Hunter and Webb testified that they spent time outside in the parking lot and observed defendant in the lobby inside the funeral home throughout the visitation, Raquel testified that defendant was outside "[i]n front of the funeral home" when she went to the parking lot at about 6:00 p.m. Further, Helton's testimony conflicted with Raquel's testimony regarding when Raquel arrived. Moreover, Helton's testimony differed from Andre's testimony because Helton stated that Raquel walked her up to view the casket, while Andre testified that he brought Helton up to view the casket. The trial court found the alibi witnesses' testimony incredible and "general, vague, nebulous and conclusory." In addition to their contradictory testimony, all of the *Ginther* witnesses were either relatives or friends of defendant, which is a factor that weighs on their credibility. Giving deference to the trial court's superior [*29] position to assess the demeanor of the alibi witnesses and determine their credibility, the trial court's finding with regard to their credibility was not clearly erroneous. *Dendel, 481 Mich at 130*.

In addition to the lack of credibility of the witnesses, and notwithstanding defendant's complaint that the prosecution's case rested on weak evidence, ample evidence supported defendant's convictions. As an initial

matter, by its verdict, the jury found the evidence sufficient and the witnesses sufficiently credible. "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *People v Davis, 241 Mich App 697, 700; 617 NW2d 381 (2000)*. Further, we defer to the jury's assessment of eyewitnesses' credibility. *People v Avant, 235 Mich App 499, 506; 597 NW2d 864 (1999)*. Lawrence Archer promptly identified defendant in the photographs the police showed him after the shooting and was "[a] hundred percent positive" that defendant was the shooter. Archer had interacted with defendant three or four times before the shooting when he bought DVDs from defendant, and he saw defendant fire three shots at the victim. The other eyewitness who testified at trial, Damia [*30] Johnson, was walking next to the victim when she saw defendant approach with a gun and shoot the victim three times. Though she could not identify defendant in the police's photographs that were shown to her after the incident, Johnson explained that defendant looked different in the photograph and she nonetheless recognized defendant at trial. Detroit Police Sergeant Kevin Hanus agreed that defendant looked different in the photograph than he did in person.

Evidence also showed that the distance from the funeral home to the site of the shooting is 5.8 miles, and half of the route is on the freeway. Archer, who witnessed the murder, testified that defendant fled the scene of the shooting in a vehicle that was waiting nearby. Thus, it is possible that, even if defendant was seen at the funeral home, he could have left for a short time to shoot the victim, and then returned.

Defendant takes issue with some of the evidence the trial court cited in support of its finding that defendant failed to show prejudice. Contrary to defendant's assertions, Johnson and Archer's testimony was consistent with the medical examiner's testimony. Johnson and Archer testified that there were a total of three [*31] gunshots and that, when defendant began shooting, the victim fell and tried to raise his hands in a defensive gesture. The medical examiner testified that the victim sustained six gunshot *wounds*, but opined that the wounds could have been made by as few as three gunshots if the victim had held his hands up in a defensive manner. The victim also suffered an abrasion on his right elbow, which indicated a "terminal fall" to the ground. This was consistent with Johnson and Archer's testimony.

Further, though Johnson denied that she stated at the scene that she knew who shot the victim, Leartis Tyner stated that Johnson told him after the incident that she knew the identity of the shooter and Detroit Police Officer Gordon Hampton confirmed that Tyner's police statement reflected this. Evidence also supported the trial court's observation that Johnson was scared to reveal the identity of the shooter. Johnson testified that she wanted to assist the police, but she and her family were scared because she had heard "stories about witnesses" and what can happen when they testify.

Defendant also contends that the trial court erred when it found that Johnson saw the shooter's face. While Johnson [*32] stated that she was looking at the victim during the shooting and was in shock, she also testified that she saw defendant as he approached the victim; she identified defendant as the person with the gun; and, she testified that defendant looked different in the police photograph than he looked at trial or on the day of the shooting. She also realized that defendant was the shooter a week before trial, when she went over the incident in her mind and "had a vision of his face."

Based on the evidence, defendant has not shown a reasonable probability that the outcome of his trial would have been different if defense counsel had presented his alibi witnesses. Accordingly, I would hold that he is not entitled to relief on the ground that his trial counsel was ineffective and I would affirm his convictions.

/s/ Henry William Saad

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APPENDIX (G)

The Unpublished Wayne County Circuit Court of Michigan's

Order and Opinion Denying

Petitioner's Motion for a New Trial

July 2, 2009

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No: 07-012443-01
Hon. Brian R. Sullivan

-vs-

ADRIAN MAHDEE AKRAM,

Defendant.

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ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

At a session of said Court, held in the Frank Murphy Hall of Justice, City of Detroit, County of Wayne, State of Michigan, on JUL 2 - 2009

PRESENT: HONORABLE BRIAN R. SULLIVAN

Defendant Adrian Akram (Akram) was charged and convicted by a jury of first degree murder (750.316); felon in possession of a firearm (750.224f) and felony firearm (750.227b).

The trial concerned the murder of Orlando Miller (Miller) about 5:30 p.m. on May 6,

2007. Akram contends on May 6, 2007 he was at the Swanson Funeral Home, 5.8 miles away from the location of the murder with witnesses, from 3:00 p.m. to 7:00 p.m., and did not commit the murder. (Defendant's motion, paragraph nine). This information was conveyed to Akram's attorney, Marlon Evans ("Evans"), but he did not interview the witnesses nor present them at trial. Those witnesses would have said "they saw Adrian Akram there (at Swanson Funeral Home), and that he was there the whole time, including at 5:30 p.m." (Defendant's motion, paragraph ten). Akram claims:

> i) his retained trial attorney, Marlon Evans, knew of the alibi witnesses but unreasonably failed to investigate and present them at trial, which deprived him of a substantial defense, and was "outcome determinative." (Defendant's motion, paragraph seven);
>
> ii) had he (Evans) "done the investigation needed to inform his strategy", he would have discovered that several credible witnesses saw Mr. Akram at the funeral home at the same time as the killing *making it impossible for him (Akram), motive or not, to have committed the murder.* (Defendant's motion, paragraph fifteen, emphasis supplied).

