

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 16-1213

SCOTT DAVID PERREAULT,
Petitioner - Appellant,

v.

WILLIE SMITH, Warden,
Respondent - Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:14-cv-11022—Marianne O. Battani, District Judge.

Argued: October 3, 2017

Decided and Filed: October 27, 2017

Before: CLAY, ROGERS, and SUTTON, Circuit
Judges.

COUNSEL

ARGUED: Edward F. Roche, ROPES & GRAY LLP,
Washington, D.C., for Appellant. Andrea M. Christen-
sen-Brown, OFFICE OF THE MICHIGAN ATTOR-
NEY GENERAL, Lansing, Michigan, for Appellee. ON
BRIEF: Edward F. Roche, Jonathan S. Klarfeld,
ROPES & GRAY LLP, Washington, D C., Alexandra L.
Roth, ROPES & GRAY LLP, New York, New York,
Justin G. Florence, ROPES & GRAY LLP, Boston, Mas-
sachusetts, for Appellant. Andrea M. Christensen-
Brown, OFFICE OF THE MICHIGAN ATTORNEY
GENERAL, Lansing, Michigan, for Appellee.

OPINION

SUTTON, Circuit Judge. In 2009, a Michigan jury convicted Scott Perreault of murdering his four-month-old daughter. He filed a habeas petition in federal court claiming that police failed to honor his request for counsel and that he received ineffective assistance of counsel at trial. The district court denied his petition. Because the state courts did not unreasonably apply the Supreme Court’s teachings in either area, we affirm.

I.

Perreault lived with his fiancée Jamie Newman and their four-month-old daughter Jenna Perreault. On the morning of September 2, 2008, Newman left Jenna at home with Perreault. At about 10:00 a.m., Perreault called 911 to report that Jenna had been injured. Police and paramedics arrived on the scene and found that Jenna had suffered a blunt-force trauma to the head. They rushed her to the hospital, where she died from her injuries two days later.

Perreault was indicted for first-degree felony murder and two counts of felony child abuse. At trial, he claimed that he had dropped Jenna while holding her in the kitchen, that he had fallen on top of her, and that she may have hit her head on an object in the kitchen as the two fell together. The State disputed this account, relying in part on the testimony of the emergency room doctor who treated Jenna, Dr. Matthew Deibel. Dr. Deibel testified that Jenna’s injuries could have been caused only by a narrow range of high-impact events, such as a high-speed car accident, a fall from several stories, or “a baseball bat to the head.” Based on this and other evidence, the State argued that Jenna’s injuries were caused by her head striking a blunt object at a high

speed. The jury found Perreault guilty of first-degree child abuse and first-degree felony murder. The court sentenced him to life in prison.

Perreault appealed to the Michigan Court of Appeals. His counsel argued that there was insufficient evidence to convict, and Perreault filed a supplemental brief on his own raising twenty-two additional claims, including claims that his statements to police should have been suppressed. The Court of Appeals affirmed. *People v. Perreault*, No. 293324, 2011 WL 1901994 (Mich. Ct. App. May 19, 2011). Mr. Perreault filed an application for leave to appeal the Court of Appeals decision to the Michigan Supreme Court, raising the same claims he had previously raised. *People v. Perreault*, 805 N.W.2d 191 (Mich. 2011). The Michigan Supreme Court denied the application because it was not “persuaded that the questions presented should be reviewed by this Court.” *Id.*

Perreault returned to the trial court and filed a motion for relief from judgment, arguing for the first time that he had received ineffective assistance of trial counsel. The trial court denied his claims, and the Court of Appeals denied leave to appeal. The Michigan Supreme Court also denied leave to appeal. *People v. Perreault*, 845 N.W.2d 122 (Mich. 2014).

Perreault filed a habeas petition in federal court. The district court denied relief but granted a certificate of appealability on two questions: (1) Whether Perreault’s statement during the police interrogation, “Well, then let’s call the lawyer then ‘cause I gave what I could,” constituted an unambiguous invocation of the right to counsel that required the police to stop questioning him? and (2) Whether Perreault’s trial counsel was

ineffective because he failed to challenge the state expert's testimony about the cause of Jenna's injuries?

II.

Under the Antiterrorism and Effective Death Penalty Act of 1996, federal courts may override state criminal convictions only if the state court unreasonably applied clearly established Supreme Court precedent or the conviction turned on unreasonable findings of fact. 28 U.S.C. § 2254(d). As for legal conclusions, the state court decision must be objectively unreasonable, not just wrong. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Right to Counsel. Perreault argues that police failed to honor his right to counsel after he requested an attorney during the interview. A suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). If the suspect invokes that right, police must stop questioning him until his attorney arrives or the suspect reinitiates discussion. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). In determining whether a suspect has invoked his right to counsel, we apply an objective standard, asking whether a reasonable police officer would have understood the suspect to be asking for an attorney. *Davis v. United States*, 512 U.S. 452, 458-59 (1994). The request must be unequivocal. *Id.* at 459. For instance, in *Edwards*, the Supreme Court found that the defendant's statement, "I want an attorney before making a deal," was an unambiguous request for counsel. *Edwards*, 451 U.S. at 479. Yet, in *Davis*, the Supreme Court found the defendant's statement, "Maybe I should talk to a lawyer," was not an unambiguous request for counsel. *Davis*, 512 U.S. at 462.

During Perreault's police interview, the examining officer said that his story was inconsistent, calling it "jacked up." *Perreault*, 2011 WL 1901994, at *9. Perreault responded, "Well, then let's call the lawyer then 'cause I gave what I could." *Id.* The officer noted, "That's fine," before Perreault added, "There's no reason for anybody to take me to jail." *Id.* The officer responded, "You getting a lawyer's not going to prevent you from going to jail," after which Perreault continued talking to the officer. *Id.*

The Michigan Court of Appeals found that Perreault did not unambiguously ask for an attorney. *Id.* In its view, his statements were "akin to negotiations." *Id.*

That is a plausible reading of Perreault's statement. A reasonable police officer could interpret "Well, then let's call the lawyer then 'cause I gave what I could" to mean something like "That's all I got; take it or leave it." Negotiation literature has a name for this tactic: threatening to resort to the "best alternative to a negotiated agreement," and it's recognized as one of the most commonly employed bargaining strategies. See Jay A. Hewlin, *The Most Overused Negotiating Tactic Is Threatening to Walk Away*, Harv. Bus. Rev. (Sept. 18, 2017), <https://hbr.org/2017/09/the-most-overused-negotiating-tactic-is-threatening-to-walk-away>.

One sees something similar at car dealerships. When a would-be car purchaser threatens to walk away, that's not because he wants to leave; it's because he wants the salesman to lower the price or otherwise sweeten the deal. When a child threatens to call Mom if his older sister refuses to return a favorite toy, the goal is not to call Mom. The goal is to convince the older sister to return the toy or at least to give it back at some point. The

threat works only if Mom is never called. So too of the threat: “Well, then, I will see you in court!” No one takes that as a request for litigation.

Consider federal regulatory schemes, which commonly allow private parties to negotiate deals with one another in the shadow of binding arbitration should they fail to reach agreement. *See, e.g.*, FIFRA, 7 U.S.C. § 136a; *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 573-74 (1985). Here too, we wouldn’t be surprised to hear, mid-negotiation, “Well, then let’s call the arbitrator then ‘cause I gave what I could.”

The point of these examples is not to show that Perreault’s statement could only be interpreted as a negotiating tactic. They merely show that the state court’s interpretation of the statement was a reasonable one.

Perreault claims that several circuit precedents prove that his statement amounted to an invocation of counsel. Most of the cases, however, did not find an unequivocal invocation. *Compare Rogers v. Kerns*, 485 F. App’x 24, 31 (6th Cir. 2012) (“I can’t write this with a lawyer or anybody[?]” was insufficient), *United States v. Delaney*, 443 F. App’x 122, 130 (6th Cir. 2011) (“I think I should talk to a lawyer, what do you think?” was insufficient), *Ledbetter v. Edwards*, 35 F.3d 1062, 1069-70 (6th Cir. 1994) (“it would be nice” to have an attorney was insufficient), *and Boles v. Foltz*, 816 F.2d 1132, 1135 (6th Cir. 1987) (a request for an attorney at a future preliminary hearing was insufficient), *with Kyger v. Carlton*, 146 F.3d 374, 376, 379 (6th Cir. 1998) (“I’d just as soon have an attorney [’]cause, you know—ya’ll say there’s been a shooting involved and that’s a serious charge” was sufficient).

This exercise misunderstands our role at any rate. Circuit precedents do not constitute “clearly established Federal law, as determined by the Supreme Court” and cannot provide the basis for relief under AEDPA. *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012).

Perreault adds that the Michigan Court of Appeals relied on his statements made after requesting counsel in order to determine that the earlier statement was ambiguous, in violation of *Smith v. Illinois*, 469 U.S. 91, 100 (1984). But that’s not what happened. While the court recognized that Perreault continued to speak to officers, it did so after noting that Perreault “never clearly requested to call an attorney or have an attorney present” and that his statements were “akin to negotiations.” *Perreault*, 2011 WL 1901994, at *9. Besides, habeas review requires us to consider what arguments or theories supported or *could have supported* the state court’s decision. See *Harrington*, 562 U.S. at 102; *Davis v. Carpenter*, 798 F.3d 468, 475 (6th Cir. 2015). And we have already explained how Perreault’s statement did not rise to an unequivocal request for counsel.

Perreault claims that the district court erred in treating the state court’s no-invocation ruling as a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). The distinction makes little difference here given the deference AEDPA demands for conclusions of law *and* fact. Still, we agree with Perreault that this case turns on the legal effect of his statements rather than a factual dispute over what they were. The question is whether the state court unreasonably applied clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). It did not.

Perreault asks us to remand his case to the district court to obtain a transcript of the police interview introduced in the state court proceedings. But the Michigan Court of Appeals opinion already recounts the relevant portion of the police interview and provides plenty of context to confirm the reasonableness of its conclusion. *See Perreault*, 2011 WL 1901994, at *9. In the absence of any inaccuracies in that account—and Perreault points to none—we see no reason to take that step. *See Clark v. Waller*, 490 F.3d 551, 556 (6th Cir. 2007).

Ineffective Assistance of Counsel. Perreault separately argues that his trial counsel provided ineffective assistance when he failed to cross-examine Dr. Deibel adequately about the scientific basis for his testimony. Success on this claim is not easy. Perreault must prove that his counsel’s performance was objectively deficient and that the deficiency prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It gets worse. On top of that, he must satisfy the Strickland requirements in the context of AEDPA’s deferential standard of review. We ask, then, not whether counsel’s actions were reasonable but whether there is any reasonable argument that counsel satisfied *Strickland*. *Harrington*, 562 U.S. at 105.

Although the state court rejected the *Strickland* claim through a procedural-default ruling, the court addressed the alleged deficiency on the merits as part of its ruling, meaning AEDPA deference applies to the *Strickland* claim. *See Brooks v. Bagley*, 513 F.3d 618, 624-25 (6th Cir. 2008). The state court found that trial counsel’s line of questioning sufficed to constitute effective assistance. That was not an unreasonable application of Supreme Court precedent. And because trial counsel’s performance was not deficient, appellate counsel’s decision

not to raise an ineffective assistance of counsel claim does not constitute the cause and prejudice required to overcome procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991).

Defense counsel, to be sure, did not cross-examine Dr. Deibel on the medical basis for his opinion that Jenna's injuries could not have been caused by a fall even if Perreault landed on top of her. But this was a reasonable strategic decision. Another prosecution witness, Dr. Kanu Virani, the forensic pathologist who performed Jenna's autopsy, testified that it was possible for her injury to have been caused by a fall followed by a 150-pound body landing on top of her, although he did not think that was the case here. In the face of conflicting prosecution witness testimony, it is within the wide range of reasonable professional assistance to leave well enough alone and avoid the risk of bolstering adverse testimony.

Dr. Virani, it is true, testified after Dr. Deibel at trial. But Dr. Virani acknowledged at the preliminary examination that Jenna's injuries could have been caused by a fall onto a hard surface, if an adult fell on top of her. Defense counsel thus had good reason to know that Dr. Virani would provide conflicting testimony later in the trial. But even if that was not the case, his performance did not violate the Sixth Amendment. *Strickland* requires that counsel exercise "such skill and knowledge as will render the trial a reliable adversarial testing process" considering all of the circumstances. *Strickland*, 466 U.S. at 688. In other words, we conduct a contextual inquiry in which counsel's individual decisions are viewed in light of the entire trial and not in a vacuum. Regardless of what Perreault's trial counsel subjectively knew or didn't know at a given moment, it makes little

sense to evaluate the deficiency of his cross-examination without considering what followed.

Hoping for a different conclusion, Perreault invokes *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006) and *Smith v. Jenkins*, 609 F. App'x 285 (6th Cir. 2015). These cases do not constitute clearly established Supreme Court precedent. Nor do they help Perreault even on their own terms. In *Higgins*, we found defense counsel deficient for failing to cross-examine the key eyewitness at all. *See Higgins*, 470 F.3d at 633. Here, defense counsel questioned Dr. Deibel about Jenna's treatment in the emergency room and his qualifications relative to a forensic pathologist, just not the scientific basis for his opinions.

