No. 24-1449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB JOHN WELD,

Petitioner-Appellant,

v.

MELINDA K. BRAMAN, Warden,

Respondent-Appellee.

ORDER

Before: NALBANDIAN, Circuit Judge.

Jacob John Weld, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Weld's notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). Weld moves this court for appointment of counsel. As set forth below, we deny Weld's application for a certificate of appealability and deny as moot his motion for appointment of counsel.

In 2019, a jury in the Emmet County Circuit Court convicted Weld of two counts of first-degree criminal sexual conduct involving the sexual penetration of a nine-year-old child. The trial court sentenced him to 25 to 50 years of imprisonment. On direct appeal, Weld claimed that his trial counsel provided ineffective assistance. The Michigan Court of Appeals affirmed Weld's conviction, rejecting his ineffective-assistance claims. *People v. Weld*, No. 348373, 2020 WL 6110637 (Mich. Ct. App. Oct. 15, 2020) (per curiam), *perm. app. denied*, 956 N.W.2d 177 (Mich. 2021).

Weld then filed a § 2254 habeas petition raising the same claims that he raised on direct appeal: his trial counsel was ineffective for failing to move to suppress his confession and failing to request a voluntary-act instruction, and the cumulative effect of that ineffective assistance

deprived him of a fair trial. The district court denied Weld's habeas petition and declined to issue a certificate of appealability. This timely appeal followed.

Weld must obtain a certificate of appealability to appeal the district court's judgment denying his habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A). Where, as here, a petitioner does not file a motion for a certificate of appealability, we construe the petitioner's notice of appeal as a request for one. *See* Fed. R. App. P. 22(b)(2). To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Reasonable jurists could not disagree with the district court's rejection of Weld's ineffective-assistance claims.

The Michigan Court of Appeals reviewed Weld's ineffective-assistance claims under the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring him to demonstrate (1) "that counsel's performance was deficient" and (2) that counsel's "deficient performance prejudiced the defense." To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Habeas relief may not be granted on Weld's ineffective-assistance claims unless he shows that the decision of the Michigan Court of Appeals "involved an unreasonable application of" *Strickland* or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Habeas review of Weld's ineffective-assistance claims is "doubly" deferential: "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Failure to Move to Suppress Confession

Weld first asserted that his trial counsel was ineffective for failing to move to suppress his confession that he made without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). "An officer's obligation to administer *Miranda* warnings attaches, however, only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam) (cleaned up). *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). Instead, a person is in custody for purposes of *Miranda* if, "in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Howes v. Fields*, 565 U.S. 499, 509 (2012) (cleaned up).

The Michigan Court of Appeals reasonably determined that Weld was not in custody during his interview with law enforcement officers until he was placed under arrest after making admissions about sexually penetrating the victim—at which point he was given *Miranda* warnings—and therefore was not entitled to suppression of his confession. *Weld*, 2020 WL 6110637, at *5. The objective circumstances indicated that the pre-arrest portion of the interview was not custodial: Weld made an appointment for the interview and drove himself to the state police post; an officer informed Weld at the outset of the interview that he was not under arrest and that he was free to leave at any time; Weld was not physically restrained during the interview; Weld left the interview to use the bathroom and voluntarily returned to the room; the officers' service weapons remained holstered and the door remained unlocked during the interview; and although Weld claimed that a detective's questioning was accusatorial and coercive, the record showed that the detective did not yell or raise his voice. *Id.* at *4–5. The Michigan appellate court reasonably concluded that, because Weld's "in custody" argument lacked merit, he could not establish that his trial counsel was ineffective for failing to file a motion to suppress his confession.

Id. at *5; *see Wilkens v. Lafler*, 487 F. App'x 983, 993–94 (6th Cir. 2012); *see also Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

The Michigan Court of Appeals went on to determine that, even if Weld's confession had been suppressed, there was no reasonable probability of a different result in light of the other overwhelming evidence of his guilt, including the victim's testimony and his admissions in recorded telephone conversations with his mother. *Weld*, 2020 WL 6110637, at *5. The Michigan appellate court reasonably determined that Weld could not establish prejudice. *See Lundgren v. Mitchell*, 440 F.3d 754, 775 (6th Cir. 2006).

Failure to Request Voluntary-Act Instruction

Weld next asserted that his trial counsel was ineffective for failing to request an instruction informing the jury that his sexual penetration of the victim must have been voluntary to find him guilty. Weld claimed at various times that he was asleep when he sexually assaulted the victim; his trial counsel made this argument to the jury but did not request a voluntary-act instruction.

The Michigan Court of Appeals reasonably determined that trial counsel's failure to request a voluntary-act instruction did not constitute deficient performance because the evidence did not support such an instruction. *Weld*, 2020 WL 6110637, at *7; *see Cathron v. Jones*, 77 F. App'x 835, 845 (6th Cir. 2003). Weld retracted his initial claim that he was asleep when he sexually assaulted the victim and admitted that he sexually assaulted the victim on multiple occasions and in three different states. *Weld*, 2020 WL 6110637, at *7. The victim testified that Weld was awake—"he seemed like he knew what he was doing, and his eyes were open, and he was talking to me." The prosecution also presented evidence that Weld viewed pornography involving sleepwalking.

The Michigan Court of Appeals went on to determine that, even if trial counsel's failure to request a voluntary-act instruction constituted deficient performance, Weld could not demonstrate a reasonable probability of a different result in light of the evidence that his actions were voluntary. *Weld*, 2020 WL 6110637, at *7. The Michigan appellate court reasonably determined that Weld could not establish prejudice.

Cumulative Effect

Weld finally asserted that the cumulative effect of his trial counsel's ineffective assistance deprived him of a fair trial. As the Michigan Court of Appeals correctly pointed out, because Weld's individual claims of ineffective assistance failed, his cumulative-error claim also failed. *See Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000).

Because the Michigan Court of Appeals reasonably applied *Strickland* and reasonably determined the facts in analyzing Weld's ineffective-assistance claims, no reasonable jurist would disagree with the district court's conclusion that he was not entitled to habeas relief. Accordingly, we **DENY** Weld's application for a certificate of appealability and **DENY** as moot his motion for appointment of counsel.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1449

JACOB JOHN WELD,

Petitioner-Appellant,

v.

MELINDA K. BRAMAN, Warden,

Respondent-Appellee.