Akram appealed his conviction to the Court of Appeals and by order that court remanded the matter for the trial court for a *Ginther*[1] on the issue of effective assistance of counsel.

Akram presented six alibi witnesses at the *Ginther* hearing. After review of all the testimony, from the hearing and trial, this court concludes Evans should have interviewed the witnesses.

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

Miller's murder was witnessed by two persons who did not know each other. The observations and testimony of the two eyewitnesses was specific, accurate and correct as to the unique characteristics of the murder. It was compelling, credible and corroborated. Each eyewitness verified the particular circumstances of the murder. The testimony of each of those witnesses was independently corroborated by other independent witnesses. The alibi witnesses, on the other hand, were vague, general and conclusory. Their testimony was not credible or at all compelling. Akram has not demonstrated a reasonable probability the proceedings would have been different with the alibi testimony because of the unique manner of the murder, nor that the result of the proceeding was unfair nor unreliable.

I. TRIAL TESTIMONY

Akram's jury trial was held November 5 and November 6, 2007. The parties stipulated that:

> 1. April Miller identified the body of her son, Orlando on May 6, 2007. (Transcript of Trial, November 5, 2007,'T1',p137); and
>
> 2. Akram was not legally eligible to carry, use or possess a firearm in this state because he had a prior specified felony conviction which rendered him ineligible to do so and and his right to do so had not been restored. (T1,p138).

A. Dr. Loewe

Dr. Cheryl Loewe, the deputy medical examiner for Wayne County, examined the body of twenty three year old Miller. She determined the manner of Miller's death was

homicide and the cause was multiple (6) gunshot wounds to his body. Miller's six wounds could have been caused by three to six separate shots, as three of the wounds (to fingers and right cheek) may have been caused by a single bullet. (T1,p149). Three of those wounds displayed evidence of close range firing. (T1,p142,150). Miller was shot:

1. Once in the left upper chest, an inch above the left nipple (which displayed evidence of close range firing), (T1, p143);

2. Once in the right wrist (which displayed evidence of close range firing, with heavy soot around the wound); and two through and through shots to the fingers of Miller's left hand. (T1,p143-144); and

3. Twice in the head:

   a. One shot, an "execution type of shot" was to the side of the left eyebrow, (exhibited evidence of close range firing) (T1, p143);

   b. Once to the right cheek;

Loewe opined Miller may have raised his hands in front of his face in a defensive manner to protect himself from the gun. (T1,p145). The bullet wound to Miller's left hand was caused by a bullet entering the inner aspect of the middle finger. There were wounds to fingers four and three and a graze wound to the index finger. (T1, p144). The wound to the right cheek was superficial, caused by a loss of force from passing through an intermediary target (right wrist and fingers) which reduced the velocity of the bullet. (T1, p143,145). Loewe used a probe to determine the bullet path through the fingers to the right cheek. (T1, p148). Dr. Loewe was able to reconstruct forensically the configuration the eyewitnesses testified to: Miller placed his hands in front of his face in an instinctive defensive posture to protect himself from the gun as he lay on the ground.

Miller had abrasions and scrapes on his right elbow which were consistent with a terminal fall. (T1,p149-150).

B. Eyewitness Identification and Scene Witnesses

1. Damia Johnson

Damia Johnson, age twenty three, was with Miller on May 6, 2007 at about 5:30 p.m. when he was murdered in broad daylight. They were walking on Collingwood near Wildemere St. walking towards Linwood coming from the Coney Island.[2] (T1,p155,156).

A person came around the corner alone near Wildemere Street. Johnson identified that person as Akram. (T1,p157). Johnson was three feet away from Akram when she made this observation.

Akram had a gun, a black revolver, tucked in his pants. Akram pulled the revolver out of his waist and walked up directly to Orlando. (T1,p157,165). Orlando said, "What's up?" Akram responded, "You know what's up" and shot Miller in the left chest. (T1,p157). Johnson was less than two feet away from Akram when he shot Miller.

Miller fell to the ground after the first shot. Johnson testified, "And the guy that shot him walked over to him and shot him in the face while Orlando covered his face up." (T1,p160). Miller put his hands over his face to cover himself.

---

[2]They stopped at the liquor store at Collingwood and Dexter, and left to return to Miller's house. (T1,p156).

Miller was shot a total of three times. (T1,p157-160).

Akram walked off to Johnson's right and away from the scene.

Johnson called for help and the police arrived. A lady came down the street with a blanket and placed it over Miller. Johnson announced at the scene that she knew who the shooter was.

Johnson observed a photo show up a few days later but did not select anyone. (T1,p161). Akram's photo was included in the array shown to Ms. Johnson. (T1,p162). Johnson did not identify Akram from the photo array because Akram looked different in the photo than he did in person. (T1,p168-173). That is, there were differences between the photographs she observed in the show up after the shooting and how she observed Akram in court. Akram's photograph depicted Akram as younger, bigger and with more facial hair. (T1,p194).

Johnson was not a personal friend of Akram, but she did know who he was. (T1,p177,178). Johnson testified she saw the face of the shooter and that Akram was the shooter. She watched Akram shoot Miller several times. (T1,p196,197). Johnson admitted she was scared to say anything because she heard "stories about witnesses."

(T1,p198,225).[3]

Miller's sister was Johnson's supervisor, not her employer. Johnson left town and returned to testify "because he's (Akram) the one who did it." (T1,p213).

Johnson did not see a poster for a reward for information regarding Miller's murder. (T1,p187).

2. Lawrence Archer

Lawrence Archer, age fifty eight, was looking at a home to buy at Wildemere and Collingwood on May 6 about 5:30 p.m. (Transcript of Trial, 'T2',p10,12). There were other people outside on the street. Archer identified Akram as being one of them. (T2,p13).

Archer saw Akram come running out of the alley. As Akram got closer to the street (Collingwood) he started walking, real fast. (T2,p14). Akram was only about three or four feet from Archer and was walking towards Archer. (T2,p15,20).

