UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KIRK MARCICKY,

Plaintiff,

v.

Case Number 00-10462-BC
Honorable David M. Lawson

PAUL RENICO,

Defendant.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR AN EVIDENTIARY HEARING

The petitioner, Kirk Marcicky, is a state prisoner presently confined at the Thumb Correctional Facility in Lapeer, Michigan, who seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He filed his application *pro se* but subsequently an attorney appeared on his behalf. The petitioner challenges his conviction and sentence on one count of first-degree felony murder, contrary to Mich. Comp. Laws § 750.316, one count of assault with intent to commit murder, contrary to Mich. Comp. Laws § 750.83, and one count of armed robbery, contrary to Mich. Comp. Laws § 750.529. He contests the sufficiency of evidence, the competency of his trial attorney, the jury instructions, the conduct of the prosecutor, and the fairness of his state appeal. The petitioner has also requested an evidentiary hearing. The Court concludes that the decision of the Michigan Court of Appeals affirming the petitioner's convictions was neither contrary to, nor an unreasonable application of clearly established federal law. Accordingly, the petition will be denied, as will be the motion for an evidentiary hearing.

I.

The petitioner's conviction arose out of an incident which occurred in Dearborn Heights,

Michigan on November 26, 1994. The petitioner and his co-defendant, Christopher Schema, were tried jointly, but with separate juries hearing their cases. The petitioner was actually found guilty of second-degree murder, first-degree felony murder, assault with intent to commit murder, and two counts of armed robbery. The second-degree murder conviction and one of the armed robbery convictions were vacated at sentencing.

On November 26, 1994, Officer Stephen Popp of the Dearborn Heights Police Department went to the house of Gary Rocus to respond to a call involving the theft of an automobile. When Officer Popp arrived at the location, Curtiss Padgett answered the front door. Padgett appeared frantic and his face was covered with blood. Officer Popp entered the house and discovered the murder victim, Gary Rocus, lying on the floor in the hallway, with his legs laying into the bedroom and his hands tied behind his back. Rocus' face was swollen and bloody. Officer Popp searched the residence and did not find any weapons, but discovered both halves of a broken pool cue stick in the first floor living room and bedroom. Officer Popp also observed red stains in the floor around the bed and noticed an entertainment center that did not contain a television, VCR or CD player. A nine-inch television set was sitting unplugged by the entrance. Officer Popp later discovered a broken glass and a pool cue on the floor beside the pool table in the bar area of the basement.

There was evidence that Rocus and Padgett had met the petitioner and co-defendant Schema the previous evening at Ken's Pub in Detroit, Michigan. George Horattas, the manager of Ken's Pub, testified that the majority of the pub's clientele were homosexual. Horattas testified that Rocus and Padgett were patrons of the bar, although he did not say that either man was homosexual. Ronald Lynn testified that he was a patron of Ken's Pub, and stated on cross-examination that Gary Rocus was a homosexual.

Several patrons and the bartender of Ken's Pub testified that they observed both Gary Rocus and Curtis Padgett, as well as the petitioner and his co-defendant, Christopher Schema, at Ken's Pub on November 25, 1994. These witnesses testified that the petitioner and Schema arrived at the bar together but that Padgett and Rocus arrived at the bar separately. During the evening, Schema and Rocus began playing darts. Rocus and Schema were ultimately joined by Padgett and then the petitioner. The four men left the pub together at the same time after the last call from the bar.

Randy Bertrand testified that he was at Ken's Pub on the evening in question. Schema introduced the petitioner to Bertrand by using a false name. The petitioner later admitted to Bertrand that his name was Kirk. The petitioner told Bertrand that he was bisexual, to which Bertrand replied that he was homosexual. Bertrand believed that the petitioner was attempting to pick him up. On three or four occasions during the evening, Schema came up to the petitioner and whispered to him. Bertrand also testified that the petitioner appeared to get nervous when Schema would approach and speak to other bar patrons. At one point during the night, the petitioner appeared upset with Schema and actually asked Bertrand for a ride home.