Before: NALBANDIAN, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Jacob John Weld for a certificate of appealability.

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

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 11/12/2024.

Case Name: Jacob Weld v. Melinda Braman
Case Number: 24-1449

Docket Text:
ORDER filed: we DENY Weld's application for a certificate of appealability and DENY as moot his motion for appointment of counsel [7182949-2]. John B. Nalbandian, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Jacob John Weld
Richard A. Handlon Correctional Facility
1728 Bluewater Highway
Ionia, MI 48846

A copy of this notice will be issued to:

Ms. Kinikia D. Essix
Mr. John S. Pallas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACOB JOHN WELD,

Petitioner,

Civil Action No. 21-cv-13008

v.

HON. MARK A. GOLDSMITH

BECKY CARL,

Respondent,
_____/

OPINION & ORDER
(1) DENYING THE PETITION FOR WRIT OF HABEAS CORPUS, (2) DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND (3) GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS

Petitioner, John Jacob Weld, filed a pro se application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction for two counts of first-degree criminal sexual conduct, Mich. Comp. L. § 750.520b(1)(a) and Mich. Comp. L. § 750.520b(2)(b). Petitioner was sentenced to twenty-five to fifty years in prison. For the reasons that follow, the petition for writ of habeas corpus is denied.

I. BACKGROUND

Petitioner was convicted after a jury trial in Michigan's Emmet County Circuit Court. This Court recites verbatim the relevant facts upon which the Michigan Court of Appeals relied, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). See Wagner v. Smith, 581 F.3d 410, 413 (6th Cir. 2009):

> Defendant admitted that he sexually assaulted the 9-year-old victim during an approximately 90-minute long interview with law enforcement. Initially, defendant claimed that any sexual assault of the victim occurred while he was asleep, but, as the interview progressed, defendant admitted to repeatedly sexually assaulting the victim over a two-year timeframe in various states, including Michigan.

At trial, the victim's foster mother testified that the victim asked to speak to her privately and revealed that defendant had penetrated her and also rubbed himself on her. The victim testified that defendant sexually assaulted her approximately 30 times in Michigan. The victim also testified that defendant called her over to him and told her to pull down her pants. Sometimes, defendant assaulted her during the day. The victim opined that defendant "seemed like he knew what he was doing, [ ] his eyes were open, and he was talking to" her. The victim further testified that defendant told her not to tell anyone. Additionally, the victim testified that defendant earlier assaulted her in Las Vegas, Nevada; Oklahoma; and Texas.

The law enforcement officers, who had interviewed defendant, testified about the interview and their investigation. Defendant's video-recorded interview was played for the jury. Therein, in describing his most recent assault, defendant admitted that, at around 9 p.m., he woke up "horny," and thought that he told the victim, "[d]on't say anything to anybody." Defendant described lifting the victim's legs up over his hip after she removed her pajama bottoms and underwear. Defendant admitted that he penetrated the victim's vagina with his penis for about five minutes. On a drawing, defendant indicated the extent of his penetration.

Shortly after these admissions, one of the troopers informed defendant that he was under arrest. Defendant received and waived his Miranda rights. Defendant ultimately confessed to three penetrations—one in Oklahoma and two in Michigan. Defendant further reported that he twice sexually assaulted the victim in Las Vegas. Defendant described these earlier instances as involving him rubbing his penis on the victim's vagina without penetration.

Defendant confessed that his first Michigan penetration occurred while the sun was still up. He stated that he became aroused when the victim touched him. Defendant further confessed that he had previously told the victim to touch him and had taught her to "rub" his private part.

At the conclusion of the interview, defendant provided a hand-written statement, reading: "It happened five times, once in Oklahoma; two in Vegas; two times in Michigan. First two times was rubbing; three times penetration." Defendant told one of the troopers that he "never meant for it to happen .... [I]t's hard to face I did it." However, defendant added that the other interviewing trooper was "right" and that defendant needed help.

During the interview, defendant also admitted to viewing pornography on his cellular telephone and he consented to a law-enforcement search of this device. Forensic investigation revealed that defendant visited a number of sites on

> Pornhub.com, including two involving sleepwalking. During the interview, defendant claimed that he was not into child pornography and that the sites he had viewed involved role-playing adults.
>
> While in jail awaiting trial, defendant also made several telephone calls to his mother that were recorded and played for the jury. On the day of his arrest, defendant admitted to molesting or penetrating the victim, but claimed to be asleep. In his second call on that day, defendant admitted that "it's happened more than once[.]" Two days later, defendant told his mother: "It wasn't penetration every time. It wasn't 'til the last time when I was sleeping." Nevertheless, defendant again admitted that the assaults happened once in Oklahoma, twice in Nevada, and twice in his mother's home. In a subsequent call, defendant expressed his desire to plead guilty to lesser charges, and, if that failed, to proceed to trial "'[c]uz ... either way I'm guilty .... Either way I'm guilty." Defendant later explained: "I admitted everything, which I shouldn't have done, but, you know, I'm honest.... And with me being honest that just made their job easier." Defendant also lamented the potential 25-year penalty he was facing, complaining that murderers received lesser terms of incarceration. Defendant added, "I didn't commit hardly anything, but, you know, I mean it's still heinous what I did." Defendant urged his mother to search for a good lawyer, one who would fight for him, and, again expressed his desire to plead guilty to lesser charges. In his final call, defendant remarked that the "Olympic guy," presumably referencing Dr. Larry Nassar, deserved the 25-year mandatory-minimum penalty for molesting "like 500 girls." Unlike defendant, who only "did it once."
>
> Despite defense counsel's request, the prosecution was unwilling to offer the plea deal that defendant sought. The case proceeded to trial and the jury convicted defendant of two counts of CSC-I.
>
> After defendant appealed, he filed a motion for remand, contending that his second court-appointed trial counsel was ineffective for failing to move to suppress his confession and for failing to request a jury instruction on the voluntary-act requirement given defendant's assertions that his assaults occurred during unconscious activity, namely, sleepwalking. This Court denied defendant's motion without prejudice. People v. Weld, unpublished order of the Court of Appeals, entered November 13, 2019 (Docket No. 348373).

People v. Weld, No. 348373, 2020 WL 6110637, at *1–*2 (Mich. Ct. App. Oct. 15, 2020).

(punctuation modified).

Petitioner's conviction was affirmed on appeal. People v. Weld, 956 N.W.2d 177 (Mich. 2021).