Archer said he heard a girl say "he's got a gun." Archer looked and saw a gun in Akram's right hand, held to his side. Akram went right past Archer on the sidewalk. After Akram passed Archer, Archer saw Akram had a blue steel revolver in his hand. (T2,p16).

[3]Johnson testified Akram was wearing a gray t-shirt with blue jean shorts when he shot Miller. Johnson recognized Akram's face but didn't know if he wore something on his head during the murder. (T1,p184).

Archer moved away but there was no place to take cover. (T2,p31,34). Akram walked up to the young man and said something which Archer did not understand. Akram raised the gun and shot the young man in the chest. The young man fell to the ground.

As Miller lay on the ground he placed his hands in a defensive position in front of his face. Akram stood over Miller. Archer said: "The man (Miller) was executed. He (Akram) shot him twice." (T2,p17).

Archer heard a total of three shots. There was no obstruction of Archer's view of Akram as he walked to, and shot, Miller.

Akram went to Wildemere Street toward Calvert and got into the passenger seat of a waiting Crown Victoria or Mercury Marquis. (T2,p22). Another person drove the car which Akram entered from the scene. (T2,p59).

Archer was "absolutely sure" Akram was the shooter. (T2,p74).

Archer walked to his car to get away from the scene. (T2,p17). Archer realized he knew the shooter. Archer had seen Akram before, and as he drove from the scene he recollected how he knew Akram. (T2,p19). Archer had seen Akram three or four times before the murder and had seen Akram as recently as a week to ten days before the murder at Collingwood and Dexter, when Archer purchased DVDs from Akram.

(T1,p18,19).

Archer did not immediately call the police because he did not want to get involved. (T2,p19,73). Archer contacted the police about a month after the incident because he was bothered by what he witnessed. (T2,p23).

In his statement to police before trial Archer admitted he had seen Akram prior to the day of the murder. In that statement Archer also revealed he had seen Akram about a week to ten days before the incident, when Archer purchased DVDs from Akram. (T2,p46).[4]

Archer was shown a photo array, a collection of six photographs. Archer identified Akram almost immediately as the shooter. (T2,p25,256). Archer testified he was:

> Positive. One hundred percent positive that Akram shot the young man on Collingwood on May 6. (T2,p26).

Archer testified Akram's beard was thicker on the day of trial than it was on the day of the shooting. (T2,p21).

Archer acknowledged his presence was obvious to anyone out there, because he was not hidden or obscured. (T2,P56,57). The same was true of the young woman who was with Miller, who Archer did not know.

[4]Archer testified Akram wore a doo rag and had on blue jeans.

Archer had no knowledge about any reward posted for information on Miller's murder. (T2,p77,78).

3. Leardis Tyner

Leardis Tyner lived in the neighborhood of Collingwood and Wildemere for forty years. (T2,p207). Tyner heard three shots at the time of Miller's murder. (T2,p10,213).

Tyner went to the door and saw a young man lying on the sidewalk with two ladies beside him, one was screaming. Tyner went outside to the scene. The young lady who was with the deceased (Johnson) made a statement which Tyner heard, "the guy walked up to us and shot him." (T2,p211). Tyner also heard Johnson say, "I know that person." (T2,p212).

C. Police Witnesses

1. Officer Thomas

Police Officer Thomas collected names at the scene, including family names. (T2,p218).

2. Donald Rem

Donald Rem, an evidence tech for the Detroit Police Department, went to the scene of the murder at 3200 Collingwood about 7:00 p.m. (T2,p106,133). Rem canvassed the

area looking for bullets and casings, but found none. (T2,p108). He drew a sketch of the scene and took photographs. Rem opined there is no obstruction of view looking from Collingwood and Wildemere toward Calvert. (T2,p122).

3. Scott Shea

Detroit Police Officer Scott Shea went to 3200 Collingwood (near Wildemere) about 6:50 p.m. (T2,p131,132). Shea canvassed the area with other officers. He saw only a blanket and blood.

4. Gordon Hampton

Detroit Police Officer Gordon Hampton responded to the scene at Collingwood and Wildemere on May 6. (T2,p157,158). Hampton took a statement from Damia Johnson at the scene. She described the shooter as a black male, mid to late thirties, 5'6", one hundred seventy to one hundred eight pounds, dark complexion, wearing a grey t-shirt and shorts light in color. (T2,p159,167,168).

Officer Hampton initially testified Johnson said to someone she did not know who did it, but that information was contradicted later and determined to be inaccurate. (T2,p175,176).

5. Edward Williams

Akram's mother, Menar Akram, initially appeared in court in response to a subpoena

issued by the State. She was going to testify Akram believed Miller was in a van when Avery was murdered, which occurred about a week before Miller's murder. She conveyed this information to Officer Edward Williams. The State called Williams to present testimony of defendant's motive. However, it was stricken because the Prosecutor was ultimately unable to connect it to Akram. Defendant's mother left court, in defiance of the court subpoena without testifying, and never returned to court. Since she did not testify at trial, no link to Akram was made.

6. Kevin Hanus

Kevin Hanus, the officer in charge of the case, was called by the defense. (T2,p226). Johnson initially viewed a mug shot book, stacks of photos, on the chance she may be able to identify the shooter. (T2,p234,235,244,245).

Hanus received information and tips from a variety of sources, including people in the neighborhood, that Miller was killed for the retaliation of the murder of Akram's brother. (T2,p236,237). He assembled a photo array based on that information. That array included pictures of Miller's associates, Marcello Smith, Dion Thomas and others. Hanus showed those photographs to Johnson because he was unclear who Miller may have been associated with and what his connection to the Akrams was. (T2,p237-240). Johnson did not identify anyone in the photo array. Hanus opined that Akram looked different in the mug shot than he personally appeared in court. (T2,p255).

Hanus showed a photo array to Archer. Archer identified Akram as the shooter "almost immediately." (T2,p256).

Johnson described the shooter as mid-twenties to mid-thirties, 5'6", and stocky build.[5] Hanus did not recall if she mentioned facial hair. (T2,p247). Johnson did not tell Hanus or anyone the shooter was dressed in all white clothing. (T2,p248).

