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

LARRY DEVEL STEWART,

Petitioner-Appellee,

v.

TONY TRIERWEILER, Warden,

Respondent-Appellant.

No. 16-2149

Appeal from the United States District Court  
for the Eastern District of Michigan at Detroit.  
No. 2:15-cv-11843—Gerald E. Rosen, District Judge

Argued: August 3, 2017

Decided and Filed: August 14, 2017

Before: SUTTON, McKEAGUE, and THAPAR, Circuit  
Judges

**COUNSEL**

**ARGUED:** Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Edmund S. Sauer, BRADLEY ARANT BOULT CUMMINGS LLP, Nashville, Tennessee, for Appellee. **ON BRIEF:** Andrea M. Christensen-Brown, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Edmund S. Sauer, Jessica Jernigan-Johnson, Brian R. Epling, Kimberly M. Ingram, BRADLEY ARANT BOULT CUMMINGS LLP, Nashville, Tennessee, for Appellee.

## OPINION

SUTTON, Circuit Judge. In this habeas case, Larry Stewart claims that a Confrontation Clause violation and prosecutorial misconduct undermined the fairness of his murder trial. But because the state court did not unreasonably reject these claims, we must reject his petition. We reverse the district court's contrary decision.

### I.

On the morning of December 19, 2011, Kevin Brown arrived at an apartment to pick up Reynatta Hamilton for what he thought was a date. Unbeknownst to Brown, Hamilton's boyfriend, Larry Stewart, was waiting for him. A struggle ensued. Shots were fired. The two men grappled with each other down a stairwell and out the door of the apartment complex. At the end of a trail of blood, Brown lay dead on the grass with several gunshot wounds in his chest. Stewart was gone.

Michigan charged Stewart and Hamilton with felony murder, felon in possession of a firearm, armed robbery,

and conspiracy to commit armed robbery. The court held a joint trial.

The evidence at trial showed that Stewart and Hamilton planned to rob Brown. Hamilton, who had met Brown while she was working at a McDonald's drive-through, would call Brown to her cousin's apartment for a supposed date. Stewart would wait with a gun to demand Brown's money. Witnesses testified that Stewart was with Hamilton at the apartment the night before the murder; that Stewart brandished a gun, asserted it was his, said he was "going to rob somebody," and invited others to help him that night, R. 8-8 at 35; that Hamilton warned Stewart to hide the gun from her cousin and then put it in her purse; that Stewart was going in and out of the apartment in the early morning; that Stewart left the apartment for good just five minutes before scuffling and gunshots were heard in the hallway; and that, after she'd been hit by a stray bullet, the first person Hamilton called was Stewart.

Hamilton's phone records, as well as statements she made to police, corroborated the witnesses' testimony. In the two days leading up to the shooting, Hamilton's phone made 127 different contacts with Stewart's phone and 28 contacts with Brown's. In the last minutes before the murder, Hamilton was on the phone with both men. Brown called Hamilton at 8:30 AM and hung up five minutes later. But Stewart connected to Hamilton's line at 8:31 AM. For nearly all of Brown's call, Stewart and Hamilton were connected via call waiting. Hamilton admitted reaching out to Brown because he often had a lot of money on him. After the shooting, she repeatedly told police that "it wasn't supposed to go down like this." R. 8-11 at 23.

The jury found Stewart guilty on all counts. The court sentenced him to life for the first degree felony murder

conviction, two years for the felony-firearm conviction, and twenty-five to fifty years for the armed robbery and conspiracy convictions. The jury likewise found Hamilton guilty on all counts, and the court sentenced her to life, two years, and ten to twenty years, respectively.

Stewart challenged his convictions on direct appeal on six grounds: (1) the prosecution violated the Fifth Amendment by mentioning his post-*Miranda* silence; (2) the court violated his Sixth Amendment right to confrontation by admitting some of Hamilton's statements; (3) the convictions for conspiracy to commit armed robbery and first-degree felony murder lacked sufficient evidence; (4) the court failed to instruct the jury on a lesser included offense; (5) the prosecution engaged in various instances of misconduct; and (6) defense counsel was constitutionally ineffective. The Michigan Court of Appeals affirmed Stewart's conviction, finding some claims forfeited, others without error, and still others harmless. *See People v. Stewart*, No. 313097, 2014 WL 1233946 (Mich. Ct. App. Mar. 25, 2014) (per curiam). The Michigan Supreme Court declined to review the appeal.

Stewart filed a federal habeas petition raising the same claims. The district court granted relief on the confrontation and prosecutorial misconduct claims and did not reach the others.

## II.

In habeas cases, we give the benefit of the doubt to the state courts' handling of the case. Under the Antiterrorism and Effective Death Penalty Act of 1996, we will not override state criminal convictions unless the state court unreasonably applied Supreme Court

precedent or the conviction turned on unreasonable fact findings. 28 U.S.C. § 2254(d).

*Confrontation Clause.* During the joint trial of Stewart and Hamilton, Stewart claims that the state trial court violated his Sixth Amendment right to be confronted with the witnesses against him by admitting certain statements Hamilton made to police officers. The state courts did not treat these claims casually. The trial court as an initial matter excluded some of the statements. But it eventually permitted the officers to introduce Hamilton's statements that (1) she and Stewart were dating; (2) she knew Brown and had met with him once before; (3) she saw Stewart with a gun on the night of December 18; and (4) she called Stewart and Brown moments before the shooting.

The state appellate court agreed with Stewart that some of the admitted statements violated his confrontation rights. It held that Hamilton's statements about her relationships with Stewart and Brown were testimonial hearsay in violation of the Sixth Amendment. *Stewart*, 2014 WL 1233946, at \*5; *see Crawford v. Washington*, 541 U.S. 36, 51–52 (2004). And it held that her statements about Stewart's possession of a gun and her phone calls immediately before the shooting implicated Stewart in violation of the Sixth Amendment. *Stewart*, 2014 WL 1233946, at \*5; *see Bruton v. United States*, 391 U.S. 123, 126 (1968). But the court concluded that both errors were harmless in view of the considerable other evidence that Stewart murdered Brown.

That conclusion receives deference under AEDPA because the state court fully adjudicated Stewart's confrontation claim. *See Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003). And we cannot say that the state court unreasonably applied federal law in rejecting it. *See Davis v. Ayala*, 135 S. Ct. 2187, 2198–99 (2015).

In assessing any potential prejudice from a Confrontation Clause violation, courts on direct review apply *Chapman's* harmless-error standard. *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993); *see Chapman v. California*, 386 U.S. 18, 24 (1967). That standard directs courts to consider “a host of factors,” including the importance of the challenged testimony, whether the testimony is cumulative, and the overall evidence of guilt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

That’s what the state court did. It found that the confrontation error was not “outcome-determinative” because each of Hamilton’s statements was cumulative of properly admitted evidence. *See Stewart*, 2014 WL 1233946, at \*5. Justin Lane had already testified that Stewart was Hamilton’s boyfriend and that he frequently came over to the apartment. Brian May described Stewart’s possession of a gun the night before the shooting and how Stewart planned to use it to rob somebody. And the telephone records confirmed Hamilton’s admission that she had contacted Brown and Stewart immediately before Brown was killed.

The state court noted that the “evidence of [Stewart’s] guilt was compelling.” *Id.* Combining the timing of the telephone records with eyewitness testimony about Stewart’s behavior on the night before and the morning of the shooting confirms the nature of the altercation in the hallway. The admissible evidence offers plenty of support for the jury verdict.

Stewart’s conviction had at least as much evidence as the one the United States Supreme Court upheld in *Harrington v. California*, 395 U.S. 250 (1969). The defendant in that case admitted he was at the scene of the crime and fled after a shooting, and other witnesses testified that he had a gun and was using it for a robbery. *See id.* at 252–54. The Court found the confrontation error

harmless because the case against the defendant was “overwhelming.” *Id.* at 254. A similar conclusion applies here.

Stewart resists that conclusion, pointing to this question that the jury asked during deliberation: “Is the report or statement[] from Ms. Hamilton evidence that the jurors can review?” R. 8-11 at 145. He maintains that two of our cases require us to treat this question as proof that Hamilton’s statements were critical, rather than cumulative, when it came to this jury. *See Vasquez v. Jones*, 496 F.3d 564, 576 (6th Cir. 2007); *Fulcher v. Motley*, 444 F.3d 791, 810–11 (6th Cir. 2006). Three problems undermine this argument. One is that neither opinion constitutes clearly established law under AEDPA. Another is that neither the trial judge nor the parties took the jury to be asking about anything other than the form in which any of the statements were made. The judge’s response to the jury’s question proves the point. “Other than what you’ve heard from the officers testifying [about Hamilton], no, there are no statements.” R. 8-11 at 145–46. The judge thought the jury was asking only for a written copy of Hamilton’s statements to *review*. Apparently, Stewart’s counsel agreed. He had no objection to the judge’s response. No one, besides Stewart now on appeal, thought that the jury was asking about its ability to *consider* Hamilton’s statements against Stewart.

The last problem is the difficulty of using a jury query in this way, whether as proof of the difficulty of the case with respect to one conviction (Hamilton) or the other (Stewart), and whether as useful proof at all. Did this jury want to use Hamilton’s statements only against Hamilton? Or did it plan to use them against Stewart? Did this jury ask because it thought the remaining evidence against Stewart was weak? Or was it confused by the

judge's instructions about the use of evidence? And perhaps most importantly, if this jury had *not* asked the question, would the opposite inference apply—that Stewart is guilty and that any error was harmless? Each set of inferences turns on far too much speculation to help the inquiry rather than distract from it.

In the end, any error was cumulative of admissible evidence, and there was considerable admissible evidence of Stewart's guilt. The state court reasonably concluded that the admission of Hamilton's statements was harmless. In view of this conclusion, we need not consider the State's argument that Stewart defaulted some of these claims, as the claims fail anyway. *See* 28 U.S.C. § 2254(d).

*Prosecutorial Misconduct.* Stewart separately alleges that the prosecutor engaged in misconduct during cross-examination and closing arguments by asking Stewart to comment on witness credibility, expressing his opinion on the evidence, referring to redacted statements by Hamilton, denigrating defense counsel, and quoting from the movie *Gladiator*. To his mind, these mistakes rendered the trial unfair and denied him due process. We disagree.