This petition for habeas corpus followed. Petitioner seeks habeas relief on the following grounds: (i) trial counsel was ineffective for failing to move to suppress his confession that was taken in violation of his Miranda rights, (ii) trial counsel was ineffective for failing to request a voluntary act instruction, and (iii) the cumulative effect of trial counsel's ineffective assistance deprived Petitioner of a fair trial.

II. STANDARD OF REVIEW

Title 28 of the United States Code Section 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

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

28 U.S.C. § 2254(d)(1)–(2).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405–406 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme

Court] to the facts of a prisoner's case." Id. at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 410–411. "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). To obtain habeas relief in federal court, a state prisoner must show that the state court's rejection of the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

III. ANALYSIS

A. Ineffective Assistance of Counsel

Petitioner seeks habeas relief on the following grounds: (i) trial counsel was ineffective for failing to move to suppress his confession that was taken in violation of his Miranda rights, (ii) trial counsel was ineffective for failing to request a voluntary act instruction, and (iii) the cumulative effect of trial counsel's ineffective assistance deprived Petitioner of a fair trial.

To establish ineffective assistance of counsel under federal constitutional standards, a defendant must satisfy a two-part test. Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. Id. at 689. In other words, a defendant must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. Id. Second, the defendant must show that such performance

prejudiced his defense. Id. at 687. To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Petitioner first argues that trial counsel was ineffective for failing to move to suppress his statement to the police because he was not advised of his Miranda rights until mid-way through the interview and after he had already made incriminating remarks. Petitioner argues that Miranda warnings should have been given to him by the police at the outset of the interview because he was subjected to a custodial interrogation from the beginning of the interview.

The Michigan Court of Appeals rejected Petitioner's claim at length:

> Defendant concedes that his interview was not custodial until the detective joined in. The small interview room at the state police post contained a round table that abutted a wall and two chairs. About thirty minutes lapsed with defendant admitting that it was possible that he had unknowingly sexually assaulted the victim as he slept. The trooper offered defendant an opportunity for a bathroom break as the trooper was going to get water; he also offered the same to defendant. At first, defendant declined the trooper's offer to use the restroom, but, on reconsideration, he used the facilities before voluntarily returning to the interview room alone. The detective brought in a third chair, sitting closer to defendant. It appears that the uniformed trooper and the detective were wearing holsters housing their service weapons. Defendant contends that the interview turned custodial as the detective's chair "blocked" the door, both troopers had weapons, and the detective's questioning was accusatory. As a result, defendant argues that the troopers were required to inform him of his Miranda rights. We disagree.

Weld, 2020 WL 6110637, at * 3.

The Michigan Court of Appeals concluded that Petitioner was not in custody when he first spoke with the police. Therefore, the police were not required to advise him of his Miranda rights, for several reasons: (i) Petitioner drove himself to the police station after the trooper called Petitioner and arranged for him to come into the station for an interview, (ii) Petitioner's interview was only of a ninety-minute duration, (iii) the trooper conducting the interview informed Petitioner from the onset that he was not under arrest and that he was free to leave at any time, (iv) the

detective testified that his method of interrogation did not involve him yelling or raising his voice and the Michigan Court of Appeals' review of the interview videotape confirmed this, (v) Petitioner was not physically restrained because he was not handcuffed, nor was he escorted to the police station, (vi) Petitioner left the interview room to use the bathroom and voluntarily returned before being joined by the trooper and detective, (vii) although the trooper and detective wore their service weapons, they remained holstered, and (viii) although the detective's chair was by the door, the door remained unlocked and Petitioner knew from what the trooper told him and his experience in leaving the room earlier that he still had the choice to do so. Weld, 2020 WL 6110637, at *4–*5. The Michigan Court of Appeals concluded that because there was no basis to suppress the statement to the police, counsel was not ineffective for failing to file a motion to suppress it. Id. at *5.

The Michigan Court of Appeals further concluded that Petitioner was not prejudiced by trial counsel's failure to move to suppress the confession in light of the additional compelling evidence of Petitioner's guilt apart from the confession:

> In this case, even if defendant's confession was suppressed, there was still overwhelming evidence to convict defendant of two counts of CSC-I against the victim. The victim testified that defendant sexually assaulted her regularly—approximately thirty times. The victim also testified that defendant told her not to tell anyone what had happened, and that he called her over and told her to pull down her pants. The assaults occurred in the victim's grandmother's living room, on an air mattress that defendant used as a bed, even though a nearby pull-out couch served as a bed for the victim and her sister. Moreover, defendant repeatedly admitted to sexual assaulting the victim in recorded telephone conversations with his mother, and defendant told his mother that there were five assaults in three separate states. Additionally, forensic analysis of defendant's cellular telephone revealed numerous pornographic sites accessed by defendant, demonstrating defendant's interest in sexual relations while "sleepwalking." Therefore, it is not reasonably probable that a different result would have obtained even if defense counsel successfully obtained suppression of defendant's confession after the detective joined the interview in light of defendant's numerous, untainted admissions.

Weld, 2020 WL 6110637, at *5.

A prosecutor may not use a defendant's statements that stem from custodial interrogation unless the prosecutor can demonstrate the use of procedural safeguards which are effective to secure a defendant's privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Unless other means are devised to inform a suspect of his right to silence and a "continuous opportunity to exercise it," the following warnings are required to be given to a suspect:

> (i) The person must be warned that he or she has a right to remain silent;
> (ii) that any statement he does make may be used against him; and
> (iii) that he has a right to the presence of an attorney, either appointed or retained.

Miranda, 384 U.S. at 444.

Police officers are not required to administer Miranda warnings to every person whom they question, nor are officers required to administer Miranda warnings simply because the questioning takes place in a police station or because the questioned person is one whom the police suspect. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). Instead, Miranda warnings are required "only where there has been such a restriction on a person's freedom as to render him or her 'in custody.'" Id. "Custody," for purposes of Miranda, requires a "significant deprivation of freedom." See Mason v. Mitchell, 320 F.3d 604, 632 (6th Cir. 2003).

Two discrete inquiries are essential to determining whether a criminal suspect was in custody at time of interrogation and therefore entitled to Miranda warnings: first, what were the circumstances surrounding the interrogation, and second, given those circumstances, would a reasonable person have felt that he or she was not at liberty to terminate the interrogation and leave. See Thompson v. Keohane, 516 U.S. 99, 112 (1995).