The surviving victim, Curtis Padgett, testified that the petitioner and Schema joined him and Rocus in the dart area of the bar. When last call was announced, Rocus asked the other three men to come to his home to shoot some pool. Rocus and Schema left the bar a few minutes before Padgett did. Once Padgett was outside, the petitioner pulled up in his car and told Padgett that Rocus and Schema had already left together and that he would follow Padgett to Rocus' house. Upon arriving at Rocus' house, all four men went into the basement of the house to play pool. Later, all four men went into the garage to look at an automobile that Rocus was restoring and then returned to the basement to play pool.

Pagdett testified that at some point, Schema suddenly shouted out, "let's get them," after which Schema and Padgett began struggling with a pool cue stick until Padgett felt a thump on the back of his head, which rendered him semi-conscious. This, in turn, caused Padgett to loosen the grip on the pool cue, at which time Schema grabbed the pool cue and hit Padgett on the head and face, rendering him unconscious. When Padgett awoke, he was lying on his stomach in the first floor hallway with his feet and hands tied in front of him with a telephone cord. Padgett managed to free himself. When he discovered Rocus, he called the police. Padgett also discovered that his 1993 Ford Thunderbird was missing, as were the keys that he had in his pocket. Padgett later identified his burned out vehicle in a police tow yard. On cross-examination, Padgett testified that at no time did he see the petitioner do anything.

John Rocus, the brother of Gary Rocus, was shown photographs of his brother's entertainment center as it appeared after the murder and the robberies had taken place. John Rocus testified that certain items like the telephone and stereo were missing from the entertainment center. John Rocus testified that his parents later retrieved these missing items from the property room of the Dearborn Heights Police Department. John Rocus also testified that his brother had a guitar which had been taken from the house. This guitar was also recovered from the police department.

Kenneth Krompatic, Schema's step-brother, testified that right after the murder, a guitar and some entertainment equipment appeared in his basement. Krompatic stated that at the time he saw the items, he had no idea how they had gotten there. Around that same time, Krompatic testified that the petitioner shaved off his goatee and moustache.

Dawn Derus testified that she was friends with the petitioner. Derus testified that the day after the murder, she was visiting the petitioner's house. The petitioner informed Derus that there

was a television for sale. The petitioner and Derus drove to Krompatic's house, where she saw the television in the basement. Derus paid the petitioner one hundred dollars for the television set. The petitioner and another man carried the television set to Derus' car.

Detectives Jeff Seipenko and James Izeluk of the Dearborn Heights Police Department testified that the police recovered the television that was stolen from Gary Rocus' house from Dawn Derus and recovered Rocus' VCR from the petitioner's brother, John Marcicky. These items were turned over to Gary Rocus' father.

The medical examiner testified that Gary Rocus sustained injuries to his head including broken facial bones. However, the cause of his death was manual strangulation.

The petitioner's conviction was affirmed on appeal. *People v. Marcicky,* No. 192055 (Mich. Ct. App. October 30, 1998) *lv. denied*, 460 Mich. 865, 598 N.W.2d 343, *cert. denied*, 528 U.S. 1049 (1999). Additional facts will be discussed as the petitioner's claims are addressed.

The petitioner seeks the issuance of a writ of habeas corpus on the following grounds:

I. The petitioner was denied a fair appeal of right and due process of law.

II. The petitioner was denied his Sixth Amendment right to effective assistance of counsel and due process of law.

III. The trial court abused its discretion in denying the petitioner's motion for a directed verdict of acquittal where the evidence presented was insufficient to submit the case to the jury.

IV. The petitioner was denied a fair trial when the trial court reread the aiding and abetting instruction, overemphasizing that crime, when the jury asked only for the mere presence instruction to be repeated.

V. The petitioner was denied a fair trial by the cumulative effect of prosecutorial misconduct.

II.

As amended, 128 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

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

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis,* 144 F.3d 429, 433, (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct."); *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous.").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

The Supreme Court has held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause of Section 2254(d)(1) "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . . .
>
> [A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, 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. Rather, that application must also be unreasonable.

Id. at 409, 410-11. *See also Lewis v. Wilkinson*, 307 F.3d 413, 418 (6th Cir. 2002).

A.

The petitioner's first two claims are interrelated. The petitioner first contends that he was denied a fair appeal of right and due process of law because the Michigan Court of Appeals improperly denied the petitioner's motion to remand his case to the trial court for an evidentiary hearing on his claims that his trial attorney failed to render effective assistance of trial counsel. The state court of appeals denied the motion to remand as untimely because the petitioner had failed to demonstrate by affidavit or an offer of proof the facts to be established at a hearing, and because the petitioner had failed to show that the issue should initially be decided by the trial court. *See* Mich.