At the outset, we must referee a dispute about whether AEDPA deference applies to these rulings given that the state court reviewed some of these claims for plain error. Our circuit has not been a paragon of clarity about whether a state court's plain-error ruling amounts to a ruling on the merits under AEDPA. *See Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 851 (6th Cir. 2017). In 2009, we held that AEDPA applies to a state court's plain-error analysis if it "conducts any reasoned elaboration of an issue under federal law." *Fleming v. Metrish*, 556 F.3d 520, 531 (6th Cir. 2009). But in 2014, we said that "plain-error review is not equivalent to

adjudication on the merits, which would trigger AEDPA deference.” *Frazier v. Jenkins*, 770 F.3d 485, 496 n.5 (6th Cir. 2014).

Both rulings cannot be right, as they look in opposite directions. *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015). To resolve this Janus-like dilemma, we look to the oldest decision on point. See *United States v. Abboud*, 438 F.3d 554, 567 (6th Cir. 2006). That is *Fleming*. If that weren’t enough, our sister circuits sing with one voice on this issue—relying, in part, on *our* earlier decision. See, e.g., *Lee v. Comm’r, Ala. Dep’t of Corr.*, 726 F.3d 1172, 1207–10 (11th Cir. 2013); *Rolan v. Coleman*, 680 F.3d 311, 319–21 (3d Cir. 2012); *Douglas v. Workman*, 560 F.3d 1156, 1177–79 (10th Cir. 2009).

Stewart tries to sidestep this conclusion on the ground that *Fleming* failed to respect earlier circuit decisions. But he misreads the decisions. They stand only for the proposition that a state court’s plain-error analysis cannot resurrect an otherwise defaulted claim. *Fleming*, 556 F.3d at 530.

Confirming this conclusion is *Harrington v. Richter*. It obligates us to “presume[] that the state court adjudicated the claim on the merits” in ambiguous situations. 562 U.S. 86, 99 (2011). Despite two fleeting references to “plain error review,” the state court’s detailed opinion “is not even ambiguous” about its reliance on federal law to address the merits of Stewart’s claims. *Frazier*, 770 F.3d at 506 (Sutton, J., concurring in part and concurring in the judgment).

The key question on the merits “is whether the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quotation omitted). Because that standard is “a very general one,” courts have considerable leeway in

resolving such claims on a case-by-case basis. *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam). That leeway increases in assessing a state court’s ruling under AEDPA. We “cannot set aside a state court’s conclusion on a federal prosecutorial-misconduct claim unless a petitioner cites . . . other Supreme Court precedent that shows the state court’s determination in a particular factual context was unreasonable.” *Trimble*, 804 F.3d at 783.

*Darden* illustrates the high bar a defendant needs to clear to win a prosecutorial misconduct claim. The prosecutor in that case asked the jury to “give [the defendant] death” because “[t]hat’s the only way I know that he is not going to get out on the public.” 477 U.S. at 180 n.10. After referring to the defendant as “this animal,” and adding for good measure that he should be kept on a leash, the prosecutor wished for his death and disfigurement in increasingly brutal terms: “I wish I could see him sitting here with no face, blown away by a shotgun.” *Id.* at 180 nn.11–12. Even though these comments “undoubtedly were improper,” the Court still found “they did not deprive the petitioner of a fair trial” in view of the district court’s curative jury instructions—that the lawyers’ comments do not amount to evidence. *Id.* at 180–81.

Stewart does not clear *Darden*’s high bar, made higher still by AEDPA. He claims that the prosecutor crossed the line by asking him about another witness’s credibility during cross-examination: “So everybody is lying except you? Bryan May is a liar, right?” R. 8-11 at 57. The state court agreed that the prosecutor misstepped but determined that the trial court’s curative instructions about credibility determinations corrected the problem. No due process violation arose from this violation for another reason. The exchange arguably benefited

Stewart. After the prosecutor suggested Stewart hardly knew May, Stewart promptly corrected him. “We’ve had a couple altercations,” he said. *Id.* And “[w]e don’t care for each other too much.” *Id.* The question permitted Stewart to argue that a key prosecution witness had a motive to lie.

Stewart next points to some of the prosecutor’s comments during closing arguments. But he does not account for these comments “in context,” *United States v. Young*, 470 U.S. 1, 11–14 (1985), “to determine their effect on the trial as a whole,” *Darden*, 477 U.S. at 182.

Consider Stewart’s criticism of the prosecutor’s final flourish during closing argument. The prosecutor recalled a line from the movie *Gladiator*: “[I]s Rome worth one good man’s life? We believed it once. . . . Make us believe it again. He was a soldier of Rome. Honor him.” R. 8-11 at 101–02. The prosecutor then attempted to put jurors in the shoes of the Praetorian Guards. “I don’t know whether Kevin Brown was a soldier, but I know that he was an uncle, he was a brother and he was a son. He has a loving family. He was someone. I ask you to honor him.” *Id.* But if this part of the trial succumbed to excessive theatrics, it wasn’t the prosecutor’s fault alone. Hamilton’s counsel used a thespian opener of his own. After a simple, “Thank you, your Honor,” defense counsel recited Lewis Carroll’s *Through the Looking-Glass*: “The time has come, the walrus said, to speak of many things. Of shoes and ships and ceiling wax and cabbages and kings. And why the sea is boiling hot and whether pigs have wings.” R. 8-8 at 23.

When a lawyer invokes a literary reference to aid his cause, he should not be surprised if an adversary does the same for his.

We realize that it was Hamilton’s counsel, not Stewart’s counsel, who started down this path. But the question is not whether the invocation of *Gladiator* was a

good idea or even proper; it's whether, in context, it would deny Stewart a fair trial. *See Young*, 470 U.S. at 12. Nothing of the sort happened.

Stewart adds that the prosecutor injected his personal opinion by using the first-person singular pronoun, "I." But we agree with the state court that the prosecutor was merely "arguing reasonable inferences from the evidence." *Stewart*, 2014 WL 1233946, at \*10. Here's one example. After saying "I don't really think that's how it happened," the prosecutor discussed his theory of circumstantial evidence and why the prosecution's account diverged from Stewart's. R. 8-11 at 84-85. Here's another. The prosecutor said "I think it's a complete lie" that Stewart didn't notice he had been shot in the arm for almost an hour; but the prosecutor said so only after discussing how the .357 Magnum was strong enough to hit Hamilton after "go[ing] through drywall." *Id.* at 101. Even if the use of "I" conveyed some vouching, the prosecutor did not stand alone. Stewart's counsel twice characterized the prosecution's witnesses as "stool pigeons," who might not "dare come to court." R. 8-8 at 21. Before they even testified, Stewart's counsel said "I submit to you that [their] testimony will not be credible." *Id.* The trial court could fairly discount these prosecution and defense comments as made "in the heat of argument." *Dunlop v. United States*, 165 U.S. 486, 498 (1897); *see Darden*, 477 U.S. at 182; *Young*, 470 U.S. at 17-18 (noting that the jury understood "the prosecutor was countering . . . defense counsel's argument that the evidence established no such crime").

Stewart next criticizes the prosecutor for referring to "defense tactic[s]" as "crap." R. 8-11 at 118. Inappropriate though the comment was, context mitigates it. After Stewart's counsel presented only the first half of the

jury's flight instruction and suggested Stewart ran for innocent reasons, the prosecutor said this in rebuttal:

Finally, let me read to you, *this is the kind of defense tactic crap I can't stand*. The rest of that jury instruction. . . . Let me give you the last sentence. "However, a person may also run or hide because of a consciousness of guilt."

*Id.* The gist of the comment, if not all of its language, was "invited by [and] responsive to" defense counsel's closing argument. *Darden*, 477 U.S. at 182.

The trial court's curative instructions also leavened any risk of prejudice from the prosecutor's and defense counsel's comments. Immediately after closing arguments, the judge instructed the jury that it may not let sympathy or the possible penalty influence its decision. He admonished the jury that it "is your job and nobody else's" to decide the facts. R. 8-11 at 123–24, 127–28. He reminded jurors that their duty extended to assessing the credibility of Hamilton's statements, the meaning of Stewart's flight, and the testimony of expert witnesses and police officers.

Above all else for present purposes, the judge reminded the jury that nothing the lawyers said or asked counted as evidence. Stewart's counsel reminded jurors of the same thing during his opening statement. And Hamilton's counsel repeated that point during closing. As in *Darden*, the trial court's curative instructions support the state court's conclusion that Stewart received a fair trial. *See* 477 U.S. at 182. That conclusion was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

It's worth adding that the prosecutor, despite some missteps, proactively sought the judge's guidance outside the presence of the jury. And when he was unclear on evidentiary rulings, he asked for clarification about what was permissible. Over the course of a four-day trial, he endeavored to comply with those rulings. The errors Stewart identifies were isolated comments during closing arguments. They did not "so infect" Stewart's entire trial. *Darden*, 477 U.S. at 181. In fact, the prosecutor's conduct in *Darden* was far "more inflammatory" than the prosecutor's conduct in this case. *Parker*, 567 U.S. at 47–48.

The district court's reasoning does not alter this conclusion. It relied heavily on circuit precedent in granting relief and mentioned *Darden* just once. The Supreme Court has reminded us countless times that "circuit precedent does not constitute 'clearly established Federal law'" and "therefore cannot form the basis for habeas relief under AEDPA." *Parker*, 567 U.S. at 48–49. The district court also relied on a Sixth Circuit case (*Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000)) that applied a test that the Supreme Court has disowned. As *Parker* explained, *Darden*'s "highly generalized standard" "bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit." 567 U.S. at 49.

*Additional Claims.* Stewart adds that the prosecutor improperly referenced his post-*Miranda* silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), and asks us to affirm on this alternative ground. Because the district court declined to review this claim, as well as Stewart's other claims, "we think it the wiser course to refrain from considering those arguments for the first time on appeal." *Pouncy v. Palmer*, 846 F.3d 144, 163 (6th Cir. 2017).

For these reasons, we reverse the district court's judgment and remand the case for further proceedings.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

No. 16-2149

LARRY DEVEL  
STEWART,

Petitioner-  
Appellee,

v.

TONY TRIERWEILER,  
Warden,

Respondent-  
Appellant.

**FILED**  
Aug 14, 2017  
DEBORAH S. HUNT,  
Clerk

Before: SUTTON, McKEAGUE, and THAPAR, 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  
ORDERED that the judgment of the district court is  
REVERSED, and the case is REMANDED for further  
proceedings consistent with the opinion of this court.