The evidence at trial establishes that Petitioner voluntarily showed up at the police station. Petitioner was not arrested at that point or placed in handcuffs or otherwise detained. The door to

the interrogation room was unlocked. Petitioner was not told he was a suspect or that he was not free to leave. In fact, Petitioner was allowed to leave the interrogation room to use the bathroom. Under the circumstances, Petitioner was not in custody, within the meaning of Miranda, when he initially spoke with the police. See Biros v. Bagley, 422 F.3d 379, 389–390 (6th Cir. 2005); Mason, 320 F.3d at 632. Moreover, the interview lasted only about ninety minutes and the officers did not brandish their weapons or make any show of force. This also militates against a finding that Petitioner was in custody within the meaning of Miranda. See United States v. Mahan, 190 F.3d 416, 422 (6th Cir. 1999).

Without any significant evidence suggesting that Petitioner was subjected to custodial interrogation within the meaning of Miranda when he initially spoke with the detective and the trooper at the police station, "a fairminded jurist could conclude that counsel acted reasonably in choosing not to move for suppression" of Petitioner's statement. See Wilkens v. Lafler, 487 F. App'x. 983, 993 (6th Cir. 2012). "Given the dearth of record evidence suggesting custody, a fairminded jurist could conclude that [petitioner's] counsel acted competently in focusing his efforts elsewhere." Id. at 994. Moreover, Petitioner is unable to show that he was prejudiced by counsel's alleged ineffectiveness, "because, even if his counsel had filed the motion to suppress, the trial court would have almost certainly denied it as meritless." Id.

Petitioner, however, also claims that the statement should have been suppressed because the police engaged in an impermissible "Miranda-in-the-middle play" and had Petitioner repeat his incriminating statements that he initially made before he had been advised of his Miranda rights.

The Supreme Court has held that a midstream recitation of Miranda warnings, after a police interrogation commenced without the police first advising the defendant of his rights, did not

comply with Miranda's constitutional requirement. Missouri v. Seibert, 542 U.S. 600, 604–606 (2004). Thus, any statement made by a defendant after being given Miranda warnings in the middle of an interrogation is inadmissible.

The holding in Seibert does not apply if the first police interview was non-custodial. See United States v. Ray, 690 F. App'x. 366, 371–372 (6th Cir. 2017) (Seibert test applied only when the defendant was subject to custodial interrogation at his home prior to Miranda warnings). Seibert did not address the issue of police questioning during an investigative detention but dealt rather with true custodial questioning in violation of Miranda. Seibert is therefore distinguishable. See Johnson v. Warren, No. 20-1071, 2020 WL 8254336, at *3 (6th Cir. Sept. 1, 2020) (state court reasonably determined that Seibert did not apply to petitioner's case because petitioner was not in custody when he made the pre-Miranda statements: "Reasonable jurists would not debate that conclusion because Seibert's holding is based on custodial interrogation both before and after Miranda warnings."); Sturm v. Superintendent of Indian River Juv. Corr. Facility, 514 F. App'x 618, 625 n.2 (6th Cir. 2013) ("Because Sturm was not in custody when he first confessed, there was nothing improper in Warden's earlier failure to Mirandize that needed to be 'cured.' Seibert applies only to a statement given during prewarning custodial interrogation."); United States v. Courtney, 463 F.3d 333, 337 (5th Cir. 2006) (when defendant's first statement does not violate Miranda, Seibert test does not apply to a post-Miranda statement); United States v. Kiam, 432 F.3d 524, 531 (3d Cir. 2006) (same); United States v. Evans, No. 18-20421, 2019 WL 458165, at *7 (E.D. Mich. Feb. 6, 2019) ("Because the pre-Miranda questioning was non-custodial, the Seibert midstream Miranda warning test does not apply.").

Based on the foregoing, there was no reasonable probability that a motion to suppress based on an alleged Miranda violation would have succeeded in this case. Petitioner was not denied

effective assistance by his trial counsel's failure to move for the suppression of his statement on this basis. See Koras v. Robinson, 123 F. App'x 207, 210–212 (6th Cir. 2005).

Finally, Petitioner was not prejudiced by counsel's failure to move to suppress the confession, in light of the overwhelming evidence of Petitioner's guilt apart from his confession. See Crawley v. Curtis, 151 F. Supp. 2d 878, 885 (E.D. Mich. 2001) (state-court determination that counsel was not ineffective in failing to move to suppress statement that was taken in violation of Miranda was a reasonable application of Strickland, such that petitioner was not entitled to habeas relief, where there was evidence from which state court could reasonably find that petitioner was not prejudiced, given overwhelming evidence of his guilt apart from his statement). Petitioner is not entitled to habeas relief on his first claim.

Petitioner in his second claim argues that counsel was ineffective for failing to request an instruction that Petitioner's sexual assaults had to be the result of a voluntary act in order for the jury to convict him. Petitioner initially told the police that he committed the assaults while he was "sleeping" or "asleep." Petitioner argues that being asleep or sleepwalking rendered him incapable of recalling his actions. Petitioner claims that sexsomnia, sexual activity during sleep, is a recognized phenomenon and provides an affirmative defense to the charges against him. Petitioner notes that trial counsel argued this point to the jury but was ineffective in failing to request a jury instruction to support it.

The Michigan Court of Appeals rejected this claim:

> However, even viewing defendant's claim as one involving an involuntary act committed during sleep, we conclude that defendant has not demonstrated that counsel's performance was deficient, and, even if he had, he has not shown that there is a reasonable probability of a different outcome. Defense counsel's failure to request a non-standard jury instruction that defendant's sexual assault must be voluntary was not deficient as the evidentiary basis for giving such an instruction to the jury was lacking. Putting it bluntly, defendant retracted his initial claim that he was sleepwalking, a state during which he could not recall engaging in a sexual

> act. Instead, consistent with the victim's testimony, defendant admitted to numerous conscious sexual assaults to the police, in great detail, and to his mother. Moreover, consistent with the victim's testimony that daytime sexual assaults occurred, defendant confessed to a daytime sexual penetration regarding one of the two sexual penetrations charged in this case. Furthermore, again consistent with the victim's testimony, defendant admitted to numerous sexual penetrations or touchings in three states over an extended period. Defendant also admitted to being sexually aroused by the victim's touches and to previously instructing the victim on how to touch him sexually. Plus, defendant viewed several pornographic materials, including two involving sexual relations while "sleepwalking." Given all of this, counsel's request for an instruction would have been without factual support and failed. And, even if we agreed that defense counsel's failure to request such an instruction was deficient, we conclude that defendant has not met his burden of demonstrating that a different outcome at trial was reasonably probable for the same reasons we have just discussed.