Ct. R. 7.211(C)(1)(a)(i) & (ii). The petitioner contends that the motion to remand was improperly denied because it was timely filed and clearly identified the issues that would be developed. The petitioner further contends that counsel's signature on the motion was a "certification" of the factual allegations contained in the motion, and that no affidavit was therefore required because counsel attached Christopher Schema's confession to the motion as an offer of proof. In the alternative, the petitioner contends that his appellate counsel was ineffective for failing to file a personal affidavit with the motion to remand.

The Court cannot grant habeas relief on the petitioner's claim that the Michigan Court of Appeals improperly denied his motion to remand pursuant to state law. Violations of state law and procedure that do not infringe specific federal constitutional protections are not cognizable claims under Section 2254. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The only remedy the Court may offer is its own evidentiary hearing. An evidentiary hearing on an ineffective assistance of counsel claim, however, is warranted only if the petition "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Stanford v. Parker,* 266 F.3d 442, 459 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 136 (2002).

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court established a two-pronged test for determination whether a criminal defendant has received ineffective assistance of counsel. First, the convicted person must prove that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the convict must show that counsel's deficient performance prejudiced him. Prejudice is established by a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Ibid*.

The Supreme Court emphasized that, when assessing counsel's performance, the reviewing court should afford counsel a great deal of deference:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent to making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (internal quotes and citations omitted). The Court explained that to establish deficient performance, a habeas petitioner must identify acts that were "outside the wide range of professionally competent assistance." *Id*. at 690.

To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. The Sixth Circuit, applying the *Strickland* standard, has held that a reviewing court therefore must focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996). The *Strickland* standard applies as well to claims of ineffective assistance of appellate counsel. *Bowen v. Foltz,* 763 F.2d 191, 195 (6th Cir. 1985).

In order to evaluate appellate counsel's effectiveness under the *Strickland* test, the Court must assess the strength of the underlying appellate claim that was allegedly mishandled. The petitioner's second claim, which he claims was not fully developed because of appellate counsel's

error, is that he was deprived of the effective assistance of trial counsel due to several mistakes that trial counsel committed. The first of these claims involves his attorney's decision not to call co-defendant Christopher Schema to testify at trial in support of the defense theory that the petitioner was merely present when the murder of Gary Rocus took place, and to establish that neither the petitioner nor Schema went to Rocus' house with the intent to steal any property, thus negating the necessary intent for the first-degree felony murder conviction. Schema, in fact, testified at the joint trial, but only in front of his jury and outside of the presence of the petitioner's jury.

To establish prejudice from counsel's failure to call a witness, a petitioner must show that the witness would have testified and that the witness's testimony would probably have changed the outcome of the trial. *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). Defense counsel has no obligation to call or even interview a witness whose testimony would not have exculpated the defendant. *Millender v. Adams*, 187 F. Supp. 2d 852, 877 (E.D. Mich. 2002).

In the present case, a review of Christopher Schema's interview with the police (Respondent's Exhibit B), his trial testimony (Petitioner's Appendix 3), and Schema's post-trial affidavit (Petitioner's Appendix 4), show that the Michigan Court of Appeals' determination that counsel was not ineffective for failing to call Schema as a witness at the petitioner's trial was not unreasonable. Schema's proposed testimony would have provided evidence that the petitioner participated in assaulting Curtiss Padgett and helped to tie up one of the victims. Schema indicated in his affidavit that it was the petitioner who stole Padgett's car. Schema suggested to police that the petitioner took other items from the house. Schema's credibility would also have been called into question because he admitted at his trial that he initially told the police that he had an alibi for th night in question, and because he falsely told the police during his interview with them that he was

intoxicated at the time of the crime.