16a

**ENTERED BY ORDER OF THE COURT**

s/ Deborah S. Hunt

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Deborah S. Hunt, Clerk

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

LARRY DEVEL  
STEWART,

Petitioner,

v.

THOMAS MACKIE,

Respondent.

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Civil No. 1:15-CV-11843  
HONORABLE GERALD  
E. ROSEN  
UNITED STATES  
DISTRICT JUDGE

**OPINION AND ORDER CONDITIONALLY  
GRANTING THE PETITION FOR WRIT OF  
HABEAS CORPUS**

Larry Devel Stewart, (“Petitioner”), incarcerated at the Oaks Correctional Facility in Manistee, Michigan, filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for first-degree felony murder, M.C.L.A. 750.316(1)(b); armed robbery, M.C.L.A. 750.529; conspiracy to commit armed robbery, M.C.L.A. 750.157a, 750.529; and felony-firearm, M.C.L.A. 750.227b.

The Court finds that petitioner was denied his due process right to a fair trial by the pervasive and flagrant misconduct of the prosecutor throughout the trial. For the reasons stated below, the petition for writ of habeas corpus is **CONDITIONALLY GRANTED**.

## I. Background

Petitioner Larry Devel Stewart was convicted following a jury trial in the Macomb County Circuit Court, in which he was tried jointly with co-defendant Renyatta Hamilton.<sup>1</sup> At trial, the prosecution presented evidence to establish that Stewart “ambushed and shot Kevin Brown in a botched robbery attempt that was set up when his girlfriend and codefendant, Renyatta Hamilton, lured Brown to the apartment complex where she was staying. Brown sustained four gunshot wounds in the incident and later died from his injuries.” *People v. Stewart*, No. 313097, 2014 WL 1233946, at \*1 (Mich. Ct. App. Mar. 25, 2014). Petitioner’s conviction was affirmed on appeal. *Id.*, *lv. den.* 497 Mich. 882, 854 N.W.2d 714 (2014).

Petitioner has filed a petition for a writ of habeas corpus on the following grounds:

I. The prosecutor violated due process and the Fifth Amendment right to silence by referencing Mr. Stewart’s post-*Miranda* silence and request for counsel, contrary to *Doyle v. Ohio*.

II. The trial court violated Mr. Stewart’s Sixth Amendment right to confront witnesses by denying the motion for severance or separate juries and by subsequently admitting Renyatta

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<sup>1</sup> Ms. Hamilton filed her own petition for writ of habeas corpus, which was held in abeyance to permit her to return to the state courts to exhaust additional claims. *See Hamilton v. Stewart*, No. 2:15-CV-12709 (E.D. Mich. Aug. 13, 2015)(Murphy, J.).

Hamilton's inadequately-redacted police statements without a proper limiting instruction.

III. Reversal is required where the prosecution failed to prove beyond a reasonable doubt that Mr. Stewart was involved in a conspiracy, or that he acted with the malice required for felony murder.

IV. The trial court committed plain error in failing to instruct the jury on the factually-supported lesser included offense of involuntary manslaughter.

V. Pervasive flagrant and ill-intentioned prosecutorial misconduct throughout this trial violated Mr. Stewart's due process rights and requires reversal.

VI. Defense counsel was constitutionally ineffective for failing to object to the prosecutor's *Doyle* violation, erroneous jury instruction, and to the failure to instruct the jury on involuntary manslaughter.

## 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 decision of a state court is “contrary to” clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An “unreasonable application” occurs when “a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner’s case.” *Id.* at 409. A federal habeas court may not “issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 410-11.

The Supreme Court explained that “[A] federal court’s collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v.*

*Viscotti*, 537 U.S. 19, 24 (2002)(*per curiam*). “[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)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

### III. Discussion

The Court finds it unnecessary to address all of the claims raised by petitioner; instead, the Court will focus on petitioner’s second and fifth claims alleging Sixth Amendment confrontation violations and prosecutorial misconduct because these claims form the basis upon which habeas relief is being granted.

A prosecutor’s improper comments will be held to violate a criminal defendant’s constitutional rights if they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct will thus form the basis for habeas relief only if the conduct was so egregious as to render the entire trial fundamentally unfair based on the totality of the circumstances. *Donnelly v. DeChristoforo*, 416 U.S. at 643-45. In order to obtain habeas relief on a prosecutorial misconduct claim, a habeas petitioner must show that the state court’s rejection of his prosecutorial misconduct claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012)(quoting *Harrington*, 562 U.S. at 103).

This Court understands that “claims of prosecutorial misconduct are reviewed deferentially on habeas review.”

*Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004)(citing *Bowling v. Parker*, 344 F. 3d 487, 512 (6th Cir. 2003)). However, even when reviewed in a light most favorable to the state, the prosecutor's insertion of matters not supported by the evidence, his disregard for the trial court's rulings, and his pervasive and inflammatory comments and questions throughout the trial were so egregious and unprofessional, that they deprived petitioner of his right to a fair trial.

Petitioner first argues that the prosecutor committed misconduct by asking petitioner on cross-examination to comment on the credibility of prosecution witnesses. Petitioner points to the following questions by the prosecutor:

Q. [Prosecutor]: So everybody is lying here except you? Bryan May is a liar, right?

A. [Petitioner]: Yes, he is.

Q: Bryan May, you don't even know him. You've never had any fight with him, have you?

A: Yeah. We've had a couple altercations, a little animosity towards each other. We don't care for each other too much.

Q: Okay. So you think he came out here under oath to lie on you because of some prior animosity?

A: Yes, I would. Because anything that would get him off or get him out of the limelight as being a suspect, I would believe he would do.

(Tr. 7/24/12, p. 57).

The prosecutor continued this theme in his closing argument:

But aside from what we heard this morning and the inconsistencies and the reasons and that everybody is a liar except him. Bryan May is not telling the truth, Rocho is not telling the truth, nobody is telling the truth. Just him, okay? And then when I confront him on the fact that what he's trying to tell you is on the video, is not on the video, he doesn't want to watch the video. I'll show you it's not on the video.

(*Id.*, p. 97).

The prosecutor's questioning of petitioner on cross-examination about whether various prosecution witnesses were lying was improper, since a prosecutor generally cannot ask a witness to comment on the credibility of other witnesses. *See United States v. Dickens*, 438 F. App'x 364, 369–70 (6th Cir.2011)(collecting cases). “[T]he general principle that credibility determinations are meant for the jury, not witnesses, applies here, and the prosecutor's questions were improper.” *Id.* at 370. It is also improper for a prosecutor to argue that the jury would have to find that the prosecution witnesses deliberately lied in order to acquit the defendant. *See Hodges v Hurley*, 426 F.3d 368, 380 (6th Cir. 2005); *United States v. Diaz-Carreón*, 915 F.2d 951, 956 (5th Cir.1990) (error occurs when a prosecutor argues that an acquittal requires its witnesses to be disbelieved and the defense witnesses to be believed). Such arguments, in effect, leave little or no room for the jury to “return a verdict of not guilty [simply] because the evidence might not [otherwise] be sufficient to convict defendant beyond a reasonable doubt.” *United States v. Vargas*, 583 F.2d 380, 386-87 (7th Cir. 1978). The prosecutor's questions and arguments here were clearly improper.

Next, petitioner claims that the prosecutor misrepresented the evidence and argued facts that had not been introduced into evidence. Misrepresenting facts in evidence can amount to substantial error because doing so “may profoundly impress a jury and may have a significant impact on the jury’s deliberations.” *Washington v. Hofbauer*, 228 F.3d 689, 700 (6th Cir. 2000) (quoting *Donnelly v. DeChristoforo*, 416 U.S. at 646). Here, throughout the trial, the prosecutor misstated facts, put words into the mouths of witnesses and assumed prejudicial facts not in evidence.

First, the prosecutor went beyond cross-examination of petitioner and essentially “testified” as to unverified off-record “facts” when he disagreed with petitioner’s characterization of his initial statement to the police following his arrest:

A [by Petitioner]: I made a statement to Detective Quinn and told him that what y’all -- what I’m being charged with is not what happened.

Q [by Prosecutor]: Okay.

A: There was a fistfight and this man pulled a gun on me.

Q: *Nope. Nope. Nope. All you told Detective Quinn was it didn’t go down that way.*

A: I told them -- Q: When you wanted to talk, you wanted to talk and then you lawyered up. That’s what you did. . . .

A: No.

Q: . . . Do you want to see the video?

A: No.

Q: They’ve got you in the room. They are giving you *Miranda*. You say, that’s not how it happened. I want to tell you how it happened but I want a

lawyer. So they take you all the way back to the jail cell and you say, well, what if that's not how it happened? And they say, do you want to talk? And you said, yeah, let's get this done. You walked all the way back with them to the interview room. They put you in the interview room, the go to Mirandize you again and you said, nope. I want a lawyer. That's what you did, right?  
\*\*\*

A: I was telling them that there was never a robbery. That is not how it happened.

Q: *I didn't hear that in the video. I just heard you say it didn't go down that way. What if it didn't go down that way is how you said it and that was all you said.*  
\*\*\*

Q: You didn't get that far. Are you creating? Do you want to see the video?

A: No. I don't want to see the video.

Q: We can play the video. There is two of them. You can see, *the jury can see that you didn't say squat about that.*

(Tr. 7/25/12 pp. 71-73 (emphasis added)).

There was hardly a question amongst the prosecutor's comments. The colloquy comprised nothing more than the prosecutor relaying to the jury what he believed the facts to be -- facts that allegedly were contained in a video recording *that was never presented as evidence*. By essentially testifying to these extra-record facts, the prosecutor became an unsworn witness whom petitioner had no ability to cross-examine.

Then during closing argument, the prosecutor misrepresented the substance of statements made by petitioner's co-defendant, Renyatta Hamilton, that were

admitted, and also introduced portions of those statements that the trial judge had explicitly excluded in a redaction ruling made in an attempt to comply with *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, the Supreme Court held that a defendant is denied the constitutional right of confrontation where a non-testifying co-defendant's incriminating confession is admitted at a joint trial. 391 U.S. at 127-28. In this case, aware of the *Bruton* implications of Renyatta Hamilton's statements to the police, petitioner's counsel moved, prior to trial, for a separate trial to prevent the admission of the statements Hamilton made. (Tr. 7/9/12, pp. 1-5). The judge denied the motion, but ruled that, at the joint trial, Hamilton's statements would be admitted against her only, and that he would not admit the parts of the statements "that would affect [petitioner]." (*Id.*, pp. 4-6). Then later, before the police officers testified, the judge made additional attempts to redact Hamilton's statements to avoid any references to petitioner. (Tr. 7/20/12, pp. 12-43, Tr. 7/24/12, pp. 2-17).