Hanus heard that posters advertising a reward for solving the murder were posted. Hanus did not receive any calls about it nor did he have any knowledge of the amount of any reward being offered. (T2,p254).

II. TESTIMONY OF GINTHER HEARING

Six witnesses, family and life long friends of Akram, were called at the *Ginther* hearing. Avery Akram (Avery) was killed a week before Miller. His viewing was held on Sunday, May 6, 2007 between 3:00 p.m. and 7:00 p.m. at Swanson Funeral Home (Swanson), located at 14751 West McNichols Road, Detroit, MI.[6]

Andre Akram (Andre) saw Akram in the parlor and outside in the hallway at the funeral home. Andre had some recollection of those who attended the viewing and knew

[5]The phrase "stocky build" was not Johnson's description but Hanus' conclusion of a person described as 5'6" at 180 lbs.
[6]A flyer announcing that viewing was introduced into evidence as Exhibit A.

Akram was there for sure. However, Andre did not know whether Akram was present the whole time of the viewing.

Akram's mother and father also attended the wake, but not the whole time. Andre did not know how long they were there. Neither parent testified at the hearing.

Khamilah Hilton, twenty four, was Avery's fiancé. She arrived at the viewing about 4:00 p.m. and saw Mrs. Avery, Akram and Racquel Akram. Akram was in the lobby and the back of the funeral home. Akram was present the whole time. There were about twenty five people there. Akram was present when she left about 6:30 or 6:45 p.m.

Racquel Akram, age thirty eight, arrived at the viewing about 4:45 p.m. Akram was in the hall near the visitation room at 5:30. She walked past him to get to the porch. Akram was in the parking lot about 6:00 p.m. and on the front porch when she left about 7:00 p.m.

Antone Webb, a long time family friend, arrived at the viewing around 4:15 p.m. Akram was there the whole time, in the lobby, and greeted persons who entered, including Webb.

James Hunter was Avery's best friend. He arrived at the viewing around 4:15 p.m. and saw Akram in the lobby. Akram was always in his sight at the funeral home.

Akram retained Marlon Evans to represent him at trial. Evans was aware of the theory that Akram was at the funeral home at the time of the shooting. Evans knew the prospective defense witnesses were members of Akram's family and friends of the family. Evans decided unilaterally that alibi was not be a viable defense and did not interview any of the witnesses. In hindsight, Evans conceded that he should have called the alibi witnesses at trial.

A Google map showing the area of the Swanson Funeral Home and 3200 Collingwood was introduced into evidence. The map shows routes between the two locations. One route starts on McNichols, about one mile from the Lodge Freeway, south on the Lodge about two miles (.2 of a mile on the exit and entrance ramps of the freeway), exit on Linwood (2.8 miles) to Collingwood Street to 3200 Collingwood. That entire distance is 5.8 miles, no more than thirteen minutes travel time, per Google, and maybe as little as seven minutes or less.[7]

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. Law

There is a strong presumption that counsel was effective at trial. *US v Cronic,* 466 US 648 (1984). The defendant bears a heavy burden to prove that counsel was not effective. See *People v LeBlanc,* 465 Mich 575; 640 NW2d 246 (2002). *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973); *Strickland v Washington,* 466 US 668 (1984). To

[7]Collingwood can be accessed by different routes, but this route was suggested as the most direct route.

establish ineffective assistance of trial counsel the defendant has the burden to show:

1. Counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and

2. There is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; or

3. The result of the proceedings was fundamentally unfair or unreliable.

See *People v Toma,* 462 Mich 281; 613 NW2d 694 (2000); *People v Rodgers,* 248 Mich App 702; 645 NW2d 294 (2001); *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994); *People v Mitchell,* 454 Mich 145; 560 NW2d 600 (1997); *People v Stanaway,* 446 Mich 643; 521 NW2d 557 (1994).

Judicial scrutiny of counsel's performance must be highly deferential. *Toma, supra; Pickens, supra.* The court is required to reconstruct the circumstances of the conduct being challenged by subsequent counsel and to evaluate counsel's conduct and performance at the time it was rendered. See *Strickland v Washington,* 445 US 689 (1984). This court is not permitted to substitute its judgment for that of counsel in matters of strategy. *People v King*, 107 Mich App 208; 413 Mich 939 (1981).

Trial counsel's performance must be measured against an objective standard of reasonableness. The court cannot use the benefit of hindsight to second guess trial strategy. See *People v Rockey,* 237 Mich App 74; 601 NW2d 887 (1999).

The determination of whether a defendant has been deprived of effective assistance

of counsel presents a mixed question of both constitutional law and facts. *People v Hoag,* 460 Mich 1; 594 NW2d 57 (1997); *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). The court must find the facts and then decide whether those facts constitute a violation of defendant's right to effective assistance of counsel. *LeBlanc,* 465 Mich at 579.

The court must consider "the totality of the evidence." *Strickland,* 466 US at 695. The court must determine if the defendant has "met his burden of showing that the decision reached would reasonably likely have been different about the errors." *Strickland,* 466 US at 696. That is, the result would reasonably probably be different with the presentation of the alibi witnesses.

B. Defendant's Argument

Defendant raises three arguments in the motion:

1. There was no evidence of 'motive' introduced at trial;

2. Evans' failure to investigate and interview witnesses fulfills the first prong of *Strickland;* and

3. The prejudice prong of *Strickland* is met because the testimony of the two eyewitnesses of the State is unreliable and the proposed alibi witnesses establish it was impossible for Akram to have committed the murder.

1. The defendant's contention that the revenge-motive theory was not in evidence is incorrect. The defendant introduced evidence of motive, revenge for the murder of Avery, into evidence through the testimony of Officer Hanus.

Akram alleges that the Prosecutor's "revenge-motive theory" of Officer Williams was stricken by the court because it was unlinked to the defendant. (Paragraph five defendant's

motion, pages 1 and 2). The Prosecutor presented the testimony of Officer Edward Williams. Williams testified about information obtained from Menar Akram, defendant's mother, that Miller was involved in the murder of her son Avery, killed a week before Miller.[8] Hence, the State theorized Akram's motive to kill Miller was revenge for this brother's death.