Weld, 2020 WL 6110637, at * 7 (punctuation modified).

Another judge in this district rejected a claim that counsel was ineffective for failing to obtain and present an expert witness to testify about sleep disorders to present a defense that the habeas petitioner may have committed a sexual assault while asleep or unconscious and that therefore petitioner's criminal intent was negated. See Petush v. Renico, No. 2:05-cv-74918, 2008 WL 596833, at * 3 (E.D. Mich. Feb. 29, 2008). In rejecting the claim, the judge noted "that at least one other federal court has rejected a similar claim that counsel was ineffective for failing to explore an unconsciousness defense, by noting that such a defense 'is virtually never effective.'" Id. (citing Greenfield v. Gunn, 556 F.2d 935, 937 (9th Cir.1977)). The judge concluded: "[I]n light of the fact that the victim testified that Petitioner actually pulled his shorts down and began rubbing his penis against the victim's leg, Petitioner has failed to come forward with any evidence suggesting that the presentation of expert testimony on an unconsciousness defense might have resulted in a different outcome, so as to support a finding that trial counsel was ineffective." Id.

In the present case, Petitioner retracted his sleepwalking claim and admitted to the police and his mother that he had sexually assaulted the victim. Petitioner was able to provide specific

details of the sexual assaults, which would negate a finding that he was asleep at the time of the assaults. The victim testified that Petitioner appeared awake and alert during the sexual assaults. Several of the assaults took place during the day. Counsel was not ineffective for failing to request a voluntary-act instruction because there was no evidence to support a sleepwalking or sexsomnia defense. See, e.g., Cathron v. Jones, 77 F. App'x 835, 845 (6th Cir. 2003) (counsel was not ineffective in failing to request an accessory-after-the-fact jury instruction where the evidence did not support such an instruction). Petitioner is not entitled to relief on his second claim.

Petitioner lastly argues that even if the individual ineffective assistance of counsel claims do not merit relief, the cumulative effect of these errors entitles him to habeas relief.

The individual claims of ineffectiveness alleged by Petitioner are all essentially meritless. Petitioner cannot show that the cumulative errors of his counsel amounted to ineffective assistance of counsel. Seymour v. Walker, 224 F. 3d 542, 557 (6th Cir. 2000); Alder v. Burt, 240 F. Supp. 2d 651, 655 (E.D. Mich. 2003). Petitioner is not entitled to relief on his third claim.

For the reasons stated above, the Court denies the petition for writ of habeas corpus.

B. Certificate of Appealability and IFP

Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. 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). When a court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. See Slack v. McDaniel, 529 U.S. 473,

484–485 (2000). "A petitioner satisfies this standard by demonstrating that. . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). In applying that standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. Id. at 336–337.

Having considered the matter, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right with respect to any of his claims. Accordingly, a certificate of appealability is not warranted in this case.

Although this Court denies a certificate of appealability to Petitioner, the standard for granting an application for leave to proceed in forma pauperis (IFP) is a lower standard than the standard for certificates of appealability. Foster v. Ludwick, 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002) (citing United States v. Youngblood, 116 F. 3d 1113, 1115 (5th Cir. 1997)). While a certificate of appealability may be granted only if a habeas petitioner makes a substantial showing of the denial of a constitutional right, a court may grant IFP status if it finds that an appeal is being taken in good faith. Id. at 764–765; 28 U.S.C. § 1915(a)(3); Fed. R. App. 24 (a). "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. Foster, 208 F. Supp. 2d at 765. Although jurists of reason would not debate this 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.

V. CONCLUSION

For the reasons stated above, (i) the petition for writ of habeas corpus is denied, (ii) a certificate of appealability is denied, and (iii) Petitioner is granted leave to appeal in forma pauperis.

SO ORDERED.

Dated: April 17, 2024
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB JOHN WELD,

Defendant-Appellant.

UNPUBLISHED
October 15, 2020

No. 348373
Emmet Circuit Court
LC No. 18-004811-FC

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Defendant, Jacob John Weld, appeals by right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a); MCL 750.520b(2)(b) (sexual penetration of victim under the age of 13 and defendant 17 years of age or older). The penalty for this offense is life imprisonment "or any term of years, but not less than 25 years." MCL 750.520b(2)(b). The trial court sentenced defendant to two concurrent terms of 25 to 50 years' imprisonment. We affirm.

I. BACKGROUND

Defendant admitted that he sexually assaulted the 9-year-old victim during an approximately 90-minute long interview with law enforcement. Initially, defendant claimed that any sexual assault of the victim occurred while he was asleep, but, as the interview progressed, defendant admitted to repeatedly sexually assaulting the victim over a two-year timeframe in various states, including Michigan.

At trial, the victim's foster mother testified that the victim asked to speak to her privately and revealed that defendant had penetrated her and also rubbed himself on her. The victim testified that defendant sexually assaulted her approximately 30 times in Michigan. The victim also testified that defendant called her over to him and told her to pull down her pants. Sometimes, defendant assaulted her during the day. The victim opined that defendant "seemed like he knew what he was doing, [] his eyes were open, and he was talking to" her. The victim further testified that defendant told her not to tell anyone. Additionally, the victim testified that defendant earlier assaulted her in Las Vegas, Nevada; Oklahoma; and Texas.

The law enforcement officers, who had interviewed defendant, testified about the interview and their investigation. Defendant's video-recorded interview was played for the jury. Therein, in describing his most recent assault, defendant admitted that, at around 9 p.m., he woke up "horny," and thought that he told the victim, "[d]on't say anything to anybody." Defendant described lifting the victim's legs up over his hip after she removed her pajama bottoms and underwear. Defendant admitted that he penetrated the victim's vagina with his penis for about five minutes. On a drawing, defendant indicated the extent of his penetration.

Shortly after these admissions, one of the troopers informed defendant that he was under arrest. Defendant received and waived his *Miranda*[1] rights. Defendant ultimately confessed to three penetrations—one in Oklahoma and two in Michigan. Defendant further reported that he twice sexually assaulted the victim in Las Vegas. Defendant described these earlier instances as involving him rubbing his penis on the victim's vagina without penetration.

