Nos. 23-3309/3365

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK HARTMAN,

Petitioner-Appellee/Cross-Appellant,

v.

OH ADULT PAROLE AUTHORITY,

Respondent-Appellant/Cross-Appellee.

ORDER

Before: MOORE, Circuit Judge.

Mark Hartman, a former Ohio prisoner represented by counsel, appeals the district court's judgment granting in part and denying in part his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Hartman applies to expand the certificate of appealability ("COA") granted by the district court. *See* Fed. R. App. P. 22(b). He also moves to substitute Ohio Attorney General Dave Yost as the respondent. For the reasons explained below, the court denies the motion to expand the COA and grants the motion to substitute.

Following a bench trial in 2014, the trial court convicted Hartman of three counts of rape, in violation of Ohio Revised Code § 2907.02(A)(2). The trial court sentenced him to three concurrent terms of four years of imprisonment and five years of post-release control and imposed a lifetime sex-offender registration requirement. At trial the state presented evidence that, after a night of heavy drinking, Hartman had a sexual encounter with a young woman. Hartman claimed that the encounter was consensual, but the victim said it was not. The Ohio Court of Appeals affirmed the convictions. *State v. Hartman*, 64 N.E.3d 519, 527 (Ohio Ct. App.), *perm. app. denied*, 60 N.E.3d 7 (Ohio 2016). Hartman sought state postconviction relief, but he was unsuccessful. *State v. Hartman*, No. 27162, 2017 WL 4334168 (Ohio Ct. App. Sept. 29, 2017), *perm. app. denied*, 93 N.E.3d 1005 (Ohio Mar. 14, 2018).

Appendix C

In 2019, Hartman filed a federal habeas petition raising twelve grounds for relief. Relevant to the present application, he claimed that his convictions were supported by insufficient evidence (Ground One), the Ohio Court of Appeals violated his due process rights by applying a new interpretation of rape under Ohio law to his sufficiency claim (Ground Two), trial counsel performed ineffectively during cross-examination of the victim, the victim's friend, and the investigating detective by bringing up new facts that bolstered the State's case (Ground Six), the trial court violated his right to confront witnesses against him by allowing a crime lab technician who did not personally conduct the DNA tests to testify about the results (Ground Seven), and trial counsel performed ineffectively by persuading him to waive his right to a trial by jury (Ground Twelve). A magistrate judge initially recommended denying the petition in its entirety, but after Hartman's objections and a recommitment to the magistrate judge by the district court, the magistrate judge recommended granting relief on a portion of Ground Six and on Ground Twelve. The district court adopted the magistrate judge's recommendation concerning Ground Six but not Ground Twelve. The district court granted a COA on Ground Twelve, however.

The respondent appealed (No. 23-3309), and Hartman cross-appealed (No. 23-3365). Hartman now seeks to expand the COA granted by the district court in his cross-appeal to include Grounds One, Two, and Seven, as well the remainder of Ground Six. The parties agree that, because Hartman has completed his term of post-release control, the proper respondent is now Ohio's Attorney General. *See* Advisory Comm. Note to Rule 2(b), Rules Governing Section 2254 Cases.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a petition is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when reviewing a district court's application of the standards of review of 28 U.S.C. § 2254(d) after a state court has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (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" nor (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Miller-El*, 537 U.S. at 336.

Hartman argued in Ground One that his convictions were supported by insufficient evidence. Relatedly, he argued in Ground Two that the Ohio Court of Appeals violated his due process rights by applying a novel definition of rape when analyzing his sufficiency claim. These two claims are intertwined and best addressed together. When evaluating the sufficiency of the evidence, the reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On habeas review, the inquiry involves two levels of deference: one to the jury's verdict under *Jackson*, and the second to the state court's decision under § 2254(d). *See Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). When assessing the sufficiency of the evidence, this court does not "weigh the evidence, assess the credibility of witnesses, or substitute [its] judgment for that of the jury." *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994).

The trial court found that Hartman purposely compelled the victim to submit to sexual conduct by force or threat of force. *See* Ohio Rev. Code § 2907.02(A)(2). Force is defined as "a physical action exerted against the one compelled." Ohio Rev. Code § 2901.01(A)(1). Purpose is shown when the defendant intends to compel the other person to engage in sexual conduct by force or threat of force. *See Hartman*, 64 N.E.3d at 535 (citing *State v. Wilkins*, 415 N.E.2d 303, 306 (Ohio 1980)). The Ohio Court of Appeals concluded that the victim's will was overcome by fear because she believed that, based on Hartman's actions, he would hurt her if she did not submit to

his advances. *Id.* at 536-37. The court must therefore evaluate whether reasonable jurists could debate the district court's conclusion that this decision was reasonable.