Two police officers, Detective Jeffrey Barbera and Officer Curtis Randall, thereafter testified to portions of the statements that Hamilton made, subject to the trial court's attempts at redacting them to comply with *Bruton*. Over defense objection, Detective Jeffrey Barbera testified that at the crime scene, Hamilton told him that she had heard a struggle outside her apartment and was shot through the wall. Hamilton did not mention petitioner's name. (Tr. 7/20/12, pp. 54-55). Hamilton was later interviewed at the hospital three times, the last time after she was arrested. Detective Barbera testified that in those statements, Hamilton admitted that she knew Mr. Brown from meeting him at McDonald's a few weeks earlier and that she and Brown had made plans for him to pick her up at the apartment the morning of the shooting

to go out. Hamilton informed Detective Barbera that petitioner was her boyfriend but they were either dating other people or had broken up, during which time Hamilton had gone out with Mr. Brown once or twice. Hamilton stated that she had spoken with both Mr. Brown and petitioner in the hours and minutes before the shooting, and that she had spoken twice with petitioner afterward. Over objection, Barbera testified that Hamilton stated when she and petitioner were at the apartment the night before, she noticed the butt of a gun sticking out of his clothes. In the last interview, Barbera told Hamilton, "it really looks like you lured Brown to the complex to rob him" to which Hamilton replied "I know how it looks but there was no plan to rob him." (Tr. 7/20/12, pp. 61-64, 75-85).

Officer Curtis Randall also was permitted to testify that during the last interview with police at the hospital, Hamilton again described the exchange of phone calls between her, Mr. Brown, and petitioner before and after the shooting. Hamilton also informed Officer Randall how she had met the victim a few weeks before the shooting and that he appeared to have a lot of money because he would "flash" it a lot. Hamilton also reportedly said numerous times that "it wasn't supposed to go down like this." (Tr. 7/24/12, pp. 23-24).

In his closing arguments, the prosecutor then made the following remarks about Ms. Hamilton's statements:

You have their statements. Their statements are direct evidence about Renyatta Hamilton specifically saying it wasn't supposed to happen that way. "My job was to get Kevin Brown to be in the apartment." And she's inside pacing.

(Tr. 7/24/12, p. 85).

The prosecutor further stated:

That was when Mr. Stewart did the act that caused the death of Kevin Lionel Brown, the defendant was committing or attempting to commit or in Renyatta Hamilton's statement, "helping someone else commit" the crime of armed robbery.

(*Id.*, pp. 88-89).

The prosecutor made a third reference to Ms. Hamilton's statements:

[Ms. Hamilton] then coordinates the assault first through Stewart. Stewart is in and out of the apartment. And I think one of the most damning things is the timing of those phone calls because she is coordinating. That's her role. When she tells Sergeant Randall and Detective Furno that she was to get him to the apartment what do you think she's doing?

(*Id.*, p. 92 (some internal punctuation added)).

The prosecutor's comments here were inappropriate for several reasons.

First, the trial judge had ruled prior to trial that Ms. Hamilton's statements could not be used against petitioner at trial, in order to avoid a *Bruton* problem. The trial court also attempted -- unsuccessfully in this Court's opinion -- to redact Hamilton's statements to avoid any references to petitioner. Nevertheless, regardless of whether or not these statements were successfully redacted, the judge had specifically ruled that Hamilton's statements could not be introduced against petitioner,

and the prosecutor's use of the statements amounted to arguing facts which had not been introduced into evidence, in direct circumvention of the trial judge's ruling. Secondly, the prosecutor's remarks mischaracterized the substance of Ms. Hamilton's statements that were admitted.

The redacted statements contained no comments that Ms. Hamilton admitted it was her "job" or responsibility to "get" or entice Mr. Brown to the apartment as part of a plan with petitioner. There was no testimony that Ms. Hamilton admitted to helping someone else commit a robbery, as the prosecutor misleadingly stated. The Michigan Court of Appeals, in fact, acknowledged that it was improper for the prosecutor to refer to Ms. Hamilton's redacted statements, because they had not been introduced into evidence:

A prosecutor may not argue facts not in evidence. Here the prosecutor clearly committed misconduct by arguing facts that were not in evidence because Hamilton's statements referenced above were expressly excluded by the trial court. The prosecutor should have known not to refer to Hamilton's redacted statements because the trial court expressly excluded these statements, and the prosecutor even sought confirmation about what was excluded.

*People v. Stewart*, 2014 WL 1233946 at \*9 (Mich. App. Mar. 25, 2014) (citations omitted). However, in spite of "this clear misconduct," the Michigan court found that petitioner was not entitled to relief under plain error review. *Id.*

Furthermore, the prosecutor's use of Hamilton's out-of-court statements to urge the jurors to convict

petitioner violated the dictates of *Bruton*. A prosecutor may commit a *Bruton* violation during summation by encouraging a jury to interpret redacted portions of a non-testifying co-defendant's statement in a way that implicates a defendant. *See Bowen v. Phillips*, 572 F. Supp. 2d 412, 420 (S.D.N.Y. 2008)(citing *Ruiz v. Kuhlmann*, 80 F. App'x 690, 693 (2d Cir. 2003)). The prosecutor's repeated references to Hamilton's statements here were clearly designed to encourage the jurors to use them as substantive evidence to convict petitioner.

For all of these reasons, the Court concludes that the prosecutor's conduct with respect to the non-testifying co-defendant's statements violated petitioner's Sixth Amendment right to confrontation as well as the judge's ruling that the statements could not be introduced against petitioner.

Petitioner next argues that the prosecutor improperly argued that Brown was a "loving son" and uncle, and had a "loving family," when there was no record evidence to support those claims. The prosecutor argued during closing:

I gave you a quote at the beginning of this trial from the movie *Gladiator*. The full quote: "is Rome worth one good man's life? We believed it once." The rest of it is: "Make us believe it again. He was a soldier of Rome. Honor him."

I don't know that Kevin Brown was a soldier, but I know that he was an uncle, he was a brother and he was a son. He has a loving family. He was someone. I ask you to honor him. I ask you to convict these two of having planned a robbery and robbed him and murdered him.

(*Id.*, pp. 101-02).

The Michigan Court of Appeals acknowledged that these remarks were also improper but held that petitioner was not entitled to habeas relief under plain error review.

*People v. Stewart*, 2014 WL 1233946, at \* 10.

“Closing arguments that encourage juror identification with crime victims are improper.” *Johnson v. Bell*, 525 F.3d 466, 484 (6th Cir. 2008). “Similarly, a prosecutor illicitly incites the passions and prejudices of the jury when he calls on the jury’s emotions and fears—rather than the evidence—to decide the case.” *Id.* The prosecutor’s repeated appeals to the juror’s sympathy for the victim were improper.

Petitioner next contends that the prosecutor vouched for the credibility of the witnesses and for petitioner’s guilt. Petitioner points to the following statements by the prosecutor in his closing argument:

Regarding petitioner’s testimony, the prosecutor stated:

Mr. Brown did not shoot himself, per Mr. Stewart, Mr. Stewart being a small guy, it appears that he was able to overpower Mr. Brown and wrestle with Mr. Brown and he put those four shots into Mr. Brown. I don’t really think that’s how it happened.

(Tr. 7/24/12, pp. 84-85).

The prosecutor continued:

I don’t get Mr. Stewart’s testimony. I don’t get -- I guess, I don’t get how an innocent man leaves the scene. I don’t get how an innocent man doesn’t want to tell the police their side of the

story. I don't get why you've got a brand new shoe and you just simply run away from that shoe.

(*Id.*, p. 96).

Then later, the prosecutor stated:

I don't think you could have a through-and-through with a .357 and not know it. I think it's a complete lie.

(*Id.*, p. 101).

The prosecutor also expressed his personal views on Ms. Hamilton's alleged involvement in the crime and, by inference, her conspiracy with petitioner:

Again, [Ms. Hamilton] knows Kevin Brown from work. She's the one that initiates contact. It's clear to me she's not interested in rekindling that relationship. The motive is robbery and then as we found out today from Officer Sergeant Randall, he flashed money.

(*Id.*, p. 90).

The prosecutor continued:

Next. I just find it incredible what [Ms. Hamilton's] actions are after she's shot. You heard Bryan May indicate that Justin came flying out of his room when he heard the gunshots. What's the first thing Renyatta tells Justin? Get back into your room. She's shot in the gut with a .357 and she's telling Justin to go back into the room?

\* \* \*

The next category. And I find this just as odd. She's shot and she's doing absolutely nothing to tend to her own wounds.

\* \* \*

Next. The fact that she changes stories, I think, is very difficult for me.

(*Id.*, pp. 94-95).

A prosecutor may not express a personal opinion concerning the guilt of a defendant or the credibility of trial witnesses, because such personal assurances of guilt or vouching for the veracity of witnesses by the prosecutor "exceeds the legitimate advocates' role by improperly inviting the jurors to convict the defendant on a basis other than a neutral independent assessment of the record proof." *Caldwell v. Russell*, 181 F.3d 731, 737 (6th Cir. 1999)(internal citations omitted). The test for improper vouching for a witness is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility. *United States v. Causey*, 834 F. 2d 1277, 1283 (6th Cir. 1987). "[G]enerally, improper vouching involves either blunt comments, or comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony." *See United States v. Francis*, 170 F. 3d 546, 550 (6th Cir. 1999)(internal citations omitted). The Sixth Circuit has held that to constitute error, a prosecutor's alleged misconduct of arguing his personal belief, in a witness' credibility or in a defendant's guilt, must be flagrant and not isolated. *See United States v. Humphrey*, 287 F.3d 422, 433 (6th Cir. 2002).

In the present case, the prosecutor flagrantly and repeatedly expressed his personal opinion as to the credibility of the witnesses, the strength of the evidence, and/or petitioner's guilt.

Petitioner finally argues that the prosecutor denigrated defense counsel while addressing the flight instruction during rebuttal, when the prosecutor stated that defense counsel's remarks about the flight instruction was the "kind of defense tactic crap I can't stand." (Tr. 7/24/12, p. 118).