Defendant confessed that his first Michigan penetration occurred while the sun was still up. He stated that he became aroused when the victim touched him. Defendant further confessed that he had previously told the victim to touch him and had taught her to "rub" his private part.

At the conclusion of the interview, defendant provided a hand-written statement, reading: "It happened five times, once in Oklahoma; two in Vegas; two times in Michigan. First two times was rubbing; three times penetration." Defendant told one of the troopers that he "never meant for it to happen . . . . [I]t's hard to face I did it." However, defendant added that the other interviewing trooper was "right" and that defendant needed help.

During the interview, defendant also admitted to viewing pornography on his cellular telephone and he consented to a law-enforcement search of this device. Forensic investigation revealed that defendant visited a number of sites on Pornhub.com, including two involving sleepwalking. During the interview, defendant claimed that he was not into child pornography and that the sites he had viewed involved role-playing adults.

While in jail awaiting trial, defendant also made several telephone calls to his mother that were recorded and played for the jury. On the day of his arrest, defendant admitted to molesting or penetrating the victim, but claimed to be asleep. In his second call on that day, defendant admitted that "it's happened more than once[.]" Two days later, defendant told his mother: "It wasn't penetration every time. It wasn't 'til the last time when I was sleeping." Nevertheless, defendant again admitted that the assaults happened once in Oklahoma, twice in Nevada, and twice in his mother's home. In a subsequent call, defendant expressed his desire to plead guilty to lesser charges, and, if that failed, to proceed to trial " '[c]uz . . . either way I'm guilty . . . . Either way I'm guilty." Defendant later explained: "I admitted everything, which I shouldn't have done, but, you know, I'm honest. . . . And with me being honest that just made their job easier." Defendant also lamented the potential 25-year penalty he was facing, complaining that murderers received lesser terms of incarceration. Defendant added, "I didn't commit hardly anything, but, you know, I mean it's still heinous what I did." Defendant urged his mother to search for a good lawyer, one who would fight for him, and, again expressed his desire to plead guilty to lesser charges. In his

[1] *Miranda v Arizona*, 384 US 436; 16 L Ed 2d 694; 86 S Ct 1602 (1966).

final call, defendant remarked that the "Olympic guy," presumably referencing Dr. Larry Nassar, deserved the 25-year mandatory-minimum penalty for molesting "like 500 girls." Unlike defendant, who only "did it once."

Despite defense counsel's request, the prosecution was unwilling to offer the plea deal that defendant sought. The case proceeded to trial and the jury convicted defendant of two counts of CSC-I.

After defendant appealed, he filed a motion for remand, contending that his second court-appointed trial counsel was ineffective for failing to move to suppress his confession and for failing to request a jury instruction on the voluntary-act requirement given defendant's assertions that his assaults occurred during unconscious activity, namely, sleepwalking. This Court denied defendant's motion without prejudice. *People v Weld*, unpublished order of the Court of Appeals, entered November 13, 2019 (Docket No. 348373).

II. STANDARDS OF REVIEW

On appeal, defendant continues to assert that his trial counsel rendered ineffective assistance. When no *Ginther*[2] hearing has occurred, this Court's review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). And the question of whether a person was in custody, requiring a *Miranda* warning, is a mixed question of fact and law that this Court reviews de novo after review of the record. *People v Barritt*, 325 Mich App 556, 561; 926 NW2d 811 (2018).

III. ANALYSIS

We conclude that defendant's two ineffective-assistance-of-counsel arguments are both unavailing.

A. FAILURE TO SUPPRESS THE INTERVIEW

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). For a new trial to be warranted, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id.*

There is a "strong presumption that counsel's performance was born from a sound trial strategy." *Id.* at 52. A court must consider whether the strategic choices were made after an incomplete investigation and whether a choice was reasonable to the extent that reasonable professional judgment support the limitations on the investigation. *Id.* "[D]efense counsel is not required to make frivolous or meritless motions . . . ." *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

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

Defendant concedes that his interview was not custodial until the detective joined in. The small interview room at the state police post contained a round table that abutted a wall and two chairs. About thirty minutes lapsed with defendant admitting that it was possible that he had unknowingly sexually assaulted the victim as he slept. The trooper offered defendant an opportunity for a bathroom break as the trooper was going to get water; he also offered the same to defendant. At first, defendant declined the trooper's offer to use the restroom, but, on reconsideration, he used the facilities before voluntarily returning to the interview room alone. The detective brought in a third chair, sitting closer to defendant. It appears that the uniformed trooper and the detective were wearing holsters housing their service weapons. Defendant contends that the interview turned custodial as the detective's chair "blocked" the door, both troopers had weapons, and the detective's questioning was accusatory. As a result, defendant argues that the troopers were required to inform him of his *Miranda* rights. We disagree.

In *Miranda*, 384 US at 444, the United States Supreme Court held that the prosecution is not allowed to use any statements from a custodial interrogation unless procedural safeguards were used to secure the privilege against self-incrimination. Law enforcement must warn the defendant of his constitutional right against self-incrimination before beginning a custodial interrogation. *Barritt*, 325 Mich App at 561. When the defendant was not read his *Miranda* rights, the question becomes whether the defendant was in custody. See *id.* at 562. To determine whether the defendant was in custody, we consider the defendant's freedom of movement, *Barritt*, 325 Mich App at 562, and whether the environment of the interrogation was coercive, *id.* at 580-581. The defendant's freedom of movement is analyzed by considering the following five factors: (1) the location of the interview, (2) the duration of the questioning, (3) the statements made during the interview, (4) the presence or absence of physical restraints during the interview, and (5) whether the defendant was released after the questioning. *Id.* at 562-563. A court "must consider the totality of the circumstances when deciding whether an individual was subjected to custodial interrogation" and "no one circumstance is controlling[.]" *Id.* at 563. The determination of whether the defendant was in custody depends on the objective circumstances of the situation and not the subjective intent of law enforcement or the defendant. *Id.* at 568.