Because Schema's testimony was in many ways consistent with the prosecutor's theory of the case, counsel was not ineffective in deciding not to call him as a defense witness. *See Anderson v. Hopkins*, 113 F.3d 825, 832 (8th Cir. 12997) (defense counsel not ineffective for failing to call potentially favorable witnesses for the petitioner, where there were significant inconsistencies in the proposed witnesses' testimony and their testimony was in some ways consistent with the state's theory). Furthermore, Schema's credibility problems also would weigh against calling him as a witness. In determining whether a defendant was prejudiced by his counsel's failure to call witnesses, a court should consider the credibility of all of the witnesses, including the likely impeachment of uncalled witnesses, the interplay of the uncalled witnesses with the actual defense witnesses called, and the strength of the evidence actually presented by the prosecutor. *McCauley-Bey v. Delo*, 97 F3d 1104, 1006 (8th Cir. 1996). Schema's ability to testify that Marcicky did not intend to rob anyone at the time they arrived at the victims' home may have counseled in favor of calling him, but certainly did not compel such a decision. In sum, because it is "highly doubtful" that Schema's testimony would have benefitted the petitioner, counsel was not ineffective for failing to call him to testify. *See Wickliffe v. Farley*, 809 F. Supp. 618, 622 (N.D. Ind. 1992).

The petitioner next contends that his counsel was ineffective for failing to *voir dire* the jury to determine if any of the prospective jurors were homosexual, in order to determine whether such jurors would be biased in favor of the victims, because apparently they were homosexual.

An important responsibility of a defense attorney is "to protect his client's constitutional right tot a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense." *Miller v. Francis,* 269 F.3d 609, 615 (6th Cir. 2001). However, a defense

lawyer's actions during *voir dire* are presumed to be matters of trial strategy. *Ibid.*

In the present case, the petitioner's ineffective assistance of counsel claim fails because he has never alleged, either in his motion to remand in the state court of appeals, or in his habeas petitioner, that any jurors who were partial to the supposed homosexual victims in this case were actually chosen to sit on his jury. The petitioner cannot identify any objectionable juror who was accepted as a result of the allegedly deficient *voir dire*. The petitioner has not alleged any specific facts from which one might reasonably infer that the composition of his jury would have been more favorable if his trial attorney inquired about sexual preference. *See Stanford*, 266 F.3d at 455 (holding that claimed ineffectiveness of counsel in failing to ask "life-qualifying" questions of jurors during the *voir dire* in the petitioner's capital murder trial did not prejudice the petitioner, where nothing indicated that any potential jurors were inclined to always impose a death sentence or that a biased jury had been impaneled). Because the petitioner has failed to identify any biased jurors who were actually chosen to serve on his jury, this aspect of the petitioner's ineffective assistance of counsel claim does not entitle him to relief.

The petitioner also claims that his attorney was ineffective for waiving his opening argument. "The timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel." *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985). Although it may be unusual for a defense lawyer to waive opening argument, that decision is essentially tactical in nature and is not objectively unreasonable. *Moss v. Hofbauer*, 286 F.3d 851, 863 (6th Cir. 2002). The petitioner has not shown that his attorney's decision not to make an opening statement was anything other than a tactical decision, nor has he demonstrated a

reasonable probability that a different outcome would have resulted had defense counsel made an opening statement. Consequently, the petitioner has failed to show that his trial counsel was ineffective for not making an opening statement. *See Byrd v. Collins*, 209 F.3d 486, 525-26 (6th Cir. 2000).

The petitioner further alleges that his counsel was ineffective for failing to object to certain improper comments made by the prosecutor in his opening and closing arguments. As will be discussed later, the Court does not find that the prosecutor engaged in any misconduct. Therefore, the petitioner cannot show that he was deprived of a fair trial due to prosecutorial misconduct. *Millender*, 187 F. Supp. 2d at 876.

The petitioner finally claims that his attorney "perfunctorily questioned" only thirteen of the thirty prosecution witnesses, asked no questions of eight prosecution witnesses, and agreed to waive nine other witnesses. A habeas petitioner's conclusory allegation that his attorney failed to adequately present a defense, without specifying what more his attorney could have done to strengthen his defense, is insufficient to established ineffective assistance of counsel. *Campbell v. Grayson*, 207 F. Supp. 2d 589, 598 (E.D. Mich. 2002). The petitioner has not specified what questions his counsel should have asked these witnesses or what favorable information could have been obtained from them. There is no basis to find constitutionally deficient performance based on the cross-examination decisions made by defense counsel.