The Prosecutor subpoenaed Akram's mother to testify at trial. Menar Akram appeared on the first day of trial. After the Prosecutor's opening statement she vanished, contrary to the subpoena, and never appeared again. (T2,p197-202). Williams' testimony was struck. The State could not connect that information to Akram as the witness with that knowledge did not testify at trial.

However, the defense called Police Officer Kevin Hanus as a witness to show bias against the Akram family. Hanus was questioned about his presentation and composition of photographs, which included Akram and his family, to the eyewitnesses. (T2,p277) Hanus testified he did this because he learned Miller was killed in retaliation for the murder of Akram's brother. (T2,p236). Thus the defense, on direct examination, introduced the matter into evidence.[9]

[8]The Prosecutor stated this in his opening statement. Akram's brother, Avery, was murdered on April 29, 2007. (T1,p127,197).

[9]The evidence of 'motive' previously struck by the court was presented into evidence by the defendant.

2. Eyewitness Identification.

a. Akram contends Johnson's identification testimony of Akram is unreliable because she did not know Akram.

Contrary to defendant's assertion, Johnson testified at trial she knew who Akram was. Moreover, Johnson announced at the scene shortly after Miller was assassinated that she "knew the shooter." Tyner, a person who Johnson did not know, testified Johnson made this proclamation at the scene very shortly after the murder. Johnson did identify Akram at trial as Miller's murderer. She also withstood rigorous cross examination of counsel who tried to undermine the reliability of her identification of Akram.

Johnson testified she did not come forward because she did not want to be involved. ("Stories about witnesses.") Johnson did not identify Akram in the photo show up. She did testify Akram's photograph depicted him differently in the photo than he appeared in person. This observation was corroborated by Hanus and Archer in their trial testimony, both of whom viewed Akram's photograph.

b. Akram claims Archer's identification of Akram is unreliable as his verbal description of Akram is at odds with his identification.

There is a difference between being able to describe someone through words, a verbal description, and being able to recognize or identify a person. Archer said he knew the shooter. Archer had seen him at least three times before, had dealt with Akram, bought DVDs from Akram and had seen Akram as recently as seven to ten days before the shooting. Archer also described Akram to the police and admitted he knew Akram in his statement to police before the exam. Archer identified Akram "almost immediately" in the

photo array before trial. Archer testified he was "positive" (100% sure) Akram was the person who shot Miller at trial.

C. Defendant's Cases on Ineffective Assistance of Counsel

Akram relies on *Poindexter v Booker,* ____ F3rd ____ (6th Cir. 2008) in support of his claim of ineffective assistance of counsel. In *Booker* Timothy Ruff (Ruff) was shot as he walked alone past Poindexter's house at 2:00 a.m. Poindexter was charged with shooting Ruff.

The State presented the testimony of only two witnesses at trial, Ruff and Petty. Ruff identified Poindexter at trial by the nickname 'Big Fifty.' Ruff said Poindexter came out of the house undressed with a long gun and shot him several times without warning and without provocation. Ruff did not immediately identify his assailant after he was shot. Ruff identified defendant by nickname ("Big 50") eighteen days after he was shot. Ruff did identify the house from which the shooter emerged. Poindexter shared that house with Walter Petty, Jr., Sabrina Moore and Dion Griffin.

Petty was an associate of Poindexter, Moore and Griffin. Petty was being questioned by police about an unrelated altercation eighteen days after the shooting of Ruff. Petty said Poindexter came to his girlfriend's house after Ruff was shot and Poindexter admitted to Petty that three men were trying to break into his car. One or more of them shot at Poindexter when he came outside to check on his car. Poindexter returned

the fire. Poindexter said two men fled and one, Ruff by inference, fell to the ground.

The defense did not call any witnesses at trial. Poindexter was convicted on the testimony of Petty and Ruff.

Poindexter sought a new trial on the basis of ineffective assistance of counsel for the failure of defense counsel to call alibi witnesses, a claim similar to that made in *Akram.* The alibi witnesses for Poindexter included Griffin, Robinson, Moore and Hicks. A *Ginther* hearing was held and the four witnesses testified Poindexter was with them at home at the time of the shooting and Poindexter did not leave the house until after the shots were fired. Then, Poindexter called the police to report the shooting.

In contrast to the testimony of Petty, both Griffin and Moore testified it was Petty who was agitated over a debt, and it was Petty who left the home immediately before they heard the shots. That testimony established by inference that Petty had a motive to shoot "someone" that evening, and Petty left the same residence that Ruff indicated Poindexter, the shooter, came from. Griffin testified that Poindexter had no gun, but Petty owned several guns. Moore testified she was with Poindexter in their bedroom when Petty arrived at the house.

This testimony provides some evidence of Poindexter's innocence and it also implicated one of the State's key witnesses, Petty, as the actual shooter. Moreover, key

undermine the State's theory and to exonerate the defendant was objectively unreasonable.

2. Prejudice, the second prong of *Strickland and Pickens:*

The second prong defendant has the burden to prove is that counsel's performance prejudiced defendant. 'Prejudice' is defined as a 'reasonable probability' that, but for the error, the result of the proceeding would have been different, or the results of the proceeding are unreliable or fundamentally unfair. *Strickland,* 466 US at 692, 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland, Id.*

The State relied on but two witnesses at Poindexter's trial, Ruff and Petty. Ruff identified others ('Red') as the shooter and gave a different version of the shooting than did the uncalled defense witnesses. The other witness for the State, Petty, provided alleged admissions made by Poindexter. The *Poindexter* court concluded that had the trial attorney called either Griffin or Moore to testify there was sound evidence that Petty, one of the State's chief witnesses who implicated Poindexter and not Poindexter, was the person who actually shot Ruff. The testimony of the uncalled defense witnesses gave credence to the conclusion Petty was the person who had guns, was angry when he left the house, had motive to shoot, was at the scene of the crime and the crime actually involved an argument (unlike the version Ruff gave). Poindexter was inside the house (that Petty just left) with another witness before and during the shooting of Ruff. The four uncalled defense

witnesses would have presented competent evidence that Ruff's initial identification of 'Red' as the shooter as well as the house from which the shooter came could have equally applied to Petty as well as Poindexter. Nothing in the testimony clearly settled who it was. Petty had guns and a motive, Poindexter had an alibi. The State's case was undermined by the evidence against Petty, and Petty's value as a witness for the state was also undermined. Hence, the outcome would probably be different with this unpresented evidence.