The first factor is the location of the interview. *Id.* at 562. There is no requirement that all interviews that occur at a police station require a *Miranda* warning. See *Oregon v Mathiason*, 429 US 492, 495-496; 97 S Ct 711; 50 L Ed 2d 714 (1977). Whether a person was transported to the police station by law enforcement can be relevant to whether the defendant was in custody. *Barritt*, 325 Mich App at 565-566. In *Barritt*, we noted that "[i]t is unlikely that a reasonable person would believe that they were free to terminate the interview and leave after being transported to the station in a marked vehicle, escorted into the building by armed police officers, and questioned by armed police officers who used an increasingly hostile tone." *Id.* at 568. We also noted that law enforcement's knowledge that the defendant did not have his own car and law enforcement's insistence that the defendant be driven to the police station in a police car supported finding that the defendant was in custody. *Id.*

The factor of location weighs against finding that defendant in this case was in custody. After the trooper called defendant, he arranged to come in for an interview. Defendant then drove himself to the state police post.

The duration of the questioning and the statements made during the interview are the next two factors to consider. *Id.* at 562. In *Barritt*, we agreed with the trial court's determination that a 90-minute interview was a neutral factor with regard to whether the interview was custodial. *Id.* at 569-570. The failure to tell the defendant that he is free to leave can contribute to finding that the interrogation was custodial. *Id.* at 570. However, in *People v Elliott*, 494 Mich 292; 833 NW2d 284 (2013), our Supreme Court held that law enforcement's failure to tell the defendant that he was free to leave when the interview took place in a jail library while the defendant was incarcerated was not dispositive or even compelling under the circumstances of that case. In *Barritt*, this Court distinguished *Elliott* because the defendant in that case was removed from a front lawn to the police station by law enforcement. *Barritt*, 325 Mich App at 570. We concluded that the statement factor weighed in favor of finding that the defendant was in custody. *Id.* This Court also considered the officer's statements and views during the interrogation to the extent that those views were manifested to the defendant and would have affected how a reasonable person would have understood whether he or she was free to leave. *Id.* at 571. In *Barritt*, we concluded that the accusatory nature of the questioning weighed in favor of determining that the interview was custodial. *Id.* at 573. We noted that law enforcement asked questions that law enforcement knew were reasonably likely to elicit incriminatory responses and the defendant's question about whether the interview was finished indicated that the defendant did not feel he was free to leave. *Id.* at 573-574. We also noted that law enforcement considered the defendant a suspect in the case as evidenced by the search warrant. *Id.* at 574.

The duration of the interview in this case does not weigh in favor of finding that defendant was in custody, and the statements do not either. Defendant's interview was approximately 90 minutes in duration, just like the interview in *Barritt*. Unlike the defendant in *Barritt*, however, the trooper interviewing defendant in this case told him from the onset that he was not under arrest and that he was free to leave at any time. Moreover, the detective testified that his method of interrogation did not involve yelling or raising his voice and our review of the interview videotape confirms this.

Whether the defendant was physically restrained and whether the defendant was released after the interview are two more factors to consider. *Id.* at 563. We have noted that, generally, the lack of the defendant being handcuffed weighs against finding that the defendant was in custody. *Id.* at 575. In *Barritt*, however, we held that the trial court did not clearly err by determining that the defendant was physically restrained even though the defendant was not handcuffed because the defendant was driven to the police station in a police car, the defendant was escorted to the police station by armed law enforcement officers, and the defendant was in the presence of armed law enforcement officers at all times. *Id.* at 575-578. The defendant's not being released after the interview also weighs in favor of finding that the interview was custodial. *Id.* at 579.

In this case, defendant was not physically restrained because he was not handcuffed, and unlike the defendant in *Barritt*, defendant was not escorted to the police station. And, as already mentioned, defendant was told at the onset of the interview that he was not under arrest and that he was free to leave at any time. Defendant set up the interview over the telephone and drove himself to the interview location. Defendant left the room to use the bathroom and voluntarily returned before being joined by the trooper and detective. Though both the trooper and detective appear to be wearing their service weapons, they remained holstered. And it appears that while the detective's chair was by the door, the door remained unlocked and defendant was aware from

what the trooper told him and his experience in leaving the room earlier that he retained the option to do so.

After considering whether the defendant's freedom of movement was restricted, whether there was a coercive environment must be considered. *Id.* at 580. Not all restraints on the defendant's freedom of movement create a custodial interrogation. *Id.* at 580-581. In *Barritt*, we determined that the same coercive pressures in play during the police station interview in *Miranda* existed in that case because the defendant was not free in any sense from the time law enforcement picked him up from the front lawn. *Id.* at 581-584. We noted that the defendant was always in the presence of an armed law enforcement officer, the defendant's dog was removed by animal control, and he was driven to the police station by law enforcement. *Id.* at 582-583. Additionally, we noted that the defendant did not arrange the interview's time, location, or tenor. *Id.* at 583. We further noted that the defendant was not told that he could leave the interview and that the interview became increasingly accusatory. *Id.*

Defendant in this case was not in a coercive environment because he arranged for his interview and was not subjected to the same consistently coercive and restrictive treatment as the defendant in *Barritt*. Defendant's contact with law enforcement initially occurred via telephone and he arranged an appointment to come in for the interview. Defendant drove himself to the post. Defendant was also told from the onset of the interview that he was free to leave at any time, and he was not restrained. The combination of these facts distinguishes this case from *Barritt*. We further reject defendant's arguments that the troopers wearing of their service revolvers, the location of the detective's chair, and the manner of the detective's questioning created a coercive environment. Moreover, we conclude that defendant's freedom of movement was not restricted, and because there was not a coercive environment, defendant would not have been entitled to have his statements after the detective entered the interview room suppressed.

Further, because defendant's argument that his confession should have been suppressed lacks merit, he cannot establish that counsel was ineffective for failing to file a motion to suppress it. Defense counsel is not required to make frivolous or meritless motions. *Knapp*, 244 Mich App at 386; *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998); *People v Mayes*, 202 Mich Ap 181, 189-191; 508 NW2d 161 (1993).