In *Smith*, defense counsel fell short of reasonable professional standards for failing to "conduct any investigation" into the state of the victim's health. *See Smith*, 609 F. App'x at 292. But we noted that a competent defense counsel may well conduct such an investigation and decide not to present expert testimony at trial. *See id.* at 292-93. *Smith* turned principally on defense counsel's lack of diligence in preparation for trial, not his strategic decision making at trial. In this case, no evidence supports the allegation that defense counsel failed to conduct a reasonable investigation into alternative causes for Jenna's injury. *See Burt v. Titlow*, 134 S. Ct. 10, 17 (2013).

Perreault ends with a different tack. He asks us to remand his *Strickland* claim to the district court to conduct an evidentiary hearing and review his claim again. But in reviewing whether a state court unreasonably applied Supreme Court precedent, a habeas court generally must take the state court record as it finds it. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Perreault

does not allege that his claim relies on a new rule of constitutional law or a factual predicate that could not have been previously discovered. 28 U.S.C. § 2254(e)(2). That leaves us with no ground to supplement that record or to substitute the state court's judgment with our own.

For these reasons, we affirm.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-1213

Judgment entered October 27, 2017

SCOTT DAVID PERREAULT,
Petitioner - Appellant,

v.

WILLIE SMITH, Warden,
Respondent - Appellee.

Before: CLAY, ROGERS, and SUTTON, Circuit
Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the
district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is OR-
DERED that the judgment of the district court is AF-
FIRMED.

ENTERED BY ORDER
OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

U.S. Const. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Section 2254 of Title 28 of the U.S. Code provides in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:14-cv-11022
Hon. Marianne O. Battani

SCOTT DAVID PERREAULT,
Petitioner,

v.

CATHERINE S. BAUMAN,
Respondent.

AMENDED OPINION AND ORDER DENYING
AMENDED PETITION FOR WRIT OF HABEAS
CORPUS, GRANTING A CERTIFICATE OF AP-
PEALABILITY WITH RESPECT TO PORTIONS
OF PETITIONER'S SECOND AND THIRD
CLAIMS, AND DENYING PETITIONER'S MO-
TION TO STAY

(Signature Date Corrected)

This is a habeas case under 28 U.S.C. § 2254. Scott Perreault, ("Petitioner"), was convicted in the Saginaw Circuit Court after a jury trial of first-degree felony murder, Mich. Comp. Laws §750.316, and first-degree child abuse. Mich. Comp. Laws §750.136b(2). He was sentenced to life imprisonment for the murder conviction and 140 months-to-15 years for the child abuse conviction. The amended petition raises four claims: (1) there was insufficient evidence presented at trial to sustain Petitioner's convictions, (2) Petitioner was denied the effective assistance of trial counsel, (3) Petitioner's

rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981) were violated, and (4) Petitioner was denied the effective assistance of counsel during his direct appeal for the failure to raise his second and third habeas claims. The Court finds that Petitioner's claims are without merit. Therefore, the petition will be denied. The Court will, however, grant Petitioner a certificate of appealability with respect to parts of his second and third habeas claims. Lastly, Petitioner's recently filed motion to stay the case will be denied.

I. Background

This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, 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's convictions arise from the death of his four-month-old daughter, who died from a severe head injury while in defendant's care. The evidence showed that the child died from blunt force head trauma. Her skull was fractured and, according to medical testimony, the nature and severity of the injury indicated that her head struck a hard object while either the head or the object were traveling at a high velocity. Defendant did not dispute that the child was injured while in his care. He gave numerous different accounts of the child's injury to the police. His accounts changed as the police confronted him with new information

about the child's condition and circumstances. At trial, defendant testified that he was holding the child while speaking on the telephone and as he went to hang up the phone, the child began to fall from his arms. He tried to catch her, but then they both fell to the floor. Defendant claimed that the child may have hit a stove as she fell, but he was not certain. Defendant did not immediately seek medical help because the child did not initially exhibit any symptoms of distress. The prosecution presented medical evidence establishing that the child's injury and condition were inconsistent with a fall in the manner described by defendant and refuting his claim that the child did not show immediate signs of distress.

People v. Perreault, No. 293324, 2011 WL 1901994, at *1 (Mich. Ct. App. May 19, 2011).

Further facts relevant to the parties' arguments will be discussed in more detail below.

Following his conviction and sentence, Petitioner filed a claim of appeal in the Michigan Court of Appeals. His appellate counsel filed a brief on appeal that raised a single issue:

I. There was insufficient evidence at trial to prove beyond a reasonable doubt that the defendant committed child abuse in the first degree by knowingly or intentionally causing serious physical harm to the minor child with specific intent required to commit felony murder.

Petitioner also filed a supplemental pro se brief, raising an additional twenty-two claims, including claims that his statements to police should have been suppressed and that his appellate counsel was ineffective. The Michigan Court of Appeals affirmed in an unpublished opinion. *Perreault*, 2011 WL 1901994, at *1, 12.

Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims he raised in the Michigan Court of Appeals. The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed by the Court. *People v. Perreault*, 805 N.W.2d 191 (Mich. 2011) (table).

Through present counsel, Petitioner then filed motion for relief from judgment, raising the following claims:

- I. Perreault is entitled to relief from judgment where defense counsel violated his Sixth and Fourteenth Amendment rights to the effective assistance of counsel.
- II. Perreault is entitled to relief from judgment because he was denied his right to the effective assistance of counsel on his direct appeal.

The trial court denied the motion for relief from judgment in an opinion dated April 22, 2013. ECF No. 10-22. The court briefly discussed the merits of both of Petitioner's claims, and found that trial counsel was not ineffective in the manner he challenged the prosecution experts regarding cause of death. *Id.*, p. 3. The court also found that appellate counsel was not ineffective for

failing to raise a separate challenge regarding the qualification of two prosecution witnesses to testify as expert witnesses because arguments related to the witnesses were presented on appeal. *Id.* The Court went on to find that Petitioner had therefore not demonstrate cause for failing to raise these issues on direct appeal. *Id.*

Petitioner then filed an application for leave to appeal in the Michigan Court of Appeals. The Michigan Court of Appeals denied the application “for failure to establish entitlement to relief under Michigan Court Rule 6.508(D).” *People v. Perreault*, No. 316188 (Mich. Ct. App. Nov. 1, 2013). Petitioner applied for leave to appeal this decision to the Michigan Supreme Court, but his application was also denied under Rule 6.508(D). *People v. Perreault*, 845 N.W.2d 122 (Mich. 2014) (table).

II. Standard of Review

28 U.S.C. § 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.

“A state court’s decision is ‘contrary to’ . . . clearly established law if it ‘applies a rule that contradicts the governing law set forth in [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.’” *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (per curiam), quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (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 (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 (2011), quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (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. . . . As a condition for obtaining habeas corpus from a federal court, a 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 786-87 (internal quotation omitted).

To obtain relief under § 2254(d)(2), a petitioner must show an unreasonable determination of fact and that the resulting state court decision was “based on” that unreasonable determination. *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2012). However, a federal habeas court must presume the correctness of state court factual determinations. See 28 U.S.C. § 2254(e)(1). A petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

III. Analysis

A. Sufficiency of the Evidence

Petitioner first asserts that there was insufficient evidence presented at his trial to sustain his convictions. Specifically, he asserts that there was no motive shown by the prosecution for Petitioner to murder his infant daughter. He asserts that the death was the result of his negligent accident, and his various contradictory statements to the police are explained by the fact that he was trying to hide his negligent conduct. He argues there was insufficient evidence presented to demonstrate beyond a reasonable doubt the elements of first-degree child abuse which require the knowing or intentional infliction of serious harm to a child. See Mich. Comp. Laws § 750.136b(2). Respondent counters that the Michigan Court of Appeals reasonably rejected the claim in light of clearly established Supreme Court law, and therefore Petitioner has not demonstrated entitlement to relief under 28 U.S.C. § 2254(d).

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). On direct review, review of a sufficiency of the evidence challenge must focus on whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Petitioner faces a steep climb to establish that the state court’s discussion of the evidence unreasonably applied the *Jackson* standard. “Two layers of deference apply to habeas claims challenging evidentiary sufficiency.” *McGuire v. Ohio*, 619 F.3d 623, 631 (6th Cir. 2010) (citing *Brown v. Konteh*, 567 F.3d 191, 204-05 (6th Cir. 2009)). First, the Court “must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Brown*, 567 F.3d at 205 (citing *Jackson*, 443 U.S. at 319). Second, if the Court were “to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, [the Court] must still defer to the state appellate court’s sufficiency determination as long as it is not unreasonable.” *Id.* The *Jackson* standard is “exceedingly general,” and therefore Michigan courts are afforded “considerable leeway” in its application. *Davis v. Lafler*, 658 F.3d 525, 535 (6th Cir. 2011).

The Michigan Court of Appeals rejected Petitioner’s claim as follows:

Defendant argues through both his appellate attorney and in a pro se Standard 4 brief [n 2. Filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4] that the evidence was insufficient to convict him of either first-degree child abuse or felony murder because the evidence showed, at most, that the child was injured in an accidental fall and, accordingly, was insufficient to prove that he knowingly or intentionally caused a serious injury to the child. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v. Hammons*, 210 Mich. App. 554, 556 (1995). An appellate court must determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the charged crimes. *People v. Wolfe*, 440 Mich. 508, 513-514 (1992), amended 441 Mich. 1201 (1992). “All conflicts in the evidence must be resolved in favor of the prosecution.” *People v. Williams*, 268 Mich. App. 416, 419 (2005). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *Id.* Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of a crime. *People v. Abraham*, 234 Mich. App. 640, 656 (1999).

As explained in *People v. Carines*, 460 Mich. 750, 758-759 (1999).

[t]he elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316]. [Citation omitted.].

First degree child abuse is one of the enumerated felonies for felony murder. MCL 750.316(1)(b).

MCL 750.136b(2) provides that “[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.” To prove intent for first-degree child abuse, the prosecution must show that the defendant wither intended to cause serious physical or mental harm to the child or knew that such harm would be caused by his or her actions. See *People v. Maynard*, 470 Mich. 289, 295-296 (2004). MCL 750.136b(1)(f) defines “[s]erious physical harm” as “any physical injury to a child that seriously impairs the child’s health or physical well-being, including, but not limited to brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.”

Defendant's sufficiency argument is principally based on the credibility of his account of the child's injuries, namely, that the child was injured in an accidental fall. However, the credibility of defendant's account was undermined by evidence that he gave numerous conflicting versions of how the child was injured and that his explanations changed as he received new information about the child's circumstances and condition. Further, the prosecution offered medical testimony that the child's injuries were not consistent with an accidental fall in the manner described by defendant. The medical evidence showed that the child suffered a skull fracture of such severity that it could only have been caused by the child's head striking a hard object while either the head or the object was moving at a high velocity. Although defendant testified at trial that the child may have struck her head on the edge of a stove as she fell and that he also stumbled and fell on the child, that account was inconsistent with defendant's initial explanations to the police. Medical evidence also showed that the child did not have any outside skin wounds or bruising on her back or torso, which would have been expected if the child had fallen in the manner described by defendant. The credibility of defendant's testimony was for the jury to resolve.

The evidence showed, and defendant did not dispute, that he was the only person who was caring for the child at the time she was in-

jured. Given defendant's changing explanations for the child's injury, that defendant's explanations were not consistent with the medical evidence, and that the medical evidence showed that the child's skull fracture was caused by the child's head striking a hard object while either the head or the object was moving at a high velocity, a reasonable juror could have found beyond a reasonable doubt that defendant knowingly or intentionally caused serious physical harm to the child. Accordingly, there was sufficient evidence of defendant's intent to support his conviction of first-degree child abuse.

Defendant also argues that there was insufficient evidence of malice to support his felony murder conviction. Again, however, the medical evidence concerning the nature and severity of the child's injury, which was inconsistent with an accidental fall, was sufficient to enable the jury to find beyond a reasonable doubt that the child died from an act by defendant that was intended to do great bodily harm or at least to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. Thus, there was sufficient evidence of malice to support defendant's felony-murder conviction.

Perreault, 2011 WL 1901994, at *1-3.

At root this case was based on circumstantial evidence. Petitioner was left at home to care for a perfectly healthy baby, and a few hours later she died as the result

of a traumatic head injury. The only real question for the jury was whether the injury was caused by the accidental or negligent conduct of Petitioner or whether he intentionally caused it. Other than Petitioner's changing accounts of what occurred there was no direct evidence presented at trial indicating how the victim was injured. Instead, the prosecutor relied on the expert testimony of the emergency room physician and medical examiner to prove that the injury was too violent and required too much force to have been produced by accident or negligence.

Dr. Matthew Deibel, the emergency room physician, testified that Petitioner's story of having dropped the victim on her head did not match the injuries he observed. Dr. Deibel testified that she was "one of the most significantly injured children" he had seen. Tr. 5/13/2009, pp. 39-40. Her injuries were akin to being thrown from a car in a high-speed accident or being dropped from a high elevation. Id. at 40. He testified that a drop of three feet does not cause the type of damage he observed. Id. at 41.

Dr. Deibel testified that he performed a CAT scan that showed that the victim had multiple areas of bleeding inside her brain. Id. at 44. He indicated that the areas of the bleeding indicated a "coup-contre-coup," meaning the initial hit was so forceful that the brain bounced inside the skull and hit the other side as a result of the initial hit. Id. at 44-45. Dr. Deibel opined that there was no way the victim was injured by a fall onto linoleum or carpeting-even if someone fell on top of her after the fall. Id. at 60-61. Rather, the injuries required speed and a forceful blow. Id. at 61-62.