Attorneys may not "make unfounded and inflammatory attacks on the opposing advocate," *United States v. Young*, 470 U.S. 1, 9 (1985), "or argue that counsel is attempting to mislead the jury." *West v. Bell*, 550 F.3d 542, 565 (6th Cir.2008). The prosecutor's inflammatory attack on defense counsel suggested that defense counsel was attempting to mislead or trick the jury and was thus improper.

Here, the prosecutor's conduct of the entire trial was not merely unprofessional and far beyond the bounds of acceptable vigorous advocacy -- although it certainly was (see ABA Model Rules of Professional Conduct, Rules 3.3, 3.4, 3.5, 3.8) -- it was beyond constitutional pale. Although each of the prosecutor's comments or questions by themselves, in isolation, may not be sufficient to grant habeas relief, the prosecutor's flagrant and repeated incidents of misconduct permeated the entire trial and were hardly inadvertent slips-of-the-tongue or isolated incidents. Rather, they were intentional, misleading, and cumulatively highly inflammatory and prejudicial.

Beyond this, the prosecutor's misconduct had the effect of violating petitioner's Sixth Amendment confrontation rights. By flagrantly ignoring the trial judge's rulings regarding redaction and the limited use of the statements of petitioner's non-testifying codefendant

Renyatta Hamilton, and by inserting accusatory information outside of the evidentiary record, the prosecutor deprived petitioner of the right to confront this information. Despite the trial judge's best efforts, the prosecutor repeatedly referenced co-defendant Hamilton's statements in closing without specifying whom they could be used against, and he clearly implied that Hamilton's police statements were evidence of petitioner's involvement in the plot to set up and rob Kevin Brown. In light of this, there is more than a reasonable probability that the prosecutor's misuse of Ms. Hamilton's statements contributed to the verdict.

The cumulative effect of the prosecutor's improper, unprofessional and inflammatory behavior throughout the trial was so flagrant and severe that the Court is constrained to find that petitioner is entitled to habeas relief. *See Gumm v. Mitchell*, 775 F.3d 345, 382-83 (6th Cir. 2014).

In *Boyle v. Million*, 201 F. 3d 711, 717 (6th Cir. 2000), the Sixth Circuit held that habeas relief was warranted on a habeas petitioner's prosecutorial misconduct claim, despite the relatively strong evidence against the petitioner, in light of the fact that the prosecutor's misconduct was flagrant, was intended to mislead and prejudice the jury, and the improprieties infected all aspects of the trial, such that the error could not be deemed harmless. In light of "the egregious and inflammatory nature" of the behavior and arguments of the prosecutor throughout trial, the Sixth Circuit was left with "grave doubt" as to whether the prosecutorial errors had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* at 718.

When a federal court judge in a habeas proceeding is in "grave doubt" about whether a trial error of federal constitutional law had a substantial and injurious effect or

influence in determining the jury's verdict, the error is not harmless and the petitioner must win. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). The focus in such a situation is not merely whether there is enough evidence to support the result, apart from the phase affected by the error. It is, rather, whether the error itself has substantial influence. If so, or if a judge is left in grave doubt, the conviction cannot stand. *O'Neal*, 513 U.S. at 438.

In the present case, this Court, at the least, has grave doubt about the viability of the jury's verdict. The cumulative impact of the prosecutor's serial misconduct in this case upon the jury's consideration of the evidence is such that the Court believes it is highly likely that the misconduct had a substantial and injurious effect or influence upon the jury's verdict. First, as indicated, the prosecutor's misconduct was flagrant and severe and pervaded the entire trial proceedings and was designed to prejudice the jurors against petitioner. Secondly, much of the case against petitioner was circumstantial. There were no persons who actually witnessed petitioner shooting the victim during an armed robbery. Petitioner, in fact, claimed that it was the victim who initially pointed a gun at him and that the victim must have accidentally shot himself while the two men were struggling over the gun. (Tr. 7/24/12, pp. 51-52, 56, 62, 70-71, 76-77). Several witnesses believed that they saw the victim in possession of a firearm. (Tr. 7/18/12, pp. 100-102, 107-108, 110, 116, Tr. 7/19/12, pp. 73-75-76, 104-105, 112-113). In light of the competing evidence in this case, this Court does not believe that the pervasive prosecutorial misconduct in this case was harmless.

In sum, this Court concludes that the prosecutorial misconduct in this case was highly prejudicial, pervasive, and deprived petitioner of a fair trial. "[I]n a close credibility contest such as this, with horrible acts alleged

but scant hard evidence for the jury to weigh, a prosecutor must be doubly careful to stay within the bounds of proper conduct.” *Washington*, 228 F. 3d at 709. Accordingly, the Court will grant a conditional writ of habeas corpus, giving the State of Michigan ninety days in which to provide petitioner a new trial or release him. *Id.*

Because the Court’s conclusion that petitioner is entitled to habeas relief on these Sixth Amendment and prosecutorial misconduct claims is dispositive of the petition, the Court considers it unnecessary to review petitioner’s other claims and declines to do so. *See Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562, 567 (E.D. Mich. 2005); *aff’d*, 453 F. 3d 362 (6th Cir. 2006); *cert. den.*, 127 S. Ct 1832 (2007).

#### IV. ORDER

For all of the reasons set forth above in this Opinion and Order,

**IT IS HEREBY ORDERED** that Petitioner’s application for writ of habeas corpus is **CONDITIONALLY GRANTED**. Accordingly, unless the State takes action to afford petitioner a new trial within ninety (90) days of the date of this opinion, Petitioner may apply for a writ ordering Respondent to release him from custody forthwith.

s/ Gerald E. Rosen  
\_\_\_\_\_  
United States District Judge

Dated: July 12, 2016

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I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on July 12, 2016, by electronic and/or ordinary mail.

s/ Julie Owens

Case Manager, (313) 234-5135

Case 2:15-cv-11843-GER-EAS Document 10  
Filed 07/12/16 Page 1 of 1 PageID 1328

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

LARRY DEVEL  
STEWART,

Petitioner,

v.

THOMAS MACKIE,

Respondent,

Civil No. 2:15-CV-1183  
HONORABLE GERALD  
E. ROSEN  
UNITED STATES  
DISTRICT JUDGE

**JUDGMENT**

The captioned matter came before the Court on a Petition for Writ of Habeas Corpus. In accordance with the Memorandum Opinion and Order entered on July 12, 2016:

The Petition for Writ of Habeas Corpus is **CONDITIONALLY GRANTED.**

Dated at Detroit, Michigan, this 12th, day of July, 2016.

DAVID J. WEAVER  
CLERK OF THE COURT

40a

BY: DAVID P. PARKER  
DEPUTY CLERK

**APPROVED:**

s/ Gerald E. Rosen  
UNITED STATES DISTRICT JUDGE

DATED: July 12, 2016

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on July 12, 2016, by electronic and/or ordinary mail.

s/ Julie Owens  
Case Manager, (313) 234-5135

Case 2:15-cv-11843-GER-EAS Document 8-15  
Filed 11/25/15 Page 1 of 143 PageID 1166

**Order**

Michigan Supreme Court  
Lansing, Michigan

Robert P. Young, Jr.,  
Chief Justice

Michael F. Cavanaugh  
Stephen J. Markman  
Mary Beth Kelly  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano  
Justices

October 22, 2014

149293

PEOPLE OF THE STATE  
OF MICHIGAN,  
Plaintiff-Appellee,

v.

LARRY DEVEL  
STEWART,  
Defendant-Appellant

SC: 14293  
COA: 313097  
Macomb CC: 2012-  
000569-FC

On order of the Court, the application for leave to  
appeal the March 25, 2014 judgment of the Court of  
Appeals is considered, and it is DENIED, because we are

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not persuaded that the questions presented should be reviewed by this Court.

Seal of the Michigan Supreme Court – Lansing

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.

October 22, 2014

s/ Larry S. Royster  
Clerk

USCA6 1038

Case 2:15-cv-11843-GER-EAS Document 8-14  
 Filed 11/25/15 Page 1 of 164 PageID 1002

**STATE OF MICHIGAN**

**COURT OF APPEALS**

|                                                                                                                                                                                                                               |                                                                                                      |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|
| <hr/> PEOPLE OF THE STATE<br>OF MICHIGAN,<br><br><div style="text-align: center;">Plaintiff-Appellee,</div><br><br>v.<br><br>LARRY DEVEL<br>STEWART,<br><br><hr/> <div style="text-align: center;">Defendant-Appellant.</div> | UNPUBLISHED<br>March 25, 2014<br><br>No. 313097<br>Macomb Circuit Court<br>LC No. 2012-000569-<br>FC |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|

Before: BECKERING, P.J., and STEPHENS and  
 RIORDAN, JJ.

PER CURIAM.

Defendant, Larry Devel Stewart, appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b, armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a. The trial court sentenced him to life imprisonment for the first-degree felony murder conviction, two years’ imprisonment for the felony-firearm conviction, 25 to 50 years’ imprisonment for the armed robbery conviction,

and 25 to 50 years' imprisonment for the conspiracy to commit armed robbery conviction. We affirm.

The prosecution presented evidence at trial to establish that defendant ambushed and shot Kevin Brown in a botched robbery attempt that was set up when his girlfriend and codefendant, Renyatta Hamilton, lured Brown to the apartment complex where she was staying. Brown sustained four gunshot wounds in the incident and later died from his injuries.

# I. DUE PROCESS AND FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

Defendant argues that he was deprived of due process and the Fifth Amendment right to silence when the prosecution referenced his post-*Miranda*<sup>1</sup> silence and request for counsel.

To preserve for appellate review the issue of the admissibility of evidence of a defendant's silence, the defendant must testify at trial. *People v Boyd*, 470 Mich 363, 377-378; 682 NW2d 459 (2004). Because defendant did not object, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A plain error affected a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

The Fifth Amendment, as applied to the states through the Fourteenth Amendment, "forbids [ ] comment by the prosecution on the accused's silence" at trial. *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013), quoting *Griffin v California*, 380 US 609, 615; 85 S

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

Ct 1229; 14 L Ed 2d 106 (1965). “[A]fter an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.” *People v Borgne*, 483 Mich 178, 187; 768 NW2d 290 (2009), quoting *Doyle v Ohio*, 426 US 610, 619 n 10; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, postarrest silence may be used to impeach a defendant “who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.” *Id.* at 192, quoting *Doyle*, 426 US at 619 n 11. “In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant’s testimony as to his behavior following arrest.” *Doyle*, 426 US at 619 n 11.