Because this Court has determined that the petitioner's ineffective assistance of trial counsel claim lacks merit, the petitioner cannot establish that appellate counsel's failure to raise the ineffective assistance of trial counsel issue on appeal in a better way was prejudicial. *Norris v. Schotten*, 146 F.3d 314, 336 (6th Cir. 1998). Furthermore, the petitioner is not entitled to an

evidentiary hearing on this issue. *See Stanford*, 266 F.3d at 459 (noting that a habeas petition must establish "sufficient grounds for release" before an evidentiary hearing is warranted).

The petitioner is not entitled to habeas relief on his first or second claims.

B.

In his third claim, the petitioner alleges that the state trial court erred in denying the petitioner's motion for a judgment of acquittal on the ground that there was insufficient evidence that the petitioner stole any property or formed the intent to steal any property prior to the murder.

A claim of insufficiency of evidence is tested under the familiar standard announced in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), where the reviewing court assesses the evidence in the light most favorable to the prosecution, and asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir. 2000). The state court of appeals applied this standard, citing *People v. Petrella*, 424 Mich. 221, 268-70, 380 N.W.2d 11, 32 (1985), which relies on *Jackson*. Because a claim of insufficiency of the evidence presents a mixed question of law and fact, this Court must determine whether the state court's application of the *Jackson* standard was reasonable. *Dell v. Straub*, 194 F. Supp. 2d 629, 647 (E.D. Mich. 2002).

In this case, the petitioner was convicted of first-degree murder under an aiding and abetting theory. The elements of first-degree felony murder in Michigan are:

> (1) the killing of a human being;
> (2) with an intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm is the probable result (i.e., malice);
> (3) while committing, attempting to commit, or assisting in the commission of one of the felonies enumerated in the felony murder statute.

Terry v. Bock, 208 F. Supp. 2d 780, 794 (E.D. Mich. 2002) (citing *People v. Carines*, 460 Mich.

750, 759, 597 N.W.2d 130, 139 (1999)). To support a finding that a defendant aided and abetted in the commission of a crime under state laws, the prosecutor must show that:

> (1) the crime charged was committed by the defendant or some other person;
> (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and
> (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.

Carines, 460 Mich. at 757-758, 597 N.W.2d at 138.

In order to be guilty of aiding and abetting under Michigan law, the accused must take some conscious action designed to make the criminal venture succeed. *Fuller v. Anderson*, 662 F.2d 420, 424 (6th Cir. 1981). Aiding and abetting describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words and deeds that might support, encourage, or incite the commission of the crime. *People v. Turner*, 213 Mich. App. 558, 568, 540 N.W.2d 728, 733 (1995). The exact amount of aid, advice, encouragement, or counsel rendered, or the time of rendering, is not material if it nonetheless had the effect of inducing the commission of the crime. *People v. Lawton*, 196 Mich. App. 341, 352, 492 N.W.2d 810, 816 (1992).

The petitioner insists that there was insufficient evidence to show that either he or Schema formed the intent to steal property from the victims at the time of the murder. The felony murder doctrine in Michigan requires that a defendant intended to commit the underlying felony at the time that the homicide was committed. *People v. Brannon*, 194 Mich. App. 121, 125, 486 N.W.2d 83, 65-86 (1992). The felony murder doctrine is inapplicable if the intent to steal property is not formed until after the homicide occurs. *Ibid*.

In *People v. Kelly*, 231 Mich. App. 627, 643, 588 N.W.2d 480, 489 (1998), the Michigan Court of Appeals held that there was sufficient evidence to show that the defendant formed the intent

to steal the victim's property prior to the homicide, where shortly after the killing, the defendant approached potential buyers for the stolen property. The Michigan Court of Appeals further noted that the defendant did not have his own transportation and therefore needed the victim's automobile to escape the crime scene. The court concluded that based on this evidence a reasonable jury could have concluded that the defendant formed the intent to rob the victim before or during the homicide.