The *Poindexter* court found such testimony constituted a reasonable probability that the trial result would have been different had those defense witnesses been presented at trial. It was reasonably probable by virtue of the witnesses' testimony, the victim's different version of the facts and the undermining of Petty's testimony that Petty may have been the perpetrator, not Poindexter. The court concluded the prejudice prong had been met.

D. Other Cases

People v Carbin, 463 Mich 590; 623 NW2d 884 (2001) and *People v Dendel,* 481 Mich 114; 748 NW2d 859 (2008), are instructive for this case.

In *Carbin,* the victim claimed she was raped in a poorly lit building after business hours by Carbin and another man.[10] The victim only saw Carbin for a short time. *Carbin,* 462 Mich at 591. The defense at trial was that the victim identified the wrong man, like Akram. Carbin asserted he was locked up in a psychiatric hospital when the rape occurred.

The defense presented evidence vis a vis medical records that Carbin was locked inside the Detroit Psychiatric Institute when the crime occurred, and so, could not have committed it. So, the victim's identification of Carbin was wrong and unreliable. *Carbin,* 463 Mich at 593. There were several locked doors and keyed elevators in the institute preventing defendant's departure.[11] The records reflect Carbin was seen by a doctor at 5:10 p.m. At 10:30 p.m. Carbin received a certificate presented to him by staff.

A *Ginther* hearing was held where the alibi defense was presented to the court. Several witnesses, including a psychiatrist, testified the facility was a "lock down" facility, with several locked doors and the elevator that could only be operated by key. It would have been extremely difficult for Carbin to leave the facility. Carbin also passed a polygraph examination which supported the innocence he maintained. *Carbin,* at 597. Similar to Akram, Carbin contended it was impossible for him to have committed the rape as he was in a lock-down facility.[12]

While the same kind of evidence was presented at both Carbin's trial and the *Ginther* hearing, it was done in far greater detail and was far more compelling at the *Ginther* hearing. Carbin predicated his claim of ineffective assistance of trial counsel on the failure to call these witnesses to testify he was locked in a facility at the time of the rape and therefore, he could not have committed the crime. *Carbin,* at 600.

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[10]The victim could not identify the other assailant.

[11]The witness at trial relied on a medical record, which did not account for defendant's exact presence at the time of the crime. *Carbin,* at 596,597.

[12]In both cases, it would have been impossible for the defendant to commit the crime had defendant been

Carbin is distinguishable from Akram insofar as the alibi defense (however incomplete) was presented at trial in *Carbin. Carbin* found the prejudice standard of *Strickland* not to have been met because the defense was presented albeit in a different and water-downed manner, on the lack of credibility of the alibi witnesses and the strength of the victim's identification of defendant as the perpetrator. *Carbin,* at 604.

In *Dendel,* the defendant claimed error in the failure of defense trial counsel to present the testimony of a medical expert to contest the cause of death at trial. The cause of death as established by the State's pathologist was that the deceased died from hypoglycemic shock from an insulin injection administered by defendant. This was based on the absence of glucose in the vitreous fluid of the deceased. Moreover, hypoxic changes were indicative of being comatose, which is contrary to defendant's versions of the events. At the *Ginther* hearing the potential witness for the defense, Dr. Simson, opined that the pathological and toxicological findings of the State did not support that theory but those anatomical changes observed by the State's pathologist were really attributable to decomposition of the deceased's body. The cause of death was actually morphine overdose. *Dendel,* 481 Mich at 128. So, no homicide occurred.

The trial court, after hearing the testimony at the *Ginther* hearing concluded the testimony of Dr. Simson would not have changed the outcome of the trial. In effect, the trial court implicitly held that Dr. Simson was not more credible than the prosecution's experts. This opinion was in keeping with MCR 2.613(C) which gives the trial court the special

opportunity to determine the credibility of the witnesses who appear before it. *Dendel, supra.*[13] The court must make findings of fact. *Strickland, supra; LeBlanc, supra.*

Both cases contain the absolute defense unpresented (or incompletely presented) at trial like Akram.

IV. DISCUSSION

1. Prejudice.

The issue in *Akram* was the identity of the shooter. The case of Akram presents very unique physical facts surrounding the murder of Miller. Unlike *Poindexter,* the verdict in *Akram* relies on the solid identification testimony of two independent eyewitnesses to the murder. Miller was shot in broad daylight, boldly before two eyewitnesses. The testimony of these two eyewitnesses was extremely compelling and keenly accurate. The testimony was extremely credible, specific, particular and distinctive. Neither Archer nor Johnson had the motive to lie as did Petty in *Poindexter.* The two eyewitnesses did not know, or ever speak to, each other. Their independent observations and descriptions of the shooting and shooter were highly convincing and corroborated. Moreover, both eyewitnesses were extremely close to Akram at the time of the murder, right next to him or three feet away.

[13]Both *Carbin* and *Dendel* were bench trials. The finder of fact concluded the defendant failed to demonstrate a reasonable probability that, but for counsel's error, the result of the proceeding should have been different.

Johnson testified:

1. Akram walked up to Miller;

2. Akram and Miller spoke (Miller "greeted" Akram);

3. Miller was shot first in his left chest (side);

4. Johnson was less than two feet away from Miller and Akram during the shooting. (T1,p158);

5. Akram shot Miller at close range;

6. Miller was shot by Akram with a "black revolver." (T1,p157);

7. Miller fell to the ground;

8. Miller then put his hands up to cover his face;

9. Akram shot Miller as Miller lay on the ground with his hands over his face. (T1,p160);

10. Akram ignored Johnson.

Johnson said she knew the shooter. Tyner corroborated this when he testified Johnson proclaimed it very shortly after Miller was murdered.