During cross-examination, the following exchange took place between defendant and the prosecutor:

*Q.* You turned yourself in a couple days [after the shooting;] that’s the first time you called the police, right?

*A.* I didn’t even call them then[;] I just turned myself in.

*Q.* You’ve never made a statement about this case until just now?

*A.* You’re right. No. Let me take that back.

*Q.* Oh, please do.

*A.* I made a statement to Detective Quinn and told him that . . . what I’m being charged with is not what happened.

*Q.* Okay.

*A.* There was a fistfight and [Brown] pulled a gun on me.

*Q.* Nope. Nope. Nope. All you told Detective Quinn was it didn't go down that way.

*A.* I told him—

*Q.* When you wanted to talk, you wanted to talk and then you lawyered up.<sup>2</sup> That's what you did.

\* \* \*

*Q.* They've got you in the room. They are giving you *Miranda*. You say, that's not how it happened. I want to tell you how it happened but I want a lawyer. So they take you all the way back to the jail cell and you say, well, what if that's not how it happened? And they say, do you want to talk? And you said, yeah, let's get this done. You walked all the way back with them to the interview room, they go to Mirandize [sic] you again and you said, nope. I want a lawyer.

That's what you did, right?

*A.* Yes, I did.

*Q.* So other than saying to him that's not how it happened, you didn't want to tell them how it happened. You waited until now so that I wouldn't know, nobody would know. This is your story now?

*A.* I was telling them that there never was a robbery. That is not how it happened.

*Q.* I didn't hear that in the video. I just heard you say it didn't go down that way. [“]What if it

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<sup>2</sup> Although we conclude that the prosecutor's conduct in this case did not violate Doyle, we do not condone his use of the phrase “lawyered up” in this context because it is derogatory towards a person's right to counsel and right to remain silent.

didn't go down that way["] is how you said it and that was all you said.

A. Right. And I told them that there was a fight, when [the officer] was standing at that counter bandaging my arm for 45 minutes.

Q. You didn't get that far. Are you creating? Do you want to see the video?

A. No. I don't want to see the video.

Q. We can play the video. There is [sic] two of them. You can see, the jury can see that you didn't say squat about that.

We disagree with defendant that the prosecutor's inquiry about his previous silence violated *Doyle*. Defendant triggered the exception, *Borgne*, 483 Mich at 192-193, to the proscription against the prosecution referring to his post-*Miranda* silence when he testified that he told Detective Quinn, "[W]hat I'm being charged with is not what happened," and that "[t]here was a fistfight and [Brown] pulled a gun" on him.<sup>3</sup> This

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<sup>3</sup> Defendant also argues that the prosecutor violated the *Doyle* rule with the question, "You've never made a statement about this case until just now?" This question was appropriate regardless of whether defendant's postarrest, post-*Miranda* statement—"[I]t didn't go down that way" or, "[T]hat's not how it happened"—is interpreted as invoking his right to remain silent. The question equally invited an affirmative or negative response and was tantamount to asking, "Have you given a statement in this case before?" Had that question been asked instead, it is likely that defendant would have responded with the same answer: his assertion that he told Detective Quinn that Brown "pulled a gun" on him. Consequently, the question did not contravene *Doyle* by

amounted to an assertion that defendant was repeating the exculpatory version of events he recounted after he was read his *Miranda* rights, since he testified during direct examination that he returned to the apartment where the shooting occurred on the morning of December 19, 2011, to retrieve his shoes, and, once there, fought a heavy-set man with dreadlocks who pulled out a gun that discharged several times. The prosecutor impeached that testimony by countering that defendant vaguely told investigators either, “[I]t didn’t go down that way,” or, “[T]hat’s not how it happened,” and asked for a lawyer before continuing the interview. In this instance, the prosecutor was not using defendant’s invocation of his right to silence as evidence of his guilt, “but rather to challenge the defendant’s testimony as to his behavior following arrest.” *Doyle*, 426 US at 619 n 11.<sup>4</sup>

Defendant next asserts as error the prosecution’s questions on recross-examination concerning whether defendant spoke with police officers with an attorney present. Some context is needed for a resolution of defendant’s assertion of error. On redirect examination,

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improperly using defendant’s postarrest, post-*Miranda* silence as evidence against him.

<sup>4</sup> Compare *People v Knapp*, 244 Mich App 361, 383-384; 624 NW2d 227 (2001), to which defendant cites for its holding that “it was improper for the prosecutor to question [a police officer] regarding [the] defendant’s invocation of his right to counsel” after a previous arrest. There was no record evidence in *Knapp* that the defendant opened the door to impeachment by testifying that he gave a similar exculpatory explanation after he was arrested. *Id.* Here, the prosecutor impeached defendant with a conflicting picture of his postarrest behavior.

defense counsel had the following exchange with defendant:

*Q.* All right. And you remember talking to Detective Quinn at the Clinton Township Police Department?

*A.* Yes, I do.

*Q.* And you indicate that you told him you wanted to tell him what happened?

*A.* Yes.

*Q.* But you wanted a lawyer present?

*A.* Yes.

*Q.* Why?

*A.* Because they will try to trick you up and mix your words up with something you didn't say.

*Q.* Okay. So you were perfectly willing to tell them everything that happened as long as you had a lawyer present?

*A.* Yes, I was.

*Q.* All right. And they weren't interested in hearing your story with a lawyer present?

*A.* No, they were not.

*Q.* They said we don't want to talk to you?

*A.* Yes.

Subsequently, during recross-examination, the prosecutor again raised the issue of defendant's refusal to speak to the police without an attorney present:

*Q.* So after you hired Mr. Haddad you didn't turn around and tell the police, ["N]ow I want to talk[;] I've got a lawyer,[""] did you?

*A.* He said it was [sic] be too late by the time I got my lawyer into my preliminary examination. They wouldn't want to hear my story again.

*Q.* So . . . it wasn't important enough to tell your story anymore?

*A.* That's what they told me.

Defendant's assertion of error is meritless because his counsel opened the door to further questioning concerning whether defendant spoke to law enforcement officials with his attorney present by expressly questioning him about this issue on redirect examination. See *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). As we explained in *Allen*, “[h]aving raised the issue of his opportunity to explain his version of the events, [defendant] opened the door to a full and not just a selective development of that subject.” *Id.* (quotation omitted). Nevertheless, even assuming error, defendant is not entitled to relief under plain error review because, as discussed in detail *infra*, defendant cannot show that the alleged error affected the outcome of the proceedings given the strong evidence of his guilt. *Vaughn*, 491 Mich at 665.

Defendant also raises as error a comment made by the prosecutor during closing argument. Defendant argues that the prosecutor violated his right to remain silent by stating, “I don’t get how an innocent man doesn’t want to tell the police their [sic] side of the story.” This argument is meritless as well. This Court reviews a prosecutor’s comments in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Here, when viewing the facts in the context of the defense theory of the case, the prosecutor’s comment referred to defendant’s prearrest, pre-*Miranda* conduct. In pertinent part, the prosecutor argued: “I don’t get – I guess, I don’t get how an innocent man leaves the scene. I don’t get how an innocent man doesn’t want to tell the police their [sic] side of the story.” Although a prosecutor cannot comment

on a defendant's silence in the face of accusation when the defendant invokes his right to remain silent, a prosecutor may comment on a defendant's silence before any police contact occurred. *People v Gibbs*, 299 Mich App 473, 483; 830 NW2d 821 (2013). Indeed, "[a] prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true." *People v McGhee*, 268 Mich App 600, 634-635; 709 NW2d 595 (2005) (quotation omitted). Here, if defendant's version of the events were true, i.e., that Brown produced the weapon and that Brown was shot during a struggle in which defendant was defending himself, it would have been natural to contact the police. Thus, the prosecutor's comment on defendant's pre-*Miranda* silence was not improper. See *id.*

## II. MOTION TO SEVER TRIALS AND RIGHT OF CONFRONTATION

Defendant next argues that the trial court erred when it denied his pretrial motion to sever trials or allow separate juries, and that it violated the Confrontation Clause when it admitted the out-of-court testimonial statements of defendant's alleged coconspirator, Hamilton.

To preserve a constitutional challenge for appellate review, a defendant must first raise the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Because defendant did not object to the trial court's decision to hold a joint trial and redact Hamilton's statements, and explicitly consented, outside the presence of the jury, to the prosecution's introduction of portions of Hamilton's statements that were actually admitted, this issue is not preserved. *Id.* Unpreserved Confrontation

Clause claims are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-765; *People v Walker*, 273 Mich App 56, 65-66; 728 NW2d 902 (2006). A plain error affected a defendant's substantial rights if the error affected the outcome of the proceedings. *Vaughn*, 491 Mich at 665. "Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Reversal is warranted only "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* (quotation omitted).

As an initial matter, defendant waived appellate review of the trial court's order denying his motion for severance or separate juries when, at the hearing on his motion, his attorney consented to a joint trial so long as Hamilton's police statements were redacted:

*The Court:* I would limit [the prosecution] from introducing [Hamilton's statement] as it affects [defendant], not as it affects [Hamilton].

*Mr. Haddad (attorney for the defense):* So in other words, you would redact any reference to [defendant] from whatever statement [Hamilton] gave to law enforcement?

*The Court:* Correct.

*Mr. Haddad (attorney for the defense):* Then that makes me happy, Your Honor.

"Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this

issue.” *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003) (quotation omitted). Defendant did not, however, waive the right to object to the prosecution’s subsequent introduction of Hamilton’s statements in violation of the trial court’s ruling. This issue is discussed below.

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” US Const, Am VI. See also Const 1963, art 1, § 20. The Confrontation Clause is violated when a trial court admits a codefendant’s confession that implicates the defendant at a joint trial. *Bruton v United States*, 391 US 123, 127-128; 88 S Ct 1620; 20 L Ed 2d 476 (1968); *Pipes*, 475 Mich at 269. Further, out-of-court testimonial statements by nontestifying witnesses are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 156 L Ed 2d 177 (2004); *People v Nunley*, 491 Mich 686, 698; 821 NW2d 642 (2012). “Statements taken by police officers in the course of interrogations” are testimonial for the purposes of the Confrontation Clause. *Crawford*, 541 US at 52. “Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for crossexamination.” *Id.* at 68.