Dr. Kanu Virani, the forensic pathologist, opined that the cause of death was blunt force head trauma. Id.

at 84-85. He found bleeding on the outside of the skull and on both sides of the brain. Impact areas were found on the left and on the right side of the head. Tr. 5/15/04 (A.M.), pp. 5-6. A skull fracture, mostly on the right side, ran through the skull which caused the brain to hemorrhage. Id. at 6-7, 9.) Another fracture intersected just below the first one. Id. at 19. In Virani's opinion, this fracture could only have occurred from the baby's head moving at a very fast speed or if some object was moving toward the head at a quick speed. Id. at 8-9. The impact would have been at a high velocity. Id. at 7-8. Such a fracture was not possible by dropping the baby from three to four feet onto a carpeted surface or onto linoleum. Id. at 8-9. The impact would have been possible by swinging the baby at a high velocity and hitting the right side of the head onto a surface. Id. at 20.

Dr. Virani did testify, however, that the fracture could have been incurred if the baby and a 150-pound man fell to the ground with the baby's head striking an open stove drawer—but only so long as the surface in question could cause the T-shaped fracture, and he had no such information here. Id. at 24. But, he also clarified that had that been the case, the baby's torso would have shown an injury if the adult fell on top of her, and he did not see any such injuries. Id. at 35.

In analyzing the sufficiency of the evidence, “[i]t is well-established that circumstantial evidence alone can be sufficient to support any burden of proof, even where, as in a matter of substantive criminal liability, the prosecution's proof must be beyond a reasonable doubt.” *United States v. Jones*, 31 F.3d 1304, 1316 (4th Cir. 1994); see also, *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984). “[C]ircumstantial evidence is intrinsically as probative as direct evidence even where the conviction

rests solely upon circumstantial evidence.” *United States v. Taylor*, 599 F.2d 832, 838 (8th Cir. 1979) (citing *Holland v. United States*, 348 U.S. 121 (1954)). As the Supreme Court explained in *Holland*:

Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland, 348 U.S. at 140.

The most Petitioner can say here is that Dr. Virani did not convincingly rebut Petitioner’s final version of events—that he fell on the victim whose head hit an open oven door. It is well established, however, that the prosecution’s evidence need not rule out every hypothesis other than Petitioner’s guilt to be sufficient. See *Jackson*, 443 U.S. at 326. Any arguable lack of medical certainty does not render the evidence insufficient. *United States v. Abdelhaq*, 246 F.3d 990, 994 (7th Cir. 2001). It is enough that the prosecutor’s “hypothesis was far more probable in the circumstances than” Petitioner’s hypothesis. *Id.*; see also, *Williams v. Stovall*, No. 06-15386, 2009 U.S. Dist. LEXIS 133482, 2009 WL 1212980, at *11 (E.D. Mich. Apr. 29, 2009) (Battani, J., adopting report of Komives, M.J.).

In light of the testimony of Drs. Deibel and Virani, it was at least reasonable for the Michigan Court of Appeals to conclude that sufficient evidence was presented to sustain Petitioner's conviction. Both doctors ruled out Petitioner's innocent explanations, and testified to the type of forceful, violent motion required to cause the injury. Their testimony allowed the jury to infer beyond a reasonable doubt that Petitioner acted with the requisite mental state for first-degree child abuse and first-degree murder. Moreover, the jury could have easily disregarded Petitioner's trial testimony beyond a reasonable doubt based on the fact that he repeatedly changed his story about how the incident occurred.

In any event, as the Supreme Court has explained, the *Jackson* standard does not permit "fine-grained factual parsing" of the evidence by a reviewing court, *Coleman*, 132 S. Ct. at 2064, nor does it permit this Court to reweigh the conflicts in the evidence or assess the credibility of the witnesses. The trier of fact was free to draw any reasonable inferences from the evidence, and to resolve the conflicts in the evidence in favor of the prosecution. In light of the expert medical testimony the jury's verdict was not "so insupportable as to fall below the threshold of bare rationality." *Coleman*, 132 S. Ct. at 2065. It therefore follows that the Michigan Court of Appeals's rejection of this claim was reasonable.

B. Ineffective Assistance of Trial Counsel

In his second claim, Petitioner's asserts that he was denied the effective assistance of trial counsel. Specifically, Petitioner asserts that his counsel was ineffective for failing to challenge on cross-examination the expert witness testimony that the injuries suffered by the victim could only have been caused by a high-speed impact

inconsistent with Petitioner's explanation of what happened. Petitioner also asserts that his counsel should have objected to allowing Dr. Deibel and paramedic Yale Miller being allowed to testify as experts on child-abuse-death issues. Petitioner also argues that his counsel failed to object to various evidentiary rulings by the trial court. Petitioner additionally asserts that his counsel was ineffective for failing to object to prosecutorial misconduct. Finally, Petitioner asserts that his counsel should have requested an instruction on voluntary manslaughter.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test for determining whether a habeas petitioner's counsel was ineffective. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel guaranteed by the Sixth Amendment. *Id.* at 687. Second, the petitioner must establish that counsel's deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial. *Id.*

With respect to the performance prong, a petitioner must identify acts that are "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court's scrutiny of counsel's performance is viewed through a highly deferential lens. *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. And it is the petitioner who bears the burden of overcoming the presumption that his counsel's actions constituted sound trial strategy. *Id.* at 689.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* “On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result.” *Id.* at 686.

Because the state trial court rejected this claim on the merits when it denied his motion for relief from judgment, however, it is beyond the scope of review for this Court to evaluate Petitioner’s claim de novo under the *Strickland* standard. The issue here is much more narrow. The question is whether the conclusion reached by the state court falls within the bounds of reasonable adjudications of Petitioner’s claims — a substantially higher threshold. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Indeed, “because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Knowles*, 556 U.S. at 123.

Because of this doubly deferential standard, the Supreme Court has indicated that:

Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). 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. at 105.

1. Failure to Adequately Challenge Expert Witnesses

Petitioner first asserts that his trial counsel inadequately challenged the evidence presented regarding the amount of force necessary to cause the victim's injuries. He points to a 1998 study indicating that a young child suffering from fatal head trauma can appear lucid for more than twenty-four hours in 25% of cases prior to death. Petitioner asserts his counsel could have used this information to rebut Dr. Deibel's testimony that the victim's injuries would have been apparent to Petitioner and he would have called for help sooner if he had accidentally injured the victim. Petitioner also refers to an article in the American Journal of Forensic Medicine and Pathology, in which the author, John Plunkett, claims to have done observational studies and performed bio-mechanical analysis indicating that a fall from short distances by a young child can produce fatal brain injuries.

The state trial court denied this claim on the merits as follows:

Defendant argues that [trial] counsel made no challenge to Dr. Deibel's testimony that the child's injuries were consistent with a high speed accident or extremely high drop. [] Trial counsel's inquiry as to whether or not Dr. Deibel received information that the Defendant had fallen on top of the child was sufficient enough to rebut the Doctor['s] testimony that the injuries on the child were consistent which a high speed accident or extremely high

drop.[] A fully grown man falling on top of an infant is similar to the impact of [an] extremely high drop because the child could have been crushed by the weight of the adult's body instead of the impact of the ground. Therefore, this line of questioning was sufficient to avoid ineffective assistance.

Order Denying Motion for Relief From Judgment, p. 3.

This opinion is brief and not entirely responsive to Petitioner's claim. Nevertheless, in conducting the inquiry under §2254(d) as to whether the state court adjudication was reasonable, the Court is not limited to an examination of the rationale employed by the state court. Deference must be given even in cases "where the state court's reasoning is flawed or abbreviated." *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009). Pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Richter*, 131 S. Ct. at 786.

There was no evidentiary hearing held in the state court on this claim, nor did Petitioner make any evidentiary proffer as to how the medical studies he refers to apply to the specific facts of this case. This absence of a record works against him. For example, it is completely unknown whether counsel was aware of the proposed line of defense but had justifiable reasons to discard it, or whether expert witnesses exist who would have testified in favor of Petitioner along the lines suggested by these articles, or any number of other things. Nor has

Petitioner provided this Court with any affidavits or offers of proof applying the theories espoused in these articles to the specific injuries suffered by the victim in this case.

The Court notes the importance that the skull fractures had on the prosecution experts' opinions that the a high speed impact caused the injuries. Dr. Virani conceded that a head injury is possible by a drop of four feet, but he specifically dismissed the idea that the skull fracture he observed in this case could be caused by such a short drop. Tr. 5/15/04 (A.M.), p. 8. It could be the case that the injuries suffered by the victim here were so severe, that even experts agreeing with the principles of the Plunkett article would find that it did not apply to this case. Indeed, for all the record shows, defense counsel did explore this line of defense, but he found that it did not apply to the particular facts of this case. These unknowns prove fatal to Petitioner's claim.

In *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388 (2011), the Supreme Court held that where a habeas claim has been decided on the merits in state court, as here, a federal court's review under 28 U.S.C. § 2254(d)(1)—whether the state court determination was contrary to or a involved an unreasonable application of established federal law—must be confined to the record that was before the state court. *Id.* at 1398. And here there is simply no record evidence that Petitioner's trial counsel did not take reasonable measures to challenge the prosecution experts' opinions on the grounds now suggested by Petitioner. And because the trial court rejected Petitioner's claim on the merits, this Court is foreclosed under *Cullen* from allowing Petitioner to expand the record here. It must be recalled that counsel is presumed to have rendered effective assistance of counsel

under *Strickland*. 466 U.S. at 689. Therefore, Petitioner bore the burden of demonstrating that counsel performed deficiently by failing to explore this avenue of defense, yet he made no such evidentiary proffer to the state courts, nor does he make one here.

Petitioner's reference to the dissenting opinion in *Cavazos v. Smith*, 132 S. Ct. 2, 10 (2011), is unavailing. In that case, Justice Ginsberg wrote about the growing doubt in the medical community that shaking a baby alone can be sufficient to produce fatal injuries. First, Petitioner is relying on a dissenting opinion from a case in which habeas relief was denied. More importantly, even according to the dissenting opinion, the growing problem is specifically with shaken baby syndrome—which Justice Ginsburg's citations contrast with cases of impact injuries, as the victim suffered in this case. *Cavazos* may show that there were avenues of attack if this was a case of shaken baby syndrome, but here the victim suffered from multiple skull fractures as well as brain injuries.

It is one thing to find support for a theory that short falls by an infant can cause a subdural hematoma and retinal hemorrhages, or that shaking alone is not enough to cause death without evidence of further physical injury. But here the victim's skull was fractured in multiple locations. Petitioner has not come close to demonstrating that the medical literature cited in his brief or in *Cavazos* has any application to the facts of this case. Again, for all the record shows, defense counsel investigated this line of defense and reasonably found that it was inapplicable to the victim's injuries and would have been rebutted by the prosecution's experts.

The recent case of *People v. Ackley*, 497 Mich. 381 (2015), cited by Petitioner in his most recent filing, reinforces the evidentiary shortcomings of his claim. In that case the Michigan Supreme Court found that the defendant was denied the effective assistance of counsel for failing to properly challenge expert testimony in a shaken baby syndrome case. But unlike the present case, the defendant had evidentiary support for his claim. He had developed a testimonial record in the state court regarding his counsel's inadequate preparation for the expert testimony. His counsel testified that he had been given the name of an expert witness who may have supported the defense theory, but he failed to adequately explain why he discontinued that line of inquiry. The defendant also developed a record regarding the dispute in the medical community regarding shaken baby syndrome and its specific applicability to his case. He did this by presenting an evidentiary proffer in the form of an affidavit from Dr. Werner Spitz that the victim's injuries were consistent with an accidental mild impact. In other words, he made the factual showings in state court necessary to sustain his claim.

Here, by contrast, there is nothing in the record that compelled the state court to find that Petitioner overcame the presumption of effective assistance. The record is totally silent on what Petitioner's trial counsel did to prepare for the prosecutor's expert, and it is totally silent on whether there even existed a viable line of attack given the nature of the victim's injuries. The Court notes that in *Ackley* the injury involved blunt force trauma or shaking which resulted in bruising. 497 Mich. at 387. There is no indication that it involved the sort of severe skull fractures present in this case.

Given the record before the state trial court, and given Petitioner's complete lack of sufficient evidentiary proffer, the trial court's decision rejecting Petitioner's claim was not objectively unreasonable.

2. Failure to Challenge Witnesses' Qualifications

Petitioner next asserts that his counsel should have challenged Dr. Deibel and paramedic Yale Miller's qualifications to testify as experts on child-abuse death causation.

Dr. Deibel testified that he had been working in the field of emergency medicine for several years and had seen at least 4,000 children over the course of his career. Tr. 5/13/09, pp. 34-35, 39-40. He testified that he sees "kids all the time that get dropped" because it's not "too uncommon." Id. at 40. In Dr. Deibel's opinion, the victim was not exhibiting symptoms similar to dropped children, but rather exhibited as one that had suffered from a higher impact incident. Id. Dr. Deibel testified that he had the education, knowledge and extensive experience treating children who had been dropped at a short distance and those that had highspeed impacts and was able to tell the difference between the two. Id. at 39-46. Accordingly, Petitioner has failed to show that had his counsel objected to Dr. Deibel's qualifications, that the objection would have been granted. Counsel cannot be deemed deficient for failing to make a meritless objection. *United States v. Harris*, 204 F.3d 681, 683 (6th Cir. 2000).