Moreover, for an ineffective assistance of counsel claim to succeed, a defendant must also show that a different result would be reasonably probable but for his defense counsel's error. *Trakhtenberg*, 493 Mich at 56. In cases in which there is relatively little evidence to support a finding of guilt, the magnitude of error required to find prejudice is less than where there is greater evidence supporting a finding of the defendant's guilt. *Id.*

In this case, even if defendant's confession was suppressed, there was still overwhelming evidence to convict defendant of two counts of CSC-I against the victim. The victim testified that defendant sexually assaulted her regularly—approximately thirty times. The victim also testified that defendant told her not to tell anyone what had happened, and that he called her over and told her to pull down her pants. The assaults occurred in the victim's grandmother's living room, on an air mattress that defendant used as a bed, even though a nearby pull-out couch served as a bed for the victim and her sister. Moreover, defendant repeatedly admitted to sexual assaulting the victim in recorded telephone conversations with his mother, and defendant told his mother that

there were five assaults in three separate states. Additionally, forensic analysis of defendant's cellular telephone revealed numerous pornographic sites accessed by defendant, demonstrating defendant's interest in sexual relations while "sleepwalking." Therefore, it is not reasonably probable that a different result would have obtained even if defense counsel successfully obtained suppression of defendant's confession after the detective joined the interview in light of defendant's numerous, untainted admissions.

B. FAILURE TO REQUEST VOLUNTARINESS JURY INSTRUCTION

Defendant contends that his trial counsel was ineffective for failing to request an instruction that defendant's sexual assaults had to be the result of voluntary act in order for the jury to convict him. We disagree.

"Failing to request a particular jury instruction can be a matter of trial strategy." *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013). However, "jury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *People v Thorne*, 322 Mich App 340, 347-348; 912 NW2d 560 (2017) (citation and quotation marks omitted).

Generally, to convict the defendant of a crime, both the *mens rea* and *actus reus* must be proven, but, when a crime is a strict-liability offense, only the *actus reus* must be proven. *People v Likine*, 492 Mich 367, 393; 823 NW2d 50 (2012). CSC-I with a child under 13 is a strict-liability crime. See *People v Cash*, 419 Mich 230, 241-242; 351 NW2d 822 (1984). "A defendant might defend against a strict-liability crime by submitting proofs either that the act never occurred or that the defendant was not the wrongdoer." *Likine*, 492 Mich at 393. "Additionally, at common law, a defendant could *admit* that he committed the act, but defend on the basis that the act was committed involuntarily.[3] *Id.* "Examples of involuntary acts that, if proved, provide a defense against the *actus reus* element of a crime include reflexive actions, spasms, seizures or convulsions, and bodily movements occurring while the actor is unconscious or asleep." *Id.* at 393-394 (footnotes omitted).

During the initial portion of his police interview and in certain later recorded conversations with his mother, defendant said he was "sleeping" or "asleep." Defendant explained that being asleep or sleepwalking rendered him incapable of recalling his actions. Defendant now asserts that sexsomnia, sexual activity during sleep, is a recognized phenomenon and provides an

[3] Counsel's decision regarding the defense to be pursued is also a matter of trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995) (determining that a counsel "faced with a choice between two defenses with significant evidentiary problems" may elect to pursue one over the other); *People v Strong*, 143 Mich App 442, 449; 372 NW2d 335 (1985). And a reviewing "court cannot conclude that merely because a trial strategy backfires, effective assistance of counsel is denied." *Strong*, 143 Mich App at 449.

affirmative defense to the charges against him. Defendant notes that trial counsel argued this point to the jury, but performed deficiently by failing to request a jury instruction to support it.[4]

The prosecution counters that sexsomnia is a novel defense; therefore, "defense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument." *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). On the other hand, defendant notes that sexsomnia has been recognized in other jurisdictions and cannot be novel in light of our Supreme Court's discussion of the pertinent common-law legal principles in *Likine*. We are inclined to agree with the prosecution that whether sexsomnia exists[5] and, if so, whether it should be permitted to serve as a defense to individual acts occurring over an extended period when a defendant is aware of his condition present novel legal questions in Michigan. Badawy, *Sexsomnia: Overcoming The Sleep Disorder Defense*, 44-Mar Prosecutor 20 (2010); *Sexsomnia: A Valid Defense To Sexual Assault?*, 12 J Gender, Race and Justice 687 (2009).

However, even viewing defendant's claim as one involving an involuntary act committed during sleep, we conclude that defendant has not demonstrated that counsel's performance was deficient, and, even if he had, he has not shown that there is a reasonable probability of a different outcome. Defense counsel's failure to request a non-standard jury instruction that defendant's sexual assault must be voluntary was not deficient as the evidentiary basis for giving such an instruction to the jury was lacking. Putting it bluntly, defendant retracted his initial claim that he was sleepwalking, a state during which he could not recall engaging in a sexual act. Instead, consistent with the victim's testimony, defendant admitted to numerous conscious sexual assaults to the police, in great detail, and to his mother. Moreover, consistent with the victim's testimony that daytime sexual assaults occurred, defendant confessed to a daytime sexual penetration regarding one of the two sexual penetrations charged in this case. Furthermore, again consistent with the victim's testimony, defendant admitted to numerous sexual penetrations or touchings in three states over an extended period. Defendant also admitted to being sexually aroused by the victim's touches and to previously instructing the victim on how to touch him sexually. Plus, defendant viewed several pornographic materials, including two involving sexual relations while "sleepwalking." Given all of this, counsel's request for an instruction would have been without factual support and failed. *Knapp*, 244 Mich App at 386. And, even if we agreed that defense counsel's failure to request such an instruction was deficient, we conclude that defendant has not

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[4] Counsel asked the jury to hold the prosecution to its burden of proof and examine the evidence to determine whether the sexual assaults occurred. Defense counsel argued that they did not because: (1) child victims are susceptible to others' influence, and, in this case, the victim increased the number of alleged assaults in Michigan from the two she initially reported to thirty, (2) the victim's medical examination was normal, despite the number and forceful nature of assaults she reported, and (3) defendant's confession to the police was unreliable. In one sentence, counsel mentioned that defendant maintained he was sleeping or "was in the process of thinking that this wasn't [the victim]."

[5] In 2014, the American Psychiatric Association added "sexsomnia" to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

met his burden of demonstrating that a different outcome at trial was reasonably probable for the same reasons we have just discussed.[6]

Affirmed.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford

[6] Defendant's cumulative-error argument is also unavailing. Cumulative error occurs when the cumulative effect of several errors creates sufficient prejudice to require reversal, even when the errors individually would not merit reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Cumulative error requires actual errors to have occurred, and those errors must undermine the reliability of the jury's verdict. *Id.* For the reasons discussed earlier in this opinion, no errors actually occurred in this case; therefore, the cumulative-error claims also fails.