Hartman questions the Ohio Court of Appeals' conclusion that the elements of rape could be established merely by putting the victim in fear that she would be physically harmed. He particularly criticizes the fact that the Ohio Court of Appeals noted his physique—i.e., that Hartman was much larger and stronger than his victim—and that the victim's fear was influenced in part by her own personal beliefs and experiences. But the trial court found that Hartman pushed the victim onto the bed, removed her clothes, laid on top of her, and pulled her into the shower, thus creating a belief in the victim's mind that physical force would be used if she did not submit to his actions. *Id.* at 536. The state court's consideration of Hartman's size and strength or the victim's own fears when considering the totality of whether he purposely put the victim in fear of the use of physical force was reasonable. It certainly was not so extreme an interpretation of prior caselaw as to amount to a violation of due process or an improper retroactive application of a new interpretation of the law. And federal habeas courts do not otherwise review state court's decisions regarding questions of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Reasonable jurists therefore could not debate the district court's rejection of Grounds One and Two.

Hartman also argues in his COA application that the district court prematurely jumped to analyzing the reasonableness of the state court's decision regarding his sufficiency claim, *see* 28 U.S.C. § 2254(d), without first analyzing the claim in the absence of deference under AEDPA. Hartman's argument lacks merit because the district court was required to apply the doubly deferential standard of review mandated by AEDPA. *See Coleman*, 566 U.S. at 651. And the magistrate judge's and district court's determinations show that they engaged with the underlying sufficiency claim and properly applied AEDPA deference. Reasonable jurists could not debate the rejection of this argument.

Hartman next seeks a COA on a subclaim of Ground Six that the district court described as a lack-of-trial-strategy claim. No such bifurcation of the claim is readily apparent from his presentation of Ground Six in his habeas petition, however, and it unclear why the claim was divided in this manner in the district court. To the extent that Hartman wishes to argue on appeal

specifically that counsel made a poor strategic choice by deciding to cross-examine the witnesses in the manner described in Ground Six, that argument is encompassed by the district court's grant of relief on that claim and the State's appeal. To the extent that a distinct claim that counsel lacked a coherent overall defense strategy can be gleaned from the filings below, reasonable jurists could not debate the district court's conclusion that counsel's decision to adopt a strategy of acknowledging that sex occurred—but attempting to show that it was consensual—was reasonable.

Hartman lastly requests a COA on his claim that his Confrontation Clause rights were violated when a crime lab technician testified about DNA test results although he did not personally conduct the tests. The Confrontation Clause prohibits the admission of out-of-court testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Hartman primarily argues in his COA application that a harmlessness analysis should not be allowed in the context of a violation of the Confrontation Clause. This court's caselaw clearly establishes that Confrontation Clause claims are subject to harmless-error review, however. *See Reiner v. Woods*, 955 F.3d 549, 555 (6th Cir. 2020). Hartman thus fails to show that the Ohio Court of Appeals' harmlessness determination was contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Hartman*, 64 N.E.3d at 550-52. And because Hartman acknowledged that he had sex with the victim, any claimed constitutional violation concerning the DNA evidence did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Williams v. Bauman*, 759 F.3d 630, 637 (6th Cir. 2014) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)). Reasonable jurists could not debate the denial of this claim.

This order, however, addresses only Hartman's application to expand the COA as it relates to his cross-appeal.[1] The court takes no position on what arguments Hartman may properly make

[1]There is an argument that Hartman does not need a COA when submitting a cross-appeal. *Compare Sumpter v. Kansas*, 61 F.4th 729, 754 (10th Cir. 2023) (finding that a COA is required for habeas petitioners who file cross-appeals), *with Szabo v. Walls*, 313 F.3d 392, 397–98 (7th Cir. 2002) (finding that a habeas petitioner is not required to file a COA for a cross-appeal because "once a case is properly before the court of appeals . . . there are no remaining

in response to the state's appeal. *See Jennings v. Stephens*, 574 U.S. 271, 283 (2015) (stating that a petitioner does not need a COA if he does not file a cross-appeal but wishes to "defen[d] . . . a judgment on alternative grounds" because "Congress enacted § 2253(c) against the well-known, if not entirely sharp, distinction between defending a judgment on appeal and taking a cross-appeal").

For these reasons, the application to expand the COA in No. 23-3665 is **DENIED**. The motion to substitute Ohio Attorney General Dave Yost as the respondent in Nos. 23-3309 and 23-3365 is **GRANTED**. The Clerk's Office is instructed to reset the briefing schedule in both appeals.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

gates to be guarded"). *See also Jennings*, 574 U.S. at 282 (citing *Szabo* for the proposition that "once a State has properly noticed an appeal of the grant of habeas relief, the court of appeals must hear the case, and 'there are no remaining gates to be guarded'" but declining to decide explicitly whether a COA is required on a cross appeal). Hartman, however, does not make this argument and, therefore, the court will not address it. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal." (quotation omitted)).

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Filed: September 15, 2023

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Re: Case No. 23-3309/23-3365, *Mark Hartman v. OH Adult Parole Auth Panel*
Originating Case No. : 3:19-cv-00003

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Mr. Lawrence J. Greger
Mr. Richard W. Nagel
Ms. S. Adele Shank

Enclosure