With respect to Yale Miller's testimony, the record reveals that defense counsel did, in fact, lodge an objection when Miller testified about the injuries he saw when children "take a fall from a height of 4 feet." Tr. 5/13/09, p. 100. Counsel objected that Miller was not qualified to

give such testimony without a background in pathology. *Id.* But the trial court disagreed, finding that Miller had more expertise than a lay person based on his training in EMS medicine and his treatment of children with similar injuries. *Id.*, at 100-101. Accordingly, Petitioner's argument with respect to Miller is not well founded in the record.

3. Failure to Raise Evidentiary Objections

Petitioner next claims that his counsel failed to object to evidentiary rulings made by the trial court. He claims objections should have been made with respect to 1) evidence of prior acts of domestic violence by Petitioner, 2) admission of the autopsy photos, 3) evidence that Petitioner previously dropped a remote control on the victim's face, 4) evidence that Petitioner was seen intoxicated in public weeks before, and 5) evidence of Petitioner's unemployment and financial problems.

The underlying evidentiary claims were considered and rejected by the Michigan Court of Appeals in light of state evidentiary law during Petitioner's appeal of right:

Defendant raises several claims of evidentiary error. We review preserved claims of evidentiary error for an abuse of discretion. *People v. McDaniel*, 468 Mich. 409, 412 (2003). Any preliminary questions of law are reviewed de novo. *Id.* Any unpreserved claims of error are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich. at 763, 764.

Defendant argues that the trial court abused its discretion by allowing

his former girlfriend, Celia Ricker, to testify about a prior episode of domestic violence during which defendant injured Ricker and pushed her four-or-five year-old daughter against a door when the daughter intervened in a fight between defendant and Ricker. Defendant argues that this evidence was irrelevant and inadmissible under MRE 404(b)(1), and was unduly prejudicial. We disagree.

MRE 404(b)(1) prohibits evidence of a defendant's other acts "to prove the character of a person in order to show action in conformity therewith," but permits such evidence for other noncharacter purposes. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v. VanderVliet*, 444 Mich. 52, 74-75 (1993), amended 445 Mich. 1205 (1994).

In this case, the trial court declined to allow the prosecution to introduce this evidence in its case-in-chief, but later allowed the prosecution to present the evidence in rebuttal, after defendant offered testimony that he was a good person who would not harm a child. Thus,

the evidence was offered for a proper purpose under MRE 401(b), i.e., to rebut the defense testimony that defendant was a good person who would not harm a child, rather than for the improper purpose of proving defendant's character to show action in conformity therewith. Although defendant argues that the evidence was not relevant, the defense testimony portraying defendant as a good father who would not harm a child made Ricker's testimony that defendant harmed her daughter relevant under MRE 401. Ricker's testimony about her fight with defendant and that he injured her during the fight was relevant to explaining defendant's conduct toward the daughter.

Defendant also argues that the evidence should have been excluded under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice does not mean any prejudice, but "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v. Pickens*, 446 Mich. 298, 337 (1994) (citation omitted). In this case, the evidence was not unfairly prejudicial considering that it was

responsive to defense testimony. Further, the trial court permitted defendant to call additional witnesses in light of its decision to allow the evidence, and it permitted defendant to retake the stand to testify regarding his own version of the incident with Ricker, thereby reducing any likelihood of unfair prejudice.

Defendant also contends that Ricker's testimony was inadmissible hearsay. Although defendant asserts that his "alleged act" (i.e., the domestic violence incident) was hearsay, hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Defendant does not identify any out of-court statement that was admitted at trial. Thus, there is no merit to this claim.

For these reasons, the trial court did not abuse its discretion in allowing the evidence of the domestic violence incident between defendant, Ricker, and Ricker's daughter. Further, because defendant denied assaulting or injuring either Ricker or her daughter, the trial court did not abuse its discretion in admitting photographs of Ricker's injuries to corroborate her testimony. See *People v. Gayheart*, 285 Mich. App. 202, 227 (2009). Defendant also challenges the ad-

mission of photographs depicting the victim's injuries and autopsy photographs of the victim. "Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *Id.* Photographs may be used to corroborate a witness's testimony and "gruesomeness alone need not cause exclusion," *Id.* (quotations and citations omitted). Further, photographs "are not excludable simply because they are cumulative of a witness's oral testimony." *Id.*

The cause and severity of the child's skull fracture was a principal issue in this case. The photographs were relevant to allow the medical examiner to demonstrate and explain his testimony and to allow the jury to understand the nature and severity of the child's injuries. Photographic evidence is permissible because "[t]he jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Id.* The record discloses that the trial court admitted the photographs only after determining that they were necessary to an understanding of the witnesses' testimony and sought to limit the number of photographs to "the least number that demonstrate what needs to be shown." The trial court did not abuse its discretion.

Next, defendant argues that the trial court abused its discretion in allowing evidence that the victim suffered broken ribs one to four weeks before her death. Defendant argues that this evidence was unduly prejudicial under MRE 403 because there was no evidence linking him to the rib fractures. However, the evidence was admissible for the simple reason that before trial, the trial court permitted the prosecution to amend the information to add a second count of first-degree child abuse based on the broken ribs. Defendant does not challenge the trial court's decision granting the prosecution's motion to amend. [n. 3 At trial, the jury acquitted defendant of this added count.] Thus, the evidence was admissible because it was the basis for one of the charges against defendant.

Defendant also argues that testimony that he admitted dropping a remote control on the child a few weeks before her death should have been excluded under MRE 403. We disagree. Evidence was presented that the child's mother noticed marks on the child's face a few weeks before the child's death. Defendant initially denied responsibility but upon being confronted, he stated that he had dropped a remote control on the child. This evidence was relevant because it showed that, like in this case, defendant was not initially forthcoming

about how the child was injured and then gave an explanation that was not consistent with the child's injuries. See MRE 401. Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403.

Defendant challenges the admission of evidence that approximately two months before the child's death, he was found intoxicated, sleeping on a hill near a store after an argument with the victim's mother. We disagree with defendant's argument that this evidence was not relevant under MRE 401. The prosecutor's theory of the case was that defendant was experiencing a number of personal problems in his life, including his relationship with the victim's mother, and that he acted against the child because of frustration from his many unresolved personal issues. Defendant, on the other hand, attempted to portray his home life as good. The evidence in question was relevant to an understanding of the nature and status of defendant's relationship with the victim's mother and, specifically, to rebut the defense suggestion that the relationship was good and stable. Further, because the prosecutor and the trial court both made clear that the evidence was not being offered as proof of the defendant's bad character,

the evidence was not unduly prejudicial under MRE 403.

For similar reasons, we also reject defendant's unreserved argument that evidence of his unemployment and financial problems was improperly admitted. As defendant correctly observes, evidence of a defendant's poverty or unemployment is generally not admissible to show motive because of its low probative value and the risk that jurors may view such a defendant as a "bad man." See *People v. McLaughlin*, 258 Mich. App. 635, 665-666 (2003). However, evidence of a defendant's financial condition may be admissible in the circumstances of a particular case. *Id.* In this case, the evidence showed that defendant, who was unemployed and had financial problems, became upset when the child's mother filed a petition for child support two weeks before the child's death. The evidence of defendant's unemployment and financial problems was not presented to generally portray defendant as a bad person, but rather to show how it affected defendant's emotional status, which was central to the prosecutor's theory of the case. Thus, there was no plain error in the admission of evidence of defendant's economic problems.

Perreault, 2011 WL 1901994, at *3-5.

The Michigan Court of Appeals rejected each of Petitioner's evidentiary claims on the merits by finding that the disputed items were admissible under state evidentiary law. It is well-settled that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas review." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Here, because the evidentiary objections Petitioner claims his counsel should have made would have been denied under state law, Petitioner cannot demonstrate that his counsel was ineffective for failing to make the objections. Again, counsel cannot be deemed deficient for failing to make meritless objections. *Harris*, 204 F.3d at 683.

4. Failure to Object to Prosecutorial Misconduct

Petitioner claims that his counsel failed to object to the misconduct of the prosecutor. Just as it did with Petitioner's evidentiary claims, the Michigan Court of Appeals rejected Petitioner's prosecutorial misconduct claims during his appeal of right:

Defendant argues that the prosecutor committed misconduct during his opening statement and closing argument requiring a new trial. We disagree. Because defendant did not object to the prosecutor's conduct, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. See *People v. Erickson*, 288 Mich. App. 192, 198 (2010).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v. Bahoda*, 448 Mich. 261, 266-267 (1995). Claims of prosecutorial misconduct are decided case by case and challenged remarks must be read in context. *People v. McElhaney*, 215 Mich. App. 269, 283 (1996). “Opening statement is the appropriate time to state the facts that will be proved at trial.” *Ericksen*, 288 Mich. App. at 200. A prosecutor is afforded great latitude in closing argument and is permitted to argue the evidence and reasonable inferences arising from the evidence in support of his theory of the case. *Bahoda*, 448 Mich. at 282-283.

Defendant has not established any misconduct during the prosecutor’s opening statement. Although defendant accuses the prosecutor of referring to prejudicial matters during his opening statements, those matters related to testimony properly presented at trial. Further, having reviewed defendant’s several claims of misconduct during closing argument, we find no error. Most of defendant’s challenges involve the prosecutor’s use of strong language to characterize the evidence and reasonable inferences arising from the evidence in support of the prosecutor’s theory of the case. Prosecutors may use “hard language” when it is supported by the evidence and they are not required to phrase their arguments in the blandest of terms. *People v. Ullah*, 216 Mich. App. 669, 678 (1996). Further, it was not improper for the prosecutor to

argue that defendant had the opportunity and motive to conform his testimony to other evidence or testimony in the case. See *People v. Buckey*, 424 Mich. 1, 14 (1985). Contrary to defendant's argument, the prosecutor did not improperly express his personal opinion about defendant's guilt. Viewed in context, the challenged remarks were made in reference to the evidence at trial. Defendant also accuses the prosecutor of misquoting and fabricating evidence, but he does not identify the factual basis for this claim. A "[d]efendant may not leave it to the Court to search for a factual basis to sustain or reject his position." *People v. Norman*, 184 Mich. App. 255, 260 (1990). To the extent defendant disagrees with the prosecutor's characterization of some of the evidence, the trial court protected defendant's substantial rights by instructing the jury that the attorneys' statements were not evidence. See *Bahoda*, 448 Mich. at 281. No plain error has been shown.

Perreault, 2011 WL 1901994, at *10.

The "clearly established Federal law" relevant to a habeas court's review of a prosecutorial misconduct claim is the Supreme Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *Parker v. Matthews*, 132 S. Ct. 2148, 2153, 183 L. Ed. 2d 32 (2012). In *Darden*, the Supreme Court held that a "prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). This Court must ask

whether the Michigan Court of Appeals' decision denying Petitioner's prosecutorial misconduct claims "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker*, 132 S. Ct. at 2155 (quoting *Harrington*, 562 U.S. at 103).

Having examined the trial record and complained-of comments by the prosecutor, the Court finds that the Michigan Court of Appeals' assessment of Petitioner's prosecutorial misconduct claims was not unreasonable, and was in fact correct. Therefore, Petitioner's counsel did not perform deficiently by failing to make meritless objections. *Harris*, 204 F.3d at 683.

5. Failure to Request Voluntary Manslaughter Instruction

Petitioner finally claims that his counsel should have requested an instruction for the lesser offense of voluntary manslaughter.

The claim is completely without merit. First, voluntary manslaughter requires "adequate provocation," see, e.g., *People v. Sullivan*, 231 Mich. App. 510 (1998), and the victim here was a four-month old baby. Second, Petitioner's defense was that he accidentally dropped the victim. Counsel did not perform ineffectively for failing to advance a defense that was inconsistent with his client's account of what happened.

Accordingly, Petitioner has failed to demonstrate entitlement to relief on his ineffective assistance of counsel claim.

C. Petitioner's Statement to Police

Petitioner next claims that his statements to police should have been suppressed because they were obtained in violation of his Fifth Amendment rights. The Michigan Court of Appeals rejected this claim on the merits as follows:

Defendant argues that the trial court erred in denying his motion to suppress his statements to the police. In reviewing a lower court's decision on a motion to suppress evidence, we review the trial court's factual findings for clear error and conclusions of law de novo. *People v. Snider*, 239 Mich. App. 393, 406 (2000).

The prosecution presented evidence of defendant's statements to the police while at the scene and after he was transported to the police station for further questioning. The statements were recorded and the recorded statements were played for the jury. Defendant argues that his statements should have been suppressed because he was not advised of his constitutional rights before questioning and the police continued to question him after he invoked his right to counsel.

The police must advise a defendant of his constitutional rights before conducting a custodial interrogation. *People v. Vaughn*, ___ Mich. App. ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip. op. at 3. However, such advice is not required if the defendant is not in custody.

In assessing whether a defendant was in custody at the time of the

interrogation, courts must examine “all of the circumstances surrounding the interrogation’ and determine ‘how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004), quoting *Stansbury [v. California]*, 511 U.S. 318, 322 (1994). [String citations omitted.] A key question is whether, under the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave—that is, was there a formal arrest of a restraint on freedom of movement of the degree associated with formal arrests. *Yarborough*, 541 U.S. at 663. [*Vaughn*, slip. op. at 4.].