Johnson, Archer and Hanus all testified Akram looked different in his photograph than he did in person. That change in appearance was the reason Johnson said she identified Akram at trial, but not in the photograph, as well as "stories about witnesses."

Archer testified:

1. Akram came out of the alley;

2. Akram walked toward Archer and then walked past him (was three or four feet away);

3. Akram had a blue steel revolver in his hand; (T2,p615,616);

4. Words were exchanged between Miller and Akram;

5. Akram raised the gun and shot Miller first in the chest;

6. Miller fell to the ground;

7. Miller put his hands up over his face in a defensive posture;

8. Akram stood over Miller and shot him twice (Miller was "executed"), (T2,p16,17);

9. Akram shot Miller at close range;

10. Archer had seen Akram several times (three or four) before the murder. (T2,p18);

11. Archer saw Akram seven to ten days before the shooting when he bought DVD's from Akram; (T2,p18);

12. Archer told the police he knew the identity of the perpetrator in his statement;

13. Archer identified Akram from a photo array "almost immediately;"

14. Archer identified Akram at trial.

Corroborative facts:

1. Dr. Loewe corroborated by physical evidence the reliability and accuracy of the two eyewitnesses as to the mechanics of the murder. Dr. Loewe lined up the wounds of Miller's hands and traced the paths of the bullets which confirmed Miller put his hands up

in a defensive posture to cover his face from being shot.

Archer and Johnson, unknown to each other, both independently testified Miller postured himself in that exact manner to protect himself from the execution. This testimony was corroborated, specific and highly reliable. The observation of this acute detail is precise and accurate. It is distinguished from testimony which is general and conclusory. The reliability of the details of the murder enhances the reliability of their identification testimony and their credibility as witnesses.

2. Loewe testified Miller's six wounds could have been made by three shots. Johnson and Archer testified they heard three shots. Moreover, Tyner, a neighbor, testified he heard three shots. None of these witnesses spoke directly with each other, although Tyner overheard Johnson speak at the scene after the murder.

3. Johnson said she knew the identity of the shooter at the scene, but did not immediately reveal it. ("Stories about witnesses").[14] Tyner heard Johnson say she knew the shooter.

4. Archer testified he knew the assailant. Archer also made this statement to the police before trial. Archer had seen Akram several times before and had dealt with him Akram as recently as seven to ten days before Miller's murder. Archer said he interacted

[14]Johnson's reluctance to name the shooter at the scene because of fear – "stories about witnesses" is not unrealistic in light of the fact she watched her friend brutally and boldly assassinated in front of her.

with Akram because he purchased DVDs from him. (T1,p19). Akram walked past Archer from the alley, only three or four feet from Archer in open, unobstructed view in broad daylight. (T1,p15).

5. Akram passed by Archer with a revolver (BSR). Johnson also said Akram had a black revolver.[15] The evidence technician and police officers testified no casings were recovered at the scene, which is consistent with the testimony of the two eyewitnesses that the murder was done with a revolver.

6. The murder was done in broad daylight. Archer was close to Akram when he executed Miller. There was nothing obstructing Archer's view. Johnson was standing right next to Miller and Akram ("right there").

7. Archer identified Akram "almost immediately" from the photo array a month after the murder. The strength of the identification of these two witnesses is far different than the shaky, changing identification presented in *Poindexter.*

8. Archer testified Akram was driven away from the scene by another person. The obvious inference is that Akram arrived there by the same waiting car.

The distance from Swanson Funeral Home to 3200 Collingwood is 5.8 miles. The distance is not so great as to physically preclude Akram from slipping out for a short time

and returning unnoticed.. It would not even have been difficult for Akram to do so. Half of the route is on freeways and ramps. Driving the freeway at sixty miles an hour (one mile per minute) and on the surface street at speed limits the distance from the funeral home to the site could well have been anywhere between seven to thirteen minutes as calculated by Google. If the car went faster, the time less. That distance is a very short distance to travel by car. The undisputed testimony of Archer was that Akram got into a Crown Victoria or Marquis, with another waiting for him, who drove Akram away from the scene. The murder did not take long to commit. The travel time was short. It would not even have been difficult, let alone impossible, for Akram to have travelled that distance and return to the wake. Akram could have easily been driven to the scene, shot Miller and fled to the waiting car. In that short period of time Akram could have easily slipped away unnoticed from, and return to, the wake.[16]

The court does not find the testimony of the alibi witnesses, that five of the six saw Akram at the viewing the entire time, from 3:00 p.m. to 7:00 p.m., to be convincing or credible. See *People v Dendel,* 481Mich 114; 748 NW2d 859 (2008). The court had the opportunity to watch the witnesses and observe their demeanor as they testified. MCR 2.613(C). The declaration of the witnesses that they had Akram under their constant eye, in different places at the funeral home and saw Akram in different places ('hallway,' 'foyer,' 'porch,' 'parking lot') was not credible. MCR 2.613(C); *Dendel, supra.* The testimony was at best general, vague, nebulous and conclusory. No persuasive facts were presented at

[15]Blue steel is also described as black, as opposed to the identification of chrome or nickel.
[16]Contrary to defendant's assertion there is no evidence this killing was the product of "immediate revenge."

the hearing. The only alibi witness who was at all credible was Adrian, who said Akram was present but he did not know the whereabouts of Akram the whole time.[17] Nothing in the testimony was so substantial that it would have changed the outcome of the trial. *Strickland, supra.*

The testimony of the witnesses presented at the *Ginther* hearing does not demonstrate a reasonable probability sufficient to undermine confidence in the outcome of the trial when all the testimony is examined. *Strickland, supra.* The result of the trial was not unfair or unreliable. *Strickland, supra.*

2. Evans' failure to investigate witnesses.

In *Akram,* the defendant has the burden to show that counsel's performance was deficient. It is easy to conclude that the refusal of counsel to talk to witnesses satisfies the first prong of the *Strickland* and *Pickens* test.[18] See *Strickland v Washington,* 466 US 668 (1984); *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994). It would be difficult indeed to conclude that Mr. Evans' refusal to talk to the alibi witnesses constituted reasonable performance or was trial strategy.