The trial court admitted into evidence several testimonial statements Hamilton made to Detective Jeffrey Barbera. In pertinent part, Hamilton discussed her relationship with defendant. She also discussed how she knew Brown. Further, Hamilton told Barbera that she saw defendant with a gun the evening before the shooting, and that she contacted defendant and Brown moments before the shooting.

We disagree with defendant that all of Hamilton's statements violated *Bruton*. Some of her statements, most notably her statements that she dated defendant and that she knew Brown, did not inculcate defendant. Thus, these statements did not violate *Bruton* because they did not implicate defendant on their face, nor did they implicate him when linked with other evidence introduced later at trial. See *Richardson v Marsh*, 481 US 200, 207-208; 107 S Ct 1702; 95 L Ed 2d 176 (1987). Nevertheless, because, as discussed *infra*, the jury was not properly instructed that it could not use these statements against defendant, the admission of these testimonial hearsay statements violated defendant's right of confrontation. *Id.* at 206 (explaining that a witness whose testimony is introduced at a joint trial is not considered a witness against the defendant for purposes of the Confrontation Clause if the jury is instructed not to consider the testimony against that defendant). Thus, these statements were admitted in error. *Id.*

The remainder of Hamilton's statements, most notably her statements concerning defendant's possession of a gun the evening before the robbery, as well as her statement that she contacted defendant and Brown immediately before the robbery, implicated defendant in the attempted robbery and shooting of Brown. Thus, these statements violated the rule from *Bruton*, see *id.*, and the trial court plainly erred by admitting the statements, see *Pipes*, 475 Mich at 269.

Although the trial court admitted Hamilton's statements in error, the totality of the evidence against defendant precludes the conclusion that the error was outcome-determinative because the evidence against defendant was significant, and because Hamilton's statements were cumulative to properly admitted evidence. Initially, Hamilton's statement that she dated

defendant was cumulative to that of other witnesses who testified concerning the relationship. Moreover, Hamilton's statements that she knew Brown were cumulative to the admission of cellular telephone records showing that Hamilton contacted Brown on multiple occasions. Further, Hamilton's statement that she saw defendant with a gun the evening before the shooting was cumulative to properly admitted evidence because Brian May testified that he saw defendant with a gun the evening before the shooting, that defendant said the gun belonged to him, that he planned to use the gun to rob someone, and that he asked for May's assistance with the robbery. Regarding Hamilton's statements that she contacted both defendant and Brown immediately before the robbery, Barbera obtained defendant and Hamilton's cellular telephone records and determined that there were 28 separate contacts between Hamilton's phone and Brown's phone between 2:01 p.m. on December 17, 2011, and 8:41 a.m. on the morning of the shooting, December 19, 2011, and that, in the same period, there were 127 separate contacts between defendant's phone and Hamilton's phone. Additionally, as discussed *infra*, evidence of defendant's guilt was compelling. Thus, in light of the other evidence produced at trial, the erroneous admission of Hamilton's statements did not prejudice defendant. See *Pipes*, 475 Mich at 280-281.

### III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his convictions of conspiracy to commit armed robbery, and first-degree felony murder. We disagree.

In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a

reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). This Court examines the lower court record de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the evidence proved each element of the crime beyond a reasonable doubt. *Id.*

Michigan's armed-robbery statute provides that a person who commits a robbery, "and who in the course of engaging in that conduct, possesses a dangerous weapon[,] . . . or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years." MCL 750.529. In order to establish a conspiracy, the prosecution must prove an agreement to commit a prohibited offense, but "the agreement necessary to form a conspiracy does not rise to the level of the 'meeting of the minds' concept from contract law . . ." *People v Mass*, 464 Mich 615, 629 n 19; 628 NW2d 540 (2001). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

There was sufficient evidence for a rational jury to have found that the prosecution proved each element of the conspiracy to commit armed robbery charge beyond a reasonable doubt. Defendant, May, and Lane agreed that defendant and Hamilton were both present at Lane's apartment on the night of December 18, 2011. May noticed a gun on a table inside the apartment and said that defendant wrapped it in a t-shirt later that evening. According to May, Hamilton admonished defendant to hide the gun "because if [Lane] come[s] home he might pick the [t]-shirt up" and discover the gun; Hamilton then hid the gun in her purse and left her purse on the table. After the shooting the following morning, May followed

Hamilton into the apartment's bathroom, from where she called defendant and said, "Baby, I've been shot." May knew Hamilton had called defendant because defendant was "the only person [May] kn[e]w that she called [']baby.[']" Hamilton's cellular telephone records revealed that there were 28 separate contacts between her cellular telephone and Brown's cellular telephone between 2:01 p.m. on December 17, 2011, and 8:41 a.m. on December 19, 2011, the morning of the shooting. In the same period, there were 127 separate contacts between Hamilton's phone and defendant's phone. In light of this evidence, it was reasonable for the jury to have accepted the prosecution's theory that defendant and Hamilton conspired to lure Brown to the apartment complex so that defendant could rob him.

Defendant argues on appeal that, while May testified that defendant had a gun and discussed his intention to use it to rob someone, "there was no indication in those alleged statements that [Hamilton] was included in that plan or that the conversation involved her in any way." However, May's testimony established that Hamilton was not only aware that defendant carried a gun, but that she was concerned enough that Lane would discover it to conceal it in her purse. Defendant next argues that although cellular telephone records showed numerous calls and text messages between defendant and Hamilton and Hamilton and Brown before and after the shooting, those records do not indicate a conspiracy to rob Brown because the substance of those conversations was unknown. Even without knowing what was said, the volume and the timing of the calls—especially the time during which Hamilton's cellular telephone was connected to both defendant's cellular telephone and Brown's cellular telephone—permitted the reasonable inference that defendant and Hamilton conspired to rob Brown. See

*Harverson*, 291 Mich App at 175 (explaining that this Court views the evidence in a light most favorable to the prosecution).

Defendant also argues that there was insufficient evidence to sustain his conviction of felony murder because the prosecution did not adequately prove the malice element of that offense. The 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(1)(b)]. [*Carines*, 460 Mich at 759 (quotation omitted).]

“The facts and circumstances of the killing may give rise to an inference of malice.” *Id.* “A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon.” *Id.* (internal citation omitted). Death is a foreseeable result of armed robbery. See *People v Craig*, 66 Mich App 406, 410; 239 NW2d 390 (1976) (“[T]he intentional commission of a felony such as armed robbery . . . usually involves the conscious creation of a very high degree of risk of death with knowledge of its probable consequences.”).

Defendant’s brief on appeal adopts his own narrative of the struggle between him and Brown, and proposes several alternatives to the jury’s verdict. For example, he argues that it was “just as likely that [the gun] was fired

either by accident or even by Brown himself, who was the last person to have held the gun during the incident,” and it was “just as likely that [defendant] never produced or displayed a gun but [that] it emerged during the struggle and was accidentally discharged.” The first problem with this argument is that it is premised on the jury having believed defendant’s testimony when it elected not to do so. The weight of evidence, the credibility of witnesses, and what inferences can be fairly drawn from the evidence are to be decided by the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). The more fundamental error with defendant’s arguments, though, is that suggesting equally likely explanations for defendant’s behavior and for the firing of a gun fails to establish a claim that there was insufficient evidence to support a conviction. “Although the prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with [a] defendant’s innocence.” *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Therefore, there was sufficient evidence to allow a rational jury to find, beyond a reasonable doubt, that defendant acted with the requisite malice for first-degree felony murder.

#### IV. JURY INSTRUCTIONS

Defendant next argues that the trial court plainly erred when it failed to instruct the jury on the necessarily lesser included offense of involuntary manslaughter. Defendant waived review of this issue when his attorney expressed satisfaction with the jury instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). After the trial court read the instructions to the jury, it asked defendant’s attorney if he was “satisfied with the instructions as given,” and counsel responded, “Yes, I am

satisfied.” Consistent with *Chapo*, defendant waived this issue.<sup>5</sup>

## V. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed several instances of misconduct. Initially, defendant argues that the prosecutor committed misconduct by asking defendant whether May lied during his trial testimony. “Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). It is improper for the prosecutor to ask a defendant to comment on the credibility of prosecution witnesses, because his or her opinion “is not probative of the matter.” *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, “[a] timely objection by defense counsel could . . . cure[] any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction.” *Id.* at 18. While the record is clear that the prosecutor erred when he asked defendant if May lied during his testimony, the error does not require reversal because a curative instruction could have alleviated any undue prejudice. *Id.*; *People v Unger*, 278 Mich App 210, 235, 237; 749 NW2d 272 (2008). Further, the trial court’s

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<sup>5</sup> The trial court instructed the jury on the lesser included offense of second-degree murder, MCL 750.317. The verdict, guilty of first-degree felony murder, MCL 750.316(1)(b), renders this claimed error harmless. See *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998).

instructions directed the jury to make its own determinations regarding the credibility of each witness.

Defendant argues that the prosecutor committed misconduct when he referred to defendant's postarrest, post-*Miranda* silence during cross-examination and closing argument. As discussed *supra*, defendant's claims of error related to the prosecution's use of his silence are meritless. Thus, there was no prosecutorial misconduct in this regard.

Next, defendant argues that, in several instances, the prosecutor mischaracterized evidence and referred to facts not in evidence. Defendant first cites as error the following exchanges between the prosecutor and defendant during defendant's cross-examination:

*Q.* You've never made a statement about this case until just now?

\* \* \*

*A.* I made a statement to Detective Quinn and told him that . . . what I'm being charged with is not what happened.

*Q.* Okay.

*A.* There was a fistfight and [Brown] pulled a gun on me.

*Q.* Nope. Nope. Nope. All you told Detective Quinn was it didn't go down that way.

*A.* I told him—

*Q.* When you wanted to talk, you wanted to talk and then you lawyered up.

\* \* \*

*Q.* They've got you in the room. They are giving you *Miranda*. You say, that's not how it happened. I want to tell you how it happened but I want a lawyer. So they take you all the way back to the jail cell and you say, well, what if that's not

how it happened? And they say, do you want to talk? And you said, yeah, let's get this done. You walked all the way back with them to the interview room, they go to Mirandize [sic] you again and you said, nope. I want a lawyer.

That's what you did, right?

\* \* \*

A. I was telling them that there never was a robbery. That is not how it happened.

Q. I didn't hear that in the video. I just heard you say it didn't go down that way. [“]What if it didn't go down that way[“] is how you said it and that was all you said.