The record and video recording of the crime scene reveals that defendant was not in custody when he was questioned by the police at his home. He was not restrained in any way, and he was free to walk around and smoke a cigarette. Because defendant was not in custody at that point, the police were not required to advise him of his constitutional rights. However, defendant was later handcuffed, placed in a patrol vehicle, and transported to the police station for further questioning. Although defendant

was clearly in custody at that point, the record indicates that he was advised of his constitutional rights before further questioning was conducted. Thus, suppression was not required on this ground.

Defendant further argues that his statements at the police station should have been suppressed because the police continued to question him after he invoked his right to counsel during the interview. The police may not continue to question a defendant who invokes his right to counsel during a custodial interrogation, unless the defendant initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 485-85 (1981) [additional citations omitted]. However, a defendant's invocation of the right to counsel must be unequivocal, as determined by an objective inquiry. *People v. McBride*, 273 Mich. App. 238, 258-259 (2006), rev'd in part on other grounds 480 Mich. 1047 (2008); *People v. Adams*, 245 Mich. App. 226, 237 (2001). If reference to an attorney is ambiguous or equivocal, the cessation of questioning is not required. *Adams*, 245 Mich. App. at 237-238.

In this case, when a police officer discussed the possibility of defendant submitting to a polygraph examination, defendant stated that he would need an attorney if he was going to take a polygraph, but he did not state that he

wanted an attorney at the time. During a police interview, the examining officer indicated that portions of defendant's story were not credible and that defendant had been home alone with the child on other occasions when she was hurt. Defendant explained that he was not at home alone with the child when the remote control was dropped on her head and then said, "What do I got to do? I mean do I need to call a lawyer or something?" The officer responded that defendant should look out for his own best interests. Defendant continued talking to the officer. Later during the same interview, when the officer indicated that defendant's story was "jacked up," defendant said, "Well, then let's call the lawyer then 'cause I gave you what I could." The officer said, "That's fine." Defendant then said, "There's no reason for anybody to take me to jail," and the officer responded, "You getting a lawyer's not going to prevent you from going to jail." Again, defendant continued talking to the officer. While defendant referenced calling an attorney on these two occasions, he never clearly requested to call an attorney or have an attorney present. Defendant's statements about calling an attorney were akin to negotiations with the officer, and immediately after making the statements, he continued talking to the officer.

Defendant also correctly observes that he made several requests to use a telephone, but none of those requests were made for the stated purpose of contacting an attorney. The trial court found, and we agree, that the record does not establish that defendant made an unambiguous, unequivocal request for counsel.

In sum, the record shows that defendant was not in custody when he made his initial statements at the crime scene and that he was advised of his constitutional rights before further questioning was conducted at the police station. Further, defendant did not make an unambiguous, unequivocal request for an attorney during the police questioning. Accordingly, the trial court did not err in denying defendant's motion to suppress his statements.

Perreault, 2011 WL 1901994, at *8-9.

The Court finds that most of the facts regarding this claim do not present close questions and were correctly and reasonably rejected by the state courts.

First, with respect to the statements made in the home, the Court agrees that they were not taken in violation of Petitioner's Fifth Amendment rights because Petitioner was not in custody at the time. The test to determine whether a suspect is in custody is objective: would a reasonable person in the defendant's position, knowing the facts as the defendant knew them, have felt that he was under arrest or was "otherwise deprived of

his freedom of action in any significant way.” *Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987) (quoting *Miranda*, 384 U.S. at 477); accord *Combs v. Coyle*, 205 F.3d 269, 284 (6th Cir. 2000). The test does not turn on the subjective views of either the interrogating officer or the person being questioned. *Mason v. Mitchell*, 320 F.3d 604, 631 (6th Cir. 2003). The objective facts indicate that Petitioner was speaking to officers in his own home. He walked around freely, no statements were made indicating that Petitioner was not free to leave, and nothing was done to secure his presence. See *Coomer v. Yukins*, 533 F.3d 477, 486-87 (6th Cir. 2008) (state court’s decision that petitioner was not in custody when the questioning took place in her own home and the police repeatedly said that she was not under arrest was reasonable). The state court’s decision that Petitioner was not in custody during this time was correct.

Furthermore, the Court readily agrees that Petitioner’s first references to an attorney did not require the police to stop questioning.

Supreme Court law holds that once having expressed a desire to law enforcement officials to consult an attorney, an accused “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court clarified what a suspect must do to actually invoke his right to have counsel present at an interrogation. As the Sixth Circuit has explained:

The *Davis* Court established an “objective inquiry”—the suspect “must unambiguously request counsel.” *Id.* at 459. Importantly, “if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.” *Id.*

Bush v. Warden, Southern Ohio Corr. Fac., 573 F. App’x 503, 511 (6th Cir. 2014). The *Davis* Court further stated:

[W]e decline to adopt a rule requiring officers to ask clarifying questions. If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police question-

ing when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Davis, 512 U.S. at 461-62.

In *Davis*, the Supreme Court found that the defendant's statement, "Maybe I should talk to a lawyer," was not an unambiguous request for counsel. Relying on *Davis*, the Sixth Circuit and other courts have found that the following statements are not unambiguous requests for counsel that require law enforcement officers to cease questioning a suspect: "I think I should talk to a lawyer, what do you think?" *United States v. Delaney*, 443 F. App'x 122, (6th Cir. 2011); "Do I need a lawyer?" and "Do you think I need a lawyer?" *United States v. Ogbuehi*, 18 F.3d 807, 813 (9th Cir. 1994); "Do you think I need a lawyer?" *Diaz v. Senkowski*, 76 F.3d 61, 65 (2nd Cir. 1996); and "[i]t would be nice to have an attorney," *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994).

In light of these cases, it was reasonable for the Michigan Court of Appeals to find that Petitioner's first statements referencing an attorney did not constitute an unambiguous request for an attorney. His first statement was not a request at all but simply indicated that if he submitted to a polygraph exam then he would need an attorney. Furthermore, Petitioner's second mention of an attorney in which he asked, "do I need to call a lawyer or something," falls squarely in line with the cases cited above that hold that such a question does not constitute an unequivocal request for counsel.

This leaves Petitioner's third mention of an attorney, where Petitioner stated, "Well, then let's call the lawyer then 'cause I gave you what I could." This is a

statement, not a question. The statement appears to essentially tell the officer that he has nothing further to say and that it is time for him to speak with an attorney. The state appellate court found that it was nevertheless not an unambiguous request because Petitioner immediately continued talking to the officer after making this statements. The state court described the statement as “akin to negotiations with the officer.”

Under AEDPA, factual findings of the state court are presumed correct unless rebutted by clear and convincing evidence. 20 U.S.C. § 2254(e)(1). The presumption of correctness also applies to a state trial court’s finding that a suspect did not make an unequivocal request for counsel. *Pritchett v. Pitcher*, 117 F.3d 959, 963-964 (6th Cir. Mich. 1997). Here, after hearing the testimony at the suppression hearing, the trial court determined that Petitioner’s statements about counsel were only a “maybe” and that he decided to continue the conversation with the officers. Tr. 2/23/2009, at 4.

In isolation, the phrase “Well, then let’s call the lawyer then ‘cause I gave you what I could,” may appear to be an unambiguous request for an attorney. But the trial court conducting the suppression hearing had the benefit of hearing live testimony from the officers who conducted the interrogation, and it also had the benefit of hearing the recordings of the interview itself. Tr. 2/20/2009, at 28, and Tr. 2/23/2009, at 4. After reviewing the recording of the interview, the court concluded that none of Petitioner’s statements amounted to an unequivocal request for an attorney because Petitioner continued to make statements after making a comment to the effect that it might be good time to speak to an attorney. Id., at 5. In other words the context of the statement, which this Court does not have access to, led the trial

court to believe that the statement was simply made in an on-going dialog and was not a legitimate request to stop questioning. The state trial court factual findings then reasonably led the state appellate court to conclude that Petitioner's statement was "akin to negotiations" and not a genuine request for the cessation of the interview and provision of an attorney.

Deference to findings of fact, such as the trial court's finding here, is given because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). The Court finds that Petitioner has not overcome the presumption of correctness that attaches to the trial court's factual finding. It was therefore reasonable for the state appellate court to reject Petitioner's claim and find that none of Petitioner's statements constituted an unequivocal request for counsel.

D. Ineffective Assistance of Appellate Counsel

Petitioner next argues that his appellate counsel was ineffective for failing to raise the claims he raised in his pro se supplemental brief filed during his appeal of right and in his state post-conviction review proceeding. The Court has reviewed all of the claims, however, and it has found none of them have merit. It is not ineffective assistance for appellate counsel to decide not to raise meritless claims. See *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013) ("[A] petitioner cannot show that appellate counsel was ineffective for failing to raise a claim on appeal if the underlying claim itself lacks merit."). Petitioner was not

denied the effective assistance of appellate counsel because the claims he alleges counsel should have raised—or assisted Petitioner to better raise on his own—are all without merit.

IV. Motion to Stay

Petitioner has filed a motion to stay the case asserting that he was entitled to a lesser offense instruction of second-degree child abuse. He wishes to stay the case and return to state court to seek relief on this unexhausted claim. A federal court may stay a federal habeas petition and hold further proceedings in abeyance pending resolution of state court post-conviction proceedings if outright dismissal of a habeas petition would potentially jeopardize the timeliness of a future petition, there is good cause for the petitioner's failure to exhaust those claims, the unexhausted claims are not "plainly meritless," and "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

Even assuming Petitioner's new claim has arguable merit under the new Michigan Supreme Court case relied upon by Petitioner, *People v. Burks*, 864 N.W.2d 140 (2015), it nevertheless presents a "plainly meritless" federal claim. Federal courts may grant habeas relief only on the basis of federal law that has been clearly established by the Supreme Court. § 2254(d)(1). The Supreme Court, however, has never held that the Due Process Clause requires instructing the jury on a lesser included offense in a non-capital case. See *Beck v. Alabama*, 447 U.S. 625, 638. n. 14 (1980). Simply put, "the Constitution does not require a lesser-included offense instruction in non-capital cases." *Campbell v. Coyle*, 260 F.3d 531, 541 (6th Cir. 2001) (citing *Bagby v. Sowders*, 894 F.2d 792,

795-97 (6th Cir. 1990) (en banc)). Because the Supreme Court has never held that due process requires lesser included-offense instructions in a non-capital case, Petitioner's claim rests on no such federal ground. Therefore, his unexhausted claim is plainly meritless under AEDPA. Accordingly, Petitioner's motion to stay the case will be denied. [Dkt. 15].

V. Certificate of Appealability

In order to appeal the Court's decision, Petitioner must obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or 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, 483-84 (2000). A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. *Castro v. United States*, 310 F.3d 900, 901 (6th Cir. 2002).

Here, jurists of reason would not debate the Court's conclusion that Petitioner has not meet the standard for a certificate of appealability with respect to the majority of his claims. The Court does find, however, that two of Petitioner's claims are reasonably debatable: 1) Petitioner's claim that his counsel was ineffective in failing to challenge the prosecution experts' opinions as to the cause of the victim's injuries, and 2) Petitioner's claim that his statement, "Well, then let's call the lawyer then 'cause I gave you what I could," constituted an unambiguous request for counsel that required the cessa-

tion of police questioning. The Court will grant a certificate of appealability with respect to these two claims. The Court will deny a certificate of appealability with respect to his other claims.

VI. Conclusion

Accordingly, the Court 1) DENIES WITH PREJUDICE the amended petition for a writ of habeas corpus, 2) GRANTS a certificate of appealability with respect to the two claims indicated above, 3) DENIES a certificate of appealability with respect to his remaining claims, and 4) DENIES Petitioner's motion for stay.

SO ORDERED.

Date: January 25, 2016 s/Marianne O. Battani
MARIANNE O. BATTANI
United States District
Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on January 25, 2016.

s/ Kay Doaks
Case Manager

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APPENDIX F

Order

Filed April 28, 2014

148316

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SCOTT DAVID PERREAULT,
Defendant-Appellant.

SC: 148316

COA: 316188

Saginaw CC: 08-031751-FC

On order of the Court, the application for leave to appeal the November 1, 2013 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

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.

April 28, 2014

s/ Larry S. Royster
Clerk

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APPENDIX G

Court of Appeals, State of Michigan

ORDER

People of MI v Scott David Perreault

Docket No. 316188

LC No. 08-031751-FC

Stephen L. Borrello, Presiding Judge

William C. Whitbeck

Amy Ronayne Krause

Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

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

Nov 1, 2013

Date

s/ Jerome W. Zimmer, Jr.
Chief Clerk

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APPENDIX H

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

**THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,**

v

**SCOTT DAVID PERREAULT,
Defendant.**

**Case No. 08-031751-FC
HON. FRED L. BORCHARD**

**JOHN A, McCOLGAN (P37168)
Saginaw County Prosecutor
111 S, Michigan Ave.
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**LAURA KATHLEEN SUTTON (P40775)
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P.O. Box 388
Manchester, MI 48158
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**OPINION AND ORDER OF THE COURT DENY-
ING DEFENDANT'S
MOTION FOR RELIEF FROM JUDGMENT**

**AT A SESSION OF SAID COURT HELD IN
THE COURTHOUSE IN THE CITY AND COUNTY
OF SAGINAW, STATE OF MICHIGAN, THIS 22
DAY OF APRIL, 2013.**

PRESENT: THE HONORABLE FRED L. BOR-
CHARD, CHIEF CIRCUIT COURT JUDGE.