While ineffective assistance of counsel will not be found simply on a difference of

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(Defendant's brief,paragraph 14).

[17]Akram's mother did not testify at the *Ginther* hearing.

[18]It is clear from the transcript Evans is an accomplished and highly aggressive trial attorney. The deficiency was not the trial skill or lack of advocacy, but his refusal to investigate the witnesses. That is, while Evans' knowledge from vast experience that the alibi may be unsuccessful, such prediction however accurate, does not discharge his legal duty to investigate them.

opinion over tactics because counsel's decision on trial strategy govern, the failure to call witnesses can amount to ineffective assistance of counsel. . See *People v Johnson,* 451 Mich 115; 545 NW2d 637 (1996); *People v Bass,* 247 Mich App 385; 636 NW2d 781 (2001); *People v Carbin,* 463 Mich 590; 623 NW2d 884 (2001); *People v Garza,* 246 Mich App 251; 631 NW2d 764 (2001); *Toma, supra; Lloyd, supra.*

The essence of the alibi claim that the witnesses would testify Akram was at the viewing was presented to Evans, who clearly understood the defense. But it cannot be concluded that Evans discharged his duty by having those witnesses interviewed by himself or a representative.[19]

V CONCLUSION

The defendant bears a heavy burden to demonstrate counsel was ineffective. *Carbin,* 463 Mich at 599. The question as to whether defendant was deprived of effective assistance of counsel is a mixed question of fact and law. The court must find the facts. The court must then decide whether those facts constitute a violation of defendant's right, a constitutional right, to effective assistance of counsel. *People v LeBlanc,* 465 Mich 575; 640 NW2d 246 (2002); *Dendel, supra; People v Hoag,* 460 Mich 1; 594 NW2d 57 (1997); *Strickland, supra, Pickens, supra*; US Const Am IV; 1963 Const, Art 1, Sec 20.

The testimony of the alibi witnesses was vague, general and conclusory. The court

[19]Another attorney appeared at the arraignment for Mr. Evans and apparently worked for him.

had an opportunity to observe the witnesses demeanor as they testified, an essential characteristic of such a hearing and an important tool for determining credibility of witnesses. MCR 2.613(C).

Miller was murdered in broad daylight before two eyewitnesses who were quite close to Akram during the murder. The testimony of those two eyewitnesses was corroborated by each other, as they did not know each other, and several other independent witnesses.

Dr. Loewe established Miller sustained six gunshot wounds to the chest, head, face and hands, made by 3 or more shots. The shot to the left side of Miller's head at the eyebrow was "an execution type shot" which exhibited evidence of close range firing. A second gunshot was to the left chest. The third shot to the right wrist exhibited evidence of close range firing, from only an inch or two away because of the density of the ring of soot around the wound. That same bullet path was traced to bullet wounds to the fingers of Miller's left hand ending in a wound to the right cheek.

Dr. Loewe was, in short, able to reconstruct and forensically confirm what both Johnson and Archer independently testified they observed Miller do: place his hands in front of his face in an instinctive defensive posture to protect him from the gun. This is a very unusual circumstance and configuration of a shooting, in fact unique, which lends strong credence to the accuracy and reliability of the observations of the witnesses.

Dr. Loewe's account of three possible shots to Miller was also testified to by Archer, Tyner and Johnson. The type of weapon, revolver, was confirmed by Johnson and Archer and corroborated by the police that no shell casings were found at the scene.

Moreover, Archer knew Akram before the murder. Johnson also declared at the scene she knew the shooter, whom she identified as Akram.

The unique facts of the murder and the details of the shooting presented by two independent witnesses corroborated by other independent witnesses as set forth herein support the conclusion Akram has not demonstrated a reasonable probability that the presentation of the alibi witnesses would change the outcome of the trial or that the result of the trial was unfair. *Strickland, supra; Pickens, supra.* Akram has failed to demonstrate prejudice as the term is defined in law: a reasonable probability that but for counsel's errors the result of the proceedings would have been different or that the result of the proceedings was fundamentally unfair or unreliable. *Strickland, supra; Pickens, supra.* Akram has not met his burden to establish he is entitled to relief. *Strickland, supra; Pickens, supra.*

Defendant's motion for a new trial is denied; and

Defendant has not met his burden to show prejudice as that term is defined in law. Defendant's motion for a new trial is denied; and

IT IS SO ORDERED.

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: July 1, 2009

APPENDIX (H)

The Unpublished Order of the

Michigan Court of Appeals Granting Remand

for an Evidentiary Hearing

January 6, 2009

Court of Appeals, State of Michigan

ORDER

People of MI v Adrian Mahdee Akram

Docket No. 283161

LC No. 07-012443-FC

Karen M. Fort Hood
Presiding Judge

Kurtis T. Wilder

Christopher M. Murray
Judges

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is GRANTED. This matter is REMANDED to the trial court for an evidentiary hearing and decision whether defendant-appellant was denied the effective assistance of counsel. The proceedings on remand are limited to the issues raised in the motion to remand. The Court retains jurisdiction and the time for proceeding with the appeal in this Court shall begin to run upon issuance of an order in the trial court that disposes of the post-conviction proceedings.

Defendant-appellant shall file with this Court a copy of any motion and supporting brief filed in the trial court within 14 days after the Clerk's certification of this order. Defendant-appellant shall also file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry.

The trial court shall hear and decide the matter within 56 days after the Clerk's certification of this order. The trial court shall make findings of fact and a determination on the record and cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings.

Defendant-appellant's brief on appeal is due as provided under MCR 7.211(C)(1)(d).

The time for proceeding with the appeal shall begin to run 14 days after the date this order is certified if the motion to initiate the post-conviction proceedings is not filed in the trial court within that 14-day period.

COURT OF APPEALS OF THE STATE OF MICHIGAN 1965

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 06 2009
Date

Sandra Schultz Mengel
Chief Clerk