Defendant argues that this constituted improper impeachment under MRE 613(b), but that rule explicitly does not apply to admissions of a party-opponent, and did not apply in this case because the prosecutor did not introduce extrinsic evidence of a prior inconsistent statement. The questions defendant cites were not erroneous simply because their tone was aggressive. “A defendant in a criminal case has a right to present a defense, but that right is not cloaked with protection from vigorous cross-examination.” *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002).

Defendant next argues that the prosecutor, during closing argument, misrepresented Hamilton's redacted statements to police investigators. The prosecutor argued, in part:

[D]irect evidence, the phone records, which you have, which you will be able to look at which clearly shows [sic] who was calling who and when the call was being made. You have their statements. Their statements are direct evidence

about [Hamilton] specifically saying it wasn't supposed to happen that way. My job was to get [Brown] to be in the apartment.

\* \* \*

It doesn't have to be a robbery. It doesn't have to be a completed act. . . .

That when [defendant] did the act that caused the death of [Brown], [defendant] was committing or attempting to commit[,] or in [Hamilton's] statement, helping someone else commit the crime of armed robbery.

\* \* \*

[Hamilton] then coordinates the assault first through [defendant. Defendant] is in and out of the apartment. And I think one of the most damning things is the timing of those phone calls because she is coordinating. That's her role. When she tells [the police] that she was to get [Brown] to the apartment[,], what do you think she's doing?

A prosecutor may not argue facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Here, the prosecutor clearly committed misconduct by arguing facts that were not in evidence because Hamilton's statements referenced above were expressly excluded by the trial court. *Id.* The prosecutor should have known not to refer to Hamilton's redacted statements because the trial court expressly excluded these statements, and the prosecutor even sought confirmation regarding what was excluded. However, in spite of this clear misconduct, defendant is not entitled to relief under plain error review. The trial court instructed the jury that the attorney's statements were not evidence. Further, the prosecutor's statement was brief and made

in the midst of proper argument that circumstantial evidence showed evidence of a conspiracy, and he did not dwell on the improper argument. Additionally, a timely request for a curative instruction could have alleviated the prejudice caused by the prosecutor's improper argument, and the evidence against defendant was compelling. As such, we decline to grant defendant relief. See *Unger*, 278 Mich App at 237.

Defendant next argues that the prosecutor improperly argued that Brown was a "loving son" and uncle, and had a "loving family," when there was no record evidence to support those claims. In pertinent part, the prosecutor argued during closing:

I gave you a quote at the beginning of this trial from the movie *Gladiator*. The full quote: "is Rome worth one good man's life? We believed it once." The rest of it is: "Make us believe it again. He was a soldier of Rome. Honor him."

I don't know that Kevin Brown was a soldier, but I know that he was an uncle, he was a brother and he was a son. He has a loving family. He was someone. I ask you to honor him. I ask you to convict these two of having planned a robbery and robbed him and murdered him.

A prosecutor may not argue facts that are not in evidence, *Watson*, 245 Mich App at 588, nor may a prosecutor appeal to the jury to sympathize with the victim, *Unger*, 278 Mich App at 237. We find that the prosecutor's comments were improper because there was no evidence regarding Brown's family presented at trial, and because the prosecutor's argument was an appeal to the jury to sympathize with the jury. See *Unger*, 278 Mich

App at 273; *Watson*, 245 Mich App at 588.<sup>6</sup> However, defendant is not entitled to relief under plain error review because the trial court instructed the jury that the attorney's arguments were not evidence, and that the jury was not to let sympathy affect its decision. See *Unger*, 278 Mich App at 273. Moreover, a timely request for a curative instruction could have alleviated whatever prejudice was caused by the prosecutor's improper comments; thus, defendant is not entitled to relief. *Id.*

Next, defendant accuses the prosecutor of having injected his personal opinion about the weight of the evidence into closing argument, pointing to statements such as, "I don't really think that's how it happened," "I don't get [defendant's] testimony," and "I think it's a complete lie." These statements were not erroneous. A prosecutor may neither express his personal opinion about a defendant's guilt nor may he use the prestige of his office to inject his personal opinion into the matter; however, a prosecutor may nonetheless argue all reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282-283, 286; 531 NW2d 659 (1995). Here, the prosecutor's argument was not improper because he was simply arguing reasonable inferences from the evidence, and was not implying that he had any personal insight into defendant's guilt. Further, although the prosecutor frequently employed the use of the word

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<sup>6</sup> We note that the prosecutor attempted to use a theme from a film in order to present the case in a compelling way. Although we respect a prosecutor's desire to use a theme to deliver a more interesting and compelling trial presentation and do not wish to discourage prosecutors from engaging in colorful trial presentation, we cannot permit a prosecutor to refer to facts not in evidence or appeal to the sympathy of the jury.

“I” while arguing that the evidence showed defendant’s guilt, such argument was not improper where it was done in the context of arguing reasonable inferences from the evidence. See *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). See also *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995) (BOYLE, J) (“The crucial inquiry is not whether the prosecutor said ‘We know’ or ‘I know’ or ‘I believe,’ but rather whether the prosecutor was attempting to vouch for the defendant’s guilt.”).

Lastly, defendant argues that the prosecutor denigrated defense counsel by addressing the flight instruction during rebuttal. During closing argument, defense counsel noted the flight instruction,<sup>7</sup> which was later read to the jury, and emphasized the portion of the instruction that a person may run for innocent reasons. Defense counsel theorized that defendant ran from the scene of the shooting in this case for innocent reasons. During rebuttal, the prosecutor responded to that argument as follows:

Finally, let me read to you, this is the kind of defense tactic crap I can’t stand. The rest of that jury instruction.

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<sup>7</sup> The trial court instructed the jury as follows:

There has been some evidence that the Defendant Mr. Stewart ran away after the crime he – after he was accused of the crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of the consciousness of guilt. You must decide whether the evidence is true. And if true, whether it shows that the Defendant had a guilty state of mind.

“The evidence does not prove guilt if he runs and hides. A person may run and hide for innocent reasons such as panic, mistake or fear.”

Let me give you the last sentence. “However, a person may also run or hide because of a consciousness of guilt.” Hence, the definition of [defendant]. . . . Please convict him of everything. Thank you.

The prosecutor may not denigrate defense counsel, nor may he suggest that defense counsel is trying to mislead the jury. See *Dobek*, 274 Mich App at 67-68. Here, we find that the prosecutor’s argument was a proper response to defense counsel’s interpretation of the flight instruction, which did not include the part of the instruction emphasized by the prosecutor. See *People v Ackerman*, 257 Mich App 434, 453; 669 NW2d 818 (2003) (the prosecutor may respond to arguments made by defense counsel). Additionally, the prosecutor “need not confine argument to the blandest possible terms.” *Dobek*, 274 Mich App at 66.

## VI EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was deprived of the effective assistance of counsel. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move for a new trial or an evidentiary hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court’s review to errors apparent on the record. *Id.* Defendant neither objected nor moved for a new trial or a *Ginther* hearing; consequently, review is limited to the

record.<sup>8</sup> *Id.* “Whether [a] defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review for clear error a circuit court’s findings of fact. We review de novo questions of constitutional law.” *Vaughn*, 491 Mich at 650 (internal citations omitted).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronie*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). “To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). See also *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” *Vaughn*, 491 Mich at 670 (quotation omitted), and is given “wide discretion in matters of trial strategy[.]” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant’s first ineffective-assistance argument is that his trial counsel should have objected to a jury instruction that, in his reading, “directed the jury to use [Hamilton’s] out-ofcourt statements against” him. The instructions with which defendant takes issue are:

[T]he prosecutor has introduced evidence of statements that it claims [Hamilton] made. Before you may consider such an out-of-court statement against [her], you must first find that [she] actually made the statement as given to you. If you find that [Hamilton] did make the statement, you may give that statement whatever weight you think it deserves.

In deciding this, you should think about how and when the statements were made and about all the other evidence in this case. You may consider the statements when deciding the facts of the case and in deciding if you believe [defendant's] testimony here in open court.

Now, [Hamilton's] statement[s] have been admitted as evidence only as against her. It [sic] cannot be used against [defendant] and you must not do so. You must not consider her statements in any way when you decide whether [defendant] is guilty or not guilty.

If the trial court gives a correct and an incorrect instruction, “we presume that the jury followed the incorrect charge.” *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Here, the trial court’s instruction in the second paragraph that the jury could consider Hamilton’s statements against defendant was incorrect. As noted *supra*, these statements could not be used against defendant. Although the trial court’s instruction in the third paragraph clarified this error, we assume that the jury followed the incorrect instruction. *Id.* Thus, defendant’s trial counsel was objectively unreasonable for

failing to object to the instructional error. However, defendant is not entitled to relief because he cannot show that but for counsel's error, the result of the proceedings would have been different. See *Strickland*, 466 US at 694. Indeed, the evidence of defendant's guilt apart from Hamilton's statements was compelling. Additionally, as noted *supra*, most of Hamilton's statements were cumulative to properly admitted evidence. Thus, the trial court's erroneous instruction did not prejudice defendant, and defendant cannot succeed on his ineffective assistance of counsel claim. *Id.*

Next, defendant argues that his trial counsel should have objected to the prosecution's *Doyle* violation. As discussed *supra*, defendant failed to identify any errors in this regard. Counsel was not ineffective for failing to raise meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Lastly, defendant argues that his trial counsel failed to request a jury instruction on the necessarily lesser included offense of involuntary manslaughter. The trial court instructed the jury on the necessarily lesser included offense of second-degree murder, MCL 750.317, and the jury rejected this offense and found defendant guilty of first-degree felony murder, MCL 750.316(1)(b); this indicates that it is not reasonably probable that there would have been a different outcome had defense counsel sought to include the even lesser included offense of involuntary manslaughter. See *Sullivan*, 231 Mich App at 520.

Affirmed.

/s/ Jane M. Beckering

/s/ Cynthia Diane Stephens

/s/ Michael J. Riordan

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| <p><b>FILED</b><br/>Nov 6, 2017<br/>DEBORAH S. HUNT, Clerk</p> |
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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

LARRY DEVEL STEWART,

Petitioner-Appellee,

v.

TONY TRIERWEILER,  
WARDEN,

Respondent, Appellant.

ORDER

**BEFORE:** SUTTON, McKEAGUE, and THAPAR,  
Circuit Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

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