Status

This matter is presently before the Court on Defendant's Motion for Relief from Judgment pursuant to MCR 6.500. For the reasons set forth below, Defendant's motion is hereby DENIED.

Facts

On May 22, 2009, Defendant was convicted by jury of first-degree felony murder and first-degree child abuse. Defendant was sentenced on July 1, 2009 to life in prison for the murder conviction to be served concurrent with 140 months to 15 years for the child abuse conviction. Defendant received 303 days credit. Defendant appealed and the Michigan Court of Appeals affirmed the conviction and sentence. The Supreme Court denied leave to appeal. Defendant now brings this motion.

Defendant has presented several issues for the Court's consideration on why he should be granted the relief requested. First, Defendant asserts that his trial counsel was ineffective for his failure to cross examine the prosecutors expert medical witness testimony that the injuries suffered by the child could only have been inflicted by something akin to a high speed car crash or an extremely high drop, failure to object to Dr. Deible and the paramedic as experts on child-abuse-death issues, failure to object to evidentiary rulings, and failure to object to prosecutorial misconduct and the jury charge. Second, Defendant argues that his appellate counsel was constitutionally ineffective for failing to raise the first two issues related to trial counsel's defective performance on appeal.

Standard of Review

Motions for relief from judgment are governed by MCR 6.500 *et seq.* Pursuant to MCR 6.508(D), “[t]he defendant has the burden of establishing entitlement to the relief requested.” Additionally, MCR 6.508(D) states as follows:

The court may not grant relief to the defendant if the motion . . . alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence . . . unless the defendant demonstrates good cause for failure to raise such grounds on appeal or in the prior motion, and actual prejudice from the alleged irregularities that support the claim for relief.

Law and Analysis

Defendant appealed by right following his conviction and sentence. The Court finds that Defendant must show cause for failing to raise the issues on appeal. Defendant has not sufficiently alleged any facts indicating the issues could not be raised on appeal, nor has the Defendant shown cause to re-litigate previously raised issues. The Court does not find that there is a significant possibility of innocence. Therefore, Defendant can only establish cause for failing to raise the issues on appeal if he shows his appellate counsel was ineffective.

“Ineffective assistance of counsel can satisfy the good cause element of MCR 6.508(D)(3),” *People v Reed*, 449 Mich 375, 378-379, 535 NW2d 496 (1995). “If good cause is established, the defendant must also show actual prejudice from the error, i.e., that but for the error, defendant would have had a reasonably likely chance of acquittal.” MCR 6.508(D)(3)(b)(i). *People v Criswell* 2007

WL 2331897 (2007). To establish ineffective assistance of counsel, “a defendant must demonstrate that counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 521 NW2d 797 (1994). According to Gillespie’s:

An appellate attorney’s failure to raise an issue may result in counsel’s performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial, (footnote omitted). *But appellate counsel’s failure to raise every nonfrivolous issue does not constitute ineffective assistance of counsel.* (footnote omitted).

MICRIMLP § 20:184. (emphasis added). Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment. *People v Reed*, 198 Mich App 639, 646 (1993).

Before concluding whether or not appellate counsel was ineffective for failing to raise issues, this Court will go through the arguments made by Defendant to determine whether or not they are conceivable claims.

1. Trial counsel’s failure to cross examine prosecutors medical expert

Defendant argues that trial counsel made no challenge to Dr. Deibel’s testimony that the child’s injuries were consistent with a high speed accident or extremely high drop. An experts opinion is Trial counsel’s inquiry

as to whether or not Dr. Deibel received information that the Defendant had fallen on top of the child was sufficient enough to rebut the Doctors testimony that the injuries on the child were consistent with a high speed accident or extremely high drop.” A fully grown man falling on top of an infant is similar to the impact of a extremely high drop because the child could have been crushed by the weight of the adults body instead of the impact of the ground. Therefore, this line of questioning was sufficient to avoid ineffective assistance.

2. Failure to object to experts on child-abuse-death issues

Defendant argues that trial counsel failed to object to Dr. Deibel and Mr. Millers qualifications to testify regarding child-abuse resulting in death. Dr. Deibel was the emergency room physician that treated the infant and Mr. Miller was the paramedic who transported the infant to the hospital. While the expert’s qualifications may be a conceivable claim on appeal, the issue regarding Mr. Miller and Dr. Deibel’s qualifications was raised on appeal by appellate counsel. Appellate counsel cannot be held ineffective for failing to raise the more specific issue of their qualifications for child-abuse death. The fact that qualifications were raised is sufficient.

Defendant has not demonstrated that trial counsel or appellate counsel were ineffective. The Court does not find that there was a defective performance of trial counsel that was not raised by appellate counsel. Therefore, appellate counsel was not constitutionally ineffective for failing to raise the issues. Because Defendant is not able to demonstrate that counsel was ineffective, he cannot show good cause as to why he did not raise these issues

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on appeal. Further, Defendant has not demonstrated actual prejudice from the alleged irregularities.

IT IS THEREFORE ORDERED that Defendant's Motion for Relief from Judgment is DENIED.

IT IS SO ORDERED.

s/ Fred L. Bochard
FRED L. BOCHARD
CHIEF CIRCUIT COURT
JUDGE

/bd

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APPENDIX I

Order

November 21, 2011

143226

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SCOTT DAVID PERREAULT,
Defendant-Appellant.

SC: 143226

COA: 293324

Saginaw CC: 08-031751-FC

On order of the Court, the application for leave to appeal the May 19, 2011 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.

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.

November 21, 2011

s/ Corbin R. Davis
Clerk

APPENDIX J

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
Filed May 19, 2011

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SCOTT DAVID PERREAULT,
Defendant-Appellant.

No. 293324 Saginaw Circuit Court LC
No. 08-031751-FC

Before: DONOFRIO, P.J., and BORRELLO and
BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). He was sentenced to life in prison for the murder conviction and a concurrent prison term of 140 months to 15 years for the child abuse conviction.¹ He appeals as of right. We affirm.

¹Defendant was acquitted of a second count of first-degree child abuse, which was based on evidence that the child suffered rib fractures a few weeks before her death.

Defendant's convictions arise from the death of his four-month-old daughter, who died from a severe head injury while in defendant's care. The evidence showed that the child died from blunt force head trauma. Her skull was fractured and, according to medical testimony, the nature and severity of the injury indicated that her head struck a hard object while either the head or the object were traveling at a high velocity. Defendant did not dispute that the child was injured while in his care. He gave numerous different accounts of the child's injury to the police. His accounts changed as the police confronted him with new information about the child's condition and circumstances. At trial, defendant testified that he was holding the child while speaking on the telephone and as he went to hang up the phone, the child began to fall from his arms. He tried to catch her, but then they both fell to the floor. Defendant claimed that the child may have hit a stove as she fell, but he was not certain. Defendant did not immediately seek medical help because the child did not initially exhibit any symptoms of distress. The prosecution presented medical evidence establishing that the child's injury and condition were inconsistent with a fall in the manner described by defendant and refuting his claim that the child did not show immediate signs of distress after being injured.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues through both his appellate attorney and in a pro se Standard 4 brief² that the evidence was insufficient to convict him of either first-degree child abuse or felony murder because the evidence

²Filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

showed, at most, that the child was injured in an accidental fall and, accordingly, was insufficient to prove that he knowingly or intentionally caused a serious injury to the child. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). An appellate court must determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the charged crimes. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “All conflicts in the evidence must be resolved in favor of the prosecution.” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *Id.* Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

As explained in *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999),

[t]he elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically

enumerated in [MCL 750.316]. [Citation omitted.]

First-degree child abuse is one of the enumerated felonies for felony murder. MCL 750.316(1)(b).

MCL 750.136b(2) provides that “[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child.” To prove intent for first-degree child abuse, the prosecution must show that the defendant either intended to cause serious physical or mental harm to the child or knew that such harm would be caused by his or her actions. See *People v Maynor*, 470 Mich 289, 295-296; 683 NW2d 565 (2004). MCL 750.136b(1)(f) defines “[s]erious physical harm” as “any physical injury to a child that seriously impairs the child’s health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.”

Defendant’s sufficiency argument is principally based on the credibility of his account of the child’s injuries, namely, that the child was injured in an accidental fall. However, the credibility of defendant’s account was undermined by evidence that he gave numerous conflicting versions of how the child was injured and that his explanations changed as he received new information about the child’s circumstances and condition. Further, the prosecution offered medical testimony that the child’s injuries were not consistent with an accidental fall in the manner described by defendant. The medical evidence showed that the child suffered a skull fracture of such severity that it could only have been caused by the child’s head striking a hard object while either the

head or the object was moving at a high velocity. Although defendant testified at trial that the child may have struck her head on the edge of a stove as she fell and that he also stumbled and fell on the child, that account was inconsistent with defendant's initial explanations to the police. Medical evidence also showed that the child did not have any outside skin wounds or bruising on her back or torso, which would have been expected if the child had fallen in the manner described by defendant. The credibility of defendant's testimony was for the jury to resolve.

The evidence showed, and defendant did not dispute, that he was the only person who was caring for the child at the time she was injured. Given defendant's changing explanations for the child's injury, that defendant's explanations were not consistent with the medical evidence, and that the medical evidence showed that the child's skull fracture was caused by the child's head striking a hard object while either the head or the object was moving at a high velocity, a reasonable juror could have found beyond a reasonable doubt that defendant knowingly or intentionally caused serious physical harm to the child. Accordingly, there was sufficient evidence of defendant's intent to support his conviction of first-degree child abuse.

Defendant also argues that there was insufficient evidence of malice to support his felony murder conviction. Again, however, the medical evidence concerning the nature and severity of the child's injury, which was inconsistent with an accidental fall, was sufficient to enable the jury to find beyond a reasonable doubt that the child died from an act by defendant that was intended to do great bodily harm or at least to create a very high risk of death or great bodily harm with knowledge that death

or great bodily harm was the probable result. Thus, there was sufficient evidence of malice to support defendant's felony-murder conviction.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in his Standard 4 brief, none of which have merit.

A. EVIDENTIARY ISSUES

Defendant raises several claims of evidentiary error. We review preserved claims of evidentiary error for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Any preliminary questions of law are reviewed de novo. *Id.* Any unpreserved claims of error are reviewed for plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763-764.

Defendant argues that the trial court abused its discretion by allowing his former girlfriend, Celia Ricker, to testify about a prior episode of domestic violence during which defendant injured Ricker and pushed her four- or five-year-old daughter against a door when the daughter intervened in a fight between defendant and Ricker. Defendant argues that this evidence was irrelevant and inadmissible under MRE 404(b)(1), and was unduly prejudicial. We disagree.

MRE 404(b)(1) prohibits evidence of a defendant's other acts "to prove the character of a person in order to show action in conformity therewith," but permits such evidence for other, noncharacter purposes. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently

probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In this case, the trial court declined to allow the prosecution to introduce this evidence in its case-in-chief, but later allowed the prosecution to present the evidence in rebuttal, after defendant offered testimony that he was a good person who would not harm a child. Thus, the evidence was offered for a proper purpose under MRE 401(b), i.e., to rebut the defense testimony that defendant was a good person who would not harm a child, rather than for the improper purpose of proving defendant's character to show action in conformity therewith. Although defendant argues that the evidence was not relevant, the defense testimony portraying defendant as a good father who would not harm a child made Ricker's testimony that defendant harmed her daughter relevant under MRE 401. Ricker's testimony about her fight with defendant and that he injured her during the fight was relevant to explaining defendant's conduct toward the daughter.

Defendant also argues that the evidence should have been excluded under MRE 403, which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice does not mean any prejudice, but "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994) (citation omitted). In this case, the evidence was not unfairly prejudicial considering that it was respon-

sive to defense testimony. Further, the trial court permitted defendant to call additional witnesses in light of its decision to allow the evidence, and it permitted defendant to retake the stand to testify regarding his own version of the incident with Ricker, thereby reducing any likelihood of unfair prejudice.

Defendant also contends that Ricker's testimony was inadmissible hearsay. Although defendant asserts that his "alleged act" (i.e., the domestic violence incident) was hearsay, hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Defendant does not identify any out-of-court statement that was admitted at trial. Thus, there is no merit to this claim.

For these reasons, the trial court did not abuse its discretion in allowing the evidence of the domestic violence incident between defendant, Ricker, and Ricker's daughter. Further, because defendant denied assaulting or injuring either Ricker or her daughter, the trial court did not abuse its discretion in admitting photographs of Ricker's injuries to corroborate her testimony. See *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

Defendant also challenges the admission of photographs depicting the victim's injuries and autopsy photographs of the victim. "Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *Id.* Photographs may be used to corroborate a witness's testimony and "gruesomeness alone need not cause exclusion." *Id.* (quotations and citations omitted). Further, photographs "are

not excludable simply because they are cumulative of a witness's oral testimony." *Id.*

The cause and severity of the child's skull fracture was a principal issue in this case. The photographs were relevant to allow the medical examiner to demonstrate and explain his testimony and to allow the jury to understand the nature and severity of the child's injuries. Photographic evidence is permissible because "[t]he jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Id.* The record discloses that the trial court admitted the photographs only after determining that they were necessary to an understanding of the witnesses' testimony and sought to limit the number of photographs to "the least number that demonstrate what needs to be shown." The trial court did not abuse its discretion.

Next, defendant argues that the trial court abused its discretion in allowing evidence that the victim suffered broken ribs one to four weeks before her death. Defendant argues that this evidence was unduly prejudicial under MRE 403 because there was no evidence linking him to the rib fractures. However, the evidence was admissible for the simple reason that before trial, the trial court permitted the prosecution to amend the information to add a second count of first-degree child abuse based on the broken ribs. Defendant does not challenge the trial court's decision granting the prosecution's motion to amend.³ Thus, the evidence was admissible because it was the basis for one of the charges against defendant.

³ At trial, the jury acquitted defendant of this added count.

Defendant also argues that testimony that he admitted dropping a remote control on the child a few weeks before her death should have been excluded under MRE 403. We disagree. Evidence was presented that the child's mother noticed marks on the child's face a few weeks before the child's death. Defendant initially denied responsibility but upon being confronted, he stated that he had dropped a remote control on the child. This evidence was relevant because it showed that, like in this case, defendant was not initially forthcoming about how the child was injured and then gave an explanation that was not consistent with the child's injuries. See MRE 401. Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403.

Defendant challenges the admission of evidence that approximately two months before the child's death, he was found intoxicated, sleeping on a hill near a store after an argument with the victim's mother. We disagree with defendant's argument that this evidence was not relevant under MRE 401. The prosecutor's theory of the case was that defendant was experiencing a number of personal problems in his life, including his relationship with the victim's mother, and that he acted against the child because of frustration from his many unresolved personal issues. Defendant, on the other hand, attempted to portray his home life as good. The evidence in question was relevant to an understanding of the nature and status of defendant's relationship with the victim's mother and, specifically, to rebut the defense suggestion that the relationship was good and stable. Further, because the prosecutor and the trial court both made clear that the evidence was not being offered as

proof of defendant's bad character, the evidence was not unduly prejudicial under MRE 403.

For similar reasons, we also reject defendant's unpreserved argument that evidence of his unemployment and financial problems was improperly admitted. As defendant correctly observes, evidence of a defendant's poverty or unemployment is generally not admissible to show motive because of its low probative value and the risk that jurors may view such a defendant as a "bad man." See *People v McLaughlin*, 258 Mich App 635, 665-666; 672 NW2d 860 (2003). However, evidence of a defendant's financial condition may be admissible in the circumstances of a particular case. *Id.* In this case, the evidence showed that defendant, who was unemployed and had financial problems, became upset when the child's mother filed a petition for child support two weeks before the child's death. The evidence of defendant's unemployment and financial problems was not presented to generally portray defendant as a bad person, but rather to show how it affected defendant's emotional status, which was central to the prosecutor's theory of the case. Thus, there was no plain error in the admission of evidence of defendant's economic problems.

Defendant also challenges the prosecutor's use of leading questions during direct examination of the victim's mother. A trial court has discretion to allow leading questions. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004). MRE 611(d)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." The record discloses that the trial court permitted the prosecutor to ask certain leading questions because of

the witness's apparent difficulty in understanding questions. Defendant has not demonstrated how he was prejudiced by any questions that were leading. Under the circumstances, the trial court properly exercised its discretion in permitting leading questions.

Further, the trial court did not abuse its discretion in permitting the prosecutor to question the victim's mother on redirect examination regarding child support that she was receiving from the father of her oldest child. The prosecutor elicited that defendant became upset when the victim's mother filed a petition for child support against him because he was aware that the victim's mother had previously filed a similar petition against her other daughter's father. To the extent defendant argues that this was an improper subject for redirect examination because the subject was not raised during cross-examination, the trial court had discretion to permit open redirect examination and defendant has not explained how he was prejudiced by this brief questioning. See *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

Next, defendant argues that the trial court abused its discretion in preventing him from offering exculpatory evidence. We disagree. The trial court prohibited defendant from questioning the emergency room physician about actress Natasha Richardson's death in a skiing accident. Defendant did not show below, and he has failed to explain on appeal, how Richardson's accident, which involved a head injury to an adult while skiing, was relevant to this case, which involved a head injury to a four-month-old child while in a parent's care. The trial court did not abuse its discretion by precluding this testimony as irrelevant. See MRE 401; MRE 402.

Further, contrary to defendant's argument, the trial court did not preclude him from offering evidence that the victim's older sister could have harmed the victim. The court merely required defendant to establish an appropriate foundation for the testimony, after which it permitted the witness to testify that the sister's play activities could have been dangerous to the victim.

We also disagree with defendant's argument that he was improperly prevented from cross-examining the emergency room physician. The court merely ruled that the witness was not required to comment on an opinion of another medical doctor which the witness had not heard. Defendant had the benefit of both expert opinions for the jury to consider in its evaluation of the case.

Next, we find no merit to defendant's unpreserved argument that the emergency room physician, Dr. Matthew Deibel, was not qualified to testify as an expert. A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702. Dr. Deibel testified that he graduated from medical school in 2002 and had worked as an emergency room physician for approximately seven years. He saw approximately 3,000 patients a year, about one-third of whom were children. Given Dr. Deibel's medical education, training, and experience as an emergency room physician, there was no plain error in qualifying him as an expert in emergency medicine. Although defendant contends that Dr. Deibel's testimony was sometimes inconsistent, any alleged inconsistencies affected only the weight of his testimony, not its admissibility or his qualifications as an expert. See *Ykimoff v W A Foote Mem Hosp*, 285 Mich App 80, 101; 776 NW2d 114 (2009). Similarly, to the ex-

tent that Dr. Deibel's testimony conflicted with the testimony of the medical examiner, it was up to the jury to determine which expert was more credible.

Defendant also argues that the opinion testimony of a responding paramedic, Yale Miller, was not admissible under MRE 701. However, the record does not disclose that his opinion testimony was offered under MRE 701. Rather, Miller was recognized as an expert in the field of paramedic treatment, so his opinion testimony was admissible under MRE 702. Given the evidence of Miller's training and experience as a paramedic, including the treatment of young children, the trial court did not abuse its discretion in finding that he was qualified to offer expert testimony in that field. Further, any perceived conflicts between the testimony of Miller and the medical examiner did not affect the admissibility of Miller's testimony, and instead were matters for the jury to resolve. See *Ykimoff*, 285 Mich App at 101.

Defendant also argues that the trial court improperly allowed the prosecutor to question witnesses about his emotional state when dealing with financial matters and Ricker about his patience around children. As discussed, these lines of questioning were relevant to the prosecutor's theory of the case. Further, Ricker's testimony was rationally based on her perceptions from her own experiences with defendant and was, therefore, admissible under MRE 701.

B. BINDOVER

Defendant argues that he should not have been bound over for trial on the charge of felony murder because there was reasonable doubt whether he intentionally killed the victim. Defendant did not challenge his bindover in a motion to quash in the trial court, leaving

this issue unpreserved. See *People v Sparks*, 53 Mich App 452, 454; 220 NW2d 153 (1974). Here, defendant's argument is without merit because the prosecutor was not required to prove the charged crimes beyond a reasonable doubt at the preliminary examination. See *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Rather, the prosecutor was only required to establish probable cause that a felony was committed and that defendant committed the crime. See MCL 766.13; *Reigle*, 223 Mich App at 37. Further, because sufficient evidence to convict was presented at trial, any error in binding defendant over for trial was harmless as a matter of law. See *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002).

C. DEFENDANT'S STATEMENTS

Defendant argues that the trial court erred in denying his motion to suppress his statements to the police. In reviewing a lower court's decision on a motion to suppress evidence, we review the trial court's factual findings for clear error and conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

The prosecution presented evidence of defendant's statements to the police while at the scene and after he was transported to the police station for further questioning. The statements were recorded and the recorded statements were played for the jury. Defendant argues that his statements should have been suppressed because he was not advised of his constitutional rights before questioning and the police continued to question him after he invoked his right to counsel.

The police must advise a defendant of his constitutional rights before conducting a custodial interrogation.

People v Vaughn, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 3. However, such advice is not required if the defendant is not in custody. *Id.*

In assessing whether a defendant was in custody at the time of the interrogation, courts must examine “‘all of the circumstances surrounding the interrogation’ and determine ‘how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.’” *Yarborough v Alvarado*, 541 US 652, 663; 124 S Ct 2140; 158 L Ed 2d 938 (2004), quoting *Stansbury [v California]*, 511 US 318, 322, 325; 114 S Ct 1526; 128 L Ed 2d 293 (1994)]. A key question is whether, under the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave—that is, was there a formal arrest or a restraint on freedom of movement of the degree associated with formal arrest. *Yarborough*, 541 US at 663. [*Vaughn*, slip op at 4.]

The record and video recording of the crime scene reveals that defendant was not in custody when he was questioned by police officers at his home. He was not restrained in any way, and he was free to walk around and smoke a cigarette. Because defendant was not in custody at that point, the police were not required to advise him of his constitutional rights. However, defendant was later handcuffed, placed in a patrol vehicle, and transported to the police station for further questioning. Although defendant was clearly in custody at that point, the record indicates that he was advised of his constitutional rights before further questioning was conducted. Thus, suppression was not required on this ground.

Defendant further argues that his statements at the police station should have been suppressed because the police continued to question him after he invoked his right to counsel during the interview. The police may not continue to question a defendant who invokes his right to counsel during a custodial interrogation, unless the defendant initiates further communication. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v Kowalski*, 230 Mich App 464, 478; 584 NW2d 613 (1998), citing *Edwards*, 451 US at 484-485. However, a defendant's invocation of the right to counsel must be unequivocal, as determined by an objective inquiry. *People v McBride*, 273 Mich App 238, 258-259; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008); *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001). If reference to an attorney is ambiguous or equivocal, the cessation of questioning is not required. *Adams*, 245 Mich App at 237-238.

In this case, when a police officer discussed the possibility of defendant submitting to a polygraph examination, defendant stated that he would need an attorney if he was going to take a polygraph, but he did not state that he wanted an attorney at that time. During a police interview, the examining officer indicated that portions of defendant's story were not credible and that defendant had been home alone with the child on other occasions when she was hurt. Defendant explained that he was not at home alone with the child when the remote control was dropped on her head and then said, "What do I got to do? I mean do I need to call a lawyer or something?" The officer responded that defendant should look out for his own best interests. Defendant continued talking to the officer. Later during the same interview, when the officer indicated that defendant's story was "jacked

up,” defendant said, “Well, then let’s call the lawyer then ‘cause I gave what I could.” The officer said, “That’s fine.” Defendant then said, “There’s no reason for anybody to take me to jail,” and the officer responded, “You getting a lawyer’s not going to prevent you from going to jail.” Again, defendant continued talking to the officer. While defendant referenced calling an attorney on these two occasions, he never clearly requested to call an attorney or have an attorney present. Defendant’s statements about calling an attorney were akin to negotiations with the officer, and immediately after making the statements, he continued talking to the officer. Defendant also correctly observes that he made several requests to use a telephone, but none of those requests were made for the stated purpose of contacting an attorney. The trial court found, and we agree, that the record does not establish that defendant made an unambiguous, unequivocal request for counsel.

In sum, the record shows that defendant was not in custody when he made his initial statements at the crime scene and that he was advised of his constitutional rights before further questioning was conducted at the police station. Further, defendant did not make an unambiguous, unequivocal request for an attorney during the police questioning. Accordingly, the trial court did not err in denying defendant’s motion to suppress his statements.

Defendant also argues that the trial court erred when it allowed the prosecutor to play his recorded statements for the jury. Defendant contends that because police witnesses had already testified regarding the substance of his statements, the recordings should have been excluded as cumulative under MRE 403 and MRE 404(b)(1). We disagree. First, MRE 404(b) is not

applicable because defendant's statements did not involve evidence of other crimes, wrongs, or acts. Second, exclusion was not required under MRE 403. The recordings provided the full context of defendant's statements and also allowed the jury to view defendant's demeanor when making his statements, which the police testimony did not provide. Thus, the evidence was not entirely cumulative. Further, the probative value of the evidence was very high because it involved defendant's own statements concerning the charged crimes. While the evidence was damaging, it was not unfairly prejudicial. Thus, there was no error.

D. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct during his opening statement and closing argument requiring a new trial. We disagree. Because defendant did not object to the prosecutor's conduct, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. See *People v Ericksen*, 288 Mich App 192, 198; 793 NW2d 120 (2010).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and challenged remarks must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). "Opening statement is the appropriate time to state the facts that will be proved at trial." *Ericksen*, 288 Mich App at 200. A prosecutor is afforded great latitude in closing argument and is permitted to argue the evidence and reasonable inferences arising from the evidence in

support of his theory of the case. *Bahoda*, 448 Mich at 282-283.

Defendant has not established any misconduct during the prosecutor's opening statement. Although defendant accuses the prosecutor of referring to prejudicial matters during his opening statement, those matters related to testimony properly presented at trial. Further, having reviewed defendant's several claims of misconduct during closing argument, we find no error. Most of defendant's challenges involve the prosecutor's use of strong language to characterize the evidence and reasonable inferences arising from the evidence in support of the prosecutor's theory of the case. Prosecutors may use "hard language" when it is supported by the evidence, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Further, it was not improper for the prosecutor to argue that defendant had the opportunity and motive to conform his testimony to other evidence or testimony in the case. See *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985). Contrary to defendant's argument, the prosecutor did not improperly express his personal opinion about defendant's guilt. Viewed in context, the challenged remarks were made in reference to the evidence at trial. Defendant also accuses the prosecutor of misquoting and fabricating evidence, but he does not identify the factual basis for this claim. A "[defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). To the extent defendant disagrees with the prosecutor's characterization of some of the evidence, the trial court protected defendant's substantial

rights by instructing the jury that the attorneys' statements were not evidence. See *Bahoda*, 448 Mich at 281. No plain error has been shown.

E. POLICE INVESTIGATION

Defendant argues that the police department's failure to further investigate the crime scene or to develop exculpatory evidence violated his right to due process. However, the police are not under a duty to seek and find exculpatory evidence. *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Similarly, a prosecutor is not required to perform a defendant's investigative work for him. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Thus, this issue is without merit.

F. JURY INSTRUCTIONS

Defendant also raises several claims of instructional error. These claims are unpreserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763-764; *People v Martin*, 271 Mich App 280, 350; 721 NW2d 815 (2006).

First, defendant argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. A voluntary manslaughter instruction need only be given as a lesser included offense to murder if supported by a rational view of the evidence. *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006). Voluntary manslaughter requires evidence of adequate provocation and a killing committed in the heat of passion. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Because there was no evidence of provocation or a heat-of-passion killing in this case, the trial court's failure to instruct on voluntary manslaughter was not plain error.

Next, contrary to defendant's argument, the record discloses that the trial court instructed the jury on motive in accordance with CJI2d 4.9.

Defendant lastly argues that when instructing the jury on the malice element of felony murder, the trial court improperly instructed the jury that it need not be concerned with the intent to kill alternative because the prosecutor was not relying on that state of mind to prove its case. There was no plain error because the prosecutor never claimed that defendant intended to kill the child. Further, the statement benefited defendant because it eliminated a basis for proving his guilt. Thus, the statement did not affect defendant's substantial rights.

G. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of appellate counsel because his appellate attorney did not consult with him before filing a brief on appeal or raise additional issues that defendant wanted him to pursue. Because defendant did not seek to develop an evidentiary record in support of this issue, our review is limited to errors apparent from the record. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The record does not disclose to what extent appellate counsel consulted with defendant before filing his appellate brief. Although appellate counsel raised only a single issue on appeal, an appellate attorney is not ineffective for weeding out weaker arguments and focusing only on issues for which the defendant is most likely to prevail. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Further, defendant has not established that he was prejudiced by his appellate attorney's

failure to raise additional issues. Defendant has been afforded the opportunity to raise additional issues in his Standard 4 brief and he has not shown that any of his additional issues have merit. See *id.* at 430-431. Thus, defendant has not shown that he was denied the effective assistance of appellate counsel.

H. CUMULATIVE ERROR

Lastly, defendant has not established that he is entitled to relief because of the cumulative effect of several errors. Although the cumulative effect of multiple errors may require reversal even though a single error, standing alone, does not, *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002), defendant has not established any actual errors that, even cumulatively considered, denied him a fair and impartial trial. See *id.* at 591 n 12 (citation omitted).

Affirmed.

s/ Pat M. Donofrio
s/ Stephen L. Borrello
s/ Jane M. Beckering

APPENDIX K

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

File No. 08-031751-FC-1

PEOPLE OF THE STATE OF MICHIGAN

v.

SCOTT DAVID PERREAULT, Defendant.

MOTION

BEFORE THE HONORABLE FRED L.
BORCHARD, CIRCUIT JUDGE

Saginaw, Michigan
February 23, 2009

[3] * * * THE COURT: Court at this time will call the matter of the People of the State of Michigan versus Scott Perreault.

The record will reflect that the defendant is present with counsel, Mr. Brisbois. Prosecution is also present. Last week the Court heard a motion that was brought on by the defense as well as heard testimony on the issue of the statement slash confession that was taken of the defendant in this case.

The facts at this point reveal that the defendant is presently before the Court on a charge of felony murder in Count I, Count II of child abuse in the first degree, and notification of habitual offender second offense notice.

The alleged offense is noted to have occurred on or about September 2nd of 2008 in the township of Saginaw, county of Saginaw and State of Michigan at or near 205 South Colony. The defendant, the statements reveal, was with the child at the time of the child sustaining personal injury.

The Court had an opportunity in reviewing the statements to note that Miranda warnings were given [4] before there was any discussion with the defendant. The Court notes that these warnings are required when the defendant is in custody or otherwise has his ability to leave significantly restrained or impaired, I forget the exact words as cited in the case law.

Following the injury to the child, the authorities were called, the police arrived and there were certain discussions held with the defendant at the location of where the injury took place. The child was removed to the hospital, and the defendant was then taken by the police to the police station where he was interviewed following Miranda instructions that were given.

The Court noted at various points throughout the discussion with the various police officers that comments had been made by the defendant that maybe now is the time to get counsel involved. He also did express an interest on a number of occasions on wanting to go to the hospital to see how the infant was, that is how the infant was doing.

At all of these occasions, discussions continued. The Court in looking at the circumstances surrounding this interview has concluded that the totality of the circumstances reveal that he was not under the influence. In fact, I believe that a test, [5] as I recollect, had been given to him and he was negative as to any alcohol in his system. He did not appear to be

deprived of any sleep, and when he spoke to the officers and requested counsel, that did not appear to this Court to be an unequivocal request to have an attorney present. The defendant continued discussions with the officers after making comment that now might be the time or words to that effect to speak to an officer.

The Court does believe that, and concludes that the discussions were voluntarily, knowingly and intelligently made as was the waiver of the Miranda warnings to talk with the police. There did not appear to be any threats of abuse or physical abuse or deprivation of food, sleep or medical attention. There did not appear to be any drugs.

The Court did view video of this gentleman as he spoke with the officers. The length of the detention did not appear to be that long. The Court is aware, and this gentleman did mention on the tape, that he had had previous experience, in particular with one officer, and -- the blonde officer, I'm drawing a blank

MR. FEHRMAN: Terry Williams.

THE COURT: Terry Williams, thank you. He -- [6] I do not know his age, but the age does not appear to be of any relevance, and looking at this gentleman, there did not appear to be, at least from visualizing the discussions, a lot of physical -- or I should say any mental duress from the situation let alone from the questioning by the officers, at least that was -- that was being shown by Mr. Perreault as the discussions were carried on, and the confession or statement, I should say, did not appear to be coerced.

The Court -- one second, please. he Court is going to, based on the findings as just mentioned by this Court, going to conclude that the conversations were properly obtained by the police and may be used at the

time of the trial of this matter . The Court believes that the motion as made by the defense does preserve any issue that may exist as to this Court's ruling, but that is the Court's ruling, and I'm going to allow the statement.

MR. FEHRMAN: Thank you, Your Honor.

THE COURT: Thank you, gentlemen.

MR. BRISBOIS: Thank you, Judge.

* * *

APPENDIX L

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

File No. 08-031751-FC-1

PEOPLE OF THE STATE OF MICHIGAN

v.

SCOTT DAVID PERREAULT, Defendant.

WALKER HEARING

BEFORE THE HONORABLE FRED L.
BORCHARD, CIRCUIT JUDGE

Saginaw, Michigan
February 20, 2009

* * * [3] THE CLERK: The case of People versus
Scott David Perreault, Case No. 08-031751-FC-1.

THE COURT: Good morning.

MR. FEHRMAN: Paul Fehrman for the People.

MR. BRISBOIS: James Brisbois representing the
defendant, Your Honor.

THE COURT: All right. If counsel is
ready to proceed.

MR. FEHRMAN: Yes, Your Honor. We are here
today for a Walker hearing.

The People will call Officer Terry Williams.

THE COURT: Raise your right hand
and I'll swear you in, sir.

You do solemnly swear that the testimony you

shall give in the cause here pending shall be the truth, the whole truth, and nothing but the truth, so help you God?

MR. WILLIAMS: Yes.

THE COURT: Thank you. Have a seat.

TERRY WILLIAMS,

Being first duly sworn, testified under oath as follows:

[35] * * * THE COURT: When was that done?

THE WITNESS: About 2:00, Your Honor, I believe it was. And the only reason I'm basing that in one of the reports it says 2:00 he was brought back and we came back and started our interview.

THE COURT: Okay. All right. Thank you.

RECROSS-EXAMINATION

BY MR. BRISBOIS:

Q: I guess just one follow-up, when the other officer was in doing the questioning, did you hear him ask for a lawyer?

A: I didn't. First time was today when I watched the portion of that during Officer Williams' interview.

MR. BRISBOIS: Thank you.

THE COURT: May this gentleman step down?

MR. FEHRMAN: Yes, Your Honor.

THE COURT: Now --

MR. FEHRMAN: Your Honor, that's all we're going to have for the hearing. I think in the end, the best evidence the Court's going to have is what was actually said in the room, and the Court can make its own judgment.

THE COURT: All right. I would like some brief argument on the positions. I've read the motions, I've listened carefully, taken notes, but I'd [36] like to hear

from counsel.

MR. FEHRMAN: Your Honor, our position is that there was no coercion by the police certainly at the scene. The police were trying to determine what happened and were gathering information. There's no indication that he was in -- in custody whatsoever.

There's no questioning until he was inside of a room where it was all recorded. Prior to any questioning he was advised of his rights. He said he understood his rights, and he chose to waive those rights and speak with the detectives. So all of that was -- all those rules were followed to the letter, and there was a recording of that occurring.

There's nothing to indicate that the defendant was put in any type of duress. In fact, the opposite seems to be true, that the police bent over backwards to try to take care of all of his needs and make him comfortable. That's not to say the questioning wasn't probing in some way and they were trying to find out what happened, but nobody was abusive to him and he chose to speak and it was done voluntarily on his part.

There was no indication that there was an involuntary statement. I believe the recording, when the Court has a chance to see it, will be able to make [37] that determination.

MR. BRISBOIS: Well, why, if we start adding up from the time he's at the house and there are four to five deputies and detectives semicircled around him while he's standing in front of the car, they're firing questions at him from there, he's handcuffed, put in the back of the squad car and transported back in the police station, not allowed to go outside by himself without police escort, and he's in the squad room again with the police escort when the detectives show

up and take him into a room. At worst, and he's free to go, but he's not free to use the phone. Well, then he's not free to go and use the phone.

I mean either you're free to go or you're not free to go, and the one thing he kept asking to do is I want to use the phone; but, no, he's free to go, but he's not free to use the phone. If he's free to go, he's out the door, he's free to use the phone when he first asked to use the phone.

At one hour 25 minutes into the interview he asks for a lawyer. Well, the Court can make a determination when you listen to it whether it's concerning a polygraph or whatever it's for. At that point he was asking for a lawyer.

The Court will also note --

[38] THE COURT: What did he specifically say as the tape is going?

MR. BRISBOIS: When I listened to it, and it was a while back, he said he wanted a lawyer. Now, maybe you can draw out the interpretation. I'm not sure whether you can. I cannot swear to you today, but I do remember when I heard it saying, well, he just asked for a lawyer and it kept going. And at one hour and 30 minutes and 48 seconds he asked for a phone; one hour 33 minutes he asked for a phone; one hour and 50 minutes he asked for a phone. And interview two at 34 minutes and 13 seconds he said, can I call my lawyer. And really it depends on what time period, if the Court makes a determination he asks for a lawyer at the very beginning.

THE COURT: Beginning.

MR. BRISBOIS: At one hour and 30 some minutes, then from there on it's cut off. If he was free to go, but not free to use the phone from that point on,

I don't think he was free to go. I think he was in custody. That should cut it off.

I guess I would ask the Court to listen to the interview. You can tell what's going on.

THE COURT: And am I correct this -- there was no polygraph given that day or has there been a [39] polygraph?

MR. BRISBOIS: Never given a polygraph, you're right. He said he would.

MR. FEHRMAN: Your Honor, if I can just comment on a couple points Mr. Brisbois made.

THE COURT: Sure.

MR. FEHRMAN: I believe what the Court is going to see is that any request during the interview was unequivocal and was related specifically to the concept of he was going to go take a polygraph. If the investigation continued to that point that's what it related to. He never unequivocally said I don't want to talk with you anymore until I have an attorney.

The issue about the defendant making a comment that he hasn't had a chance to use the phone yet, I would like to use the phone, is not equivalent to making a request for an attorney. As I recall, there was no time he said I want to use the phone to call for legal counsel or get counsel from anyone.

It appeared from my -- at least from my memory of the conversation, that he talked about using the phone and that he ought to be at the hospital and that the mother of the child would be concerned. It appeared he may have wanted to use the phone for that purpose, to contact somebody at the hospital rather [40] than for an attorney.

I don't recall hearing any testimony that the defendant was surrounded by police officers that were firing questions at him. There were a group of officers

and the defendant that were standing in close proximity to each other, because they had a conversation. I believe that's what the testimony was.

MR. BRISBOIS: A semicircle with the defendant up against the car.

THE COURT: All right. Anything further?

MR. FEHRMAN: No, Your Honor.

MR. BRISBOIS: No sir.

THE COURT: I would ask the defendant and counsel be back here Monday morning. I'll have a decision for you then.

MR. BRISBOIS: We want to talk to the Court in chambers. Quite possibly --

MR. FEHRMAN: Your Honor, if you have time to speak with us in chambers.

THE COURT: Sure, absolutely.

(Proceedings adjourned.)