Likewise, in the present case, there was sufficient circumstantial evidence to conclude that the petitioner and Schema planned to steal property from the victims prior to the murder of Gary Rocus. The evidence in this case indicated that while the men were at Gary Rocus' house, Christopher Schema shouted "Let's get them." Curtis Padgett was struck from behind by another person while he and Schema were struggling, which suggests that the petitioner was the person who hit him with the pool cue. The fact that the petitioner hit Padgett after Schema yelled "Let's get them" raises the inference, as the Michigan Court of Appeals suggested, that this attack was planned. The court of appeals further found that such an inference was bolstered by the fact that the petitioner and Schema were whispering to each other at the bar, Schema introduced the petitioner by using a false name, the petitioner became nervous when Schema approached other bar patrons, and evidence that the petitioner asked several bar patrons for a ride home, but when he had access to a ride, made no attempt to go home. The Michigan Court of Appeals further noted that the petitioner's actions after the killing, including his continued association with Schema and his involvement in the sale of the stolen television set, further supported the inference that he and Schema had formed the intent to steal prior to the homicide. *See People v. Marcicky*, 1998 WL 1989478, at * 3-4. This Court notes further that the VCR taken from the victim's house was recovered by the police from the petitioner's brother's house. A rational trier of fact could infer that the petitioner and Schema had an

intent to rob the victims prior to the murder by virtue of the large amount of the property taken from the house. Finally, the evidence in this case suggests no motive other than robbery or theft. The state court of appeals did not err in concluding that there was sufficient evidence for a jury to find that the petitioner intended to commit the underlying felony at the time of the homicide.

The petitioner also claims that there was insufficient evidence to convict him of felony murder because there was no evidence that he actually stole anything from either victim. However, as mentioned above, the petitioner was convicted under an aiding and abetting theory. There was ample evidence that the petitioner aided and abetted Christopher Schema in the commission of the felony murder, mainly for the reasons mentioned above. It therefore made no difference whether the petitioner actually stole any items himself, as long as he assisted Schema in doing so. Moreover, the fact that Gary Rocus' VCR ended up at the petitioner's brother's house is strong circumstantial evidence that the petitioner stole this item. The Michigan Court of Appeals' determination that there was sufficient evidence to convict the petitioner of first-degree felony murder was an objectively reasonable application of clearly established federal law, and the petitioner is not entitled to habeas relief on his third claim.

C.

In his fourth claim, the petitioner contends that his due process rights were violated when the trial court responding to a request from the jury to repeat the "mere presence" instruction, reread the aiding and abetting instruction to the jury as well. Specifically, the jury asked: "Please clarify for us the following question according to the law. If we believe one defendant committed the actual killing, is the other defendant equally guilty of the murder just by his presence at the scene?" Trial Tr., 11/8/95, at 7. The trial court responded to the jury's question by rereading the entire state

pattern aiding and abetting instruction, as well as the pattern instruction that mere presence at the scene of a crime is insufficient to convict a defendant under an aiding and abetting theory. *Id*. at 8. After lunch, the jury asked that the same information be read to them again. The trial court then reread the instructions on aiding and abetting and mere presence once more. *Id*. at 9-10.

The burden of demonstrating that an erroneous instruction was so prejudicial that it undermines the constitutional validity of a state court conviction is greater than the showing required in a direct appeal. The question in such a collateral proceeding is whether the challenged instruction so infected the entire trial that the resulting conviction violates due process. Habeas relief is not warranted where the instruction is undesirable, erroneous, or even "universally condemned." *Henderson v. Kibbe*, 431 U.S. 145, 154-155 (1977). The instruction may not be judged in isolation but must be considered in the context of the instructions as a whole, together with the trial court record. *Hardaway v. Withrow*, 305 F.3d 558, 565 (6th Cir. 2002). To warrant habeas relief, the jury instructions taken as a whole must be so infirm that they rendered the entire trial fundamentally unfair. *Scott*, 209 F.3d at 882. To warrant issuance of the writ, the defective jury instructions, viewed in context, must have had a substantial and injurious effect or influence on the verdict. *Ibid*.

Where a jury, desiring additional instructions, makes explicit its confusion, a trial judge "should clear [it] away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946). However, although a trial court should "give special care" in giving a supplemental instruction to a jury, the fact that an error was made in the supplemental instruction given "does not automatically mean that the jury has been unduly influenced by it." *Martini v. Hendricks*, 188 F. Supp. 2d 505, 530 (D.N.J. 2002) (quoting *Rock v. Coombe*, 694 F.2d 908, 915 (2d Cir. 1982)). No error will lie where a supplemental charge is responsive to the jury's specific request of clarification.

Alvarez v. Scully, 833 F. Supp 1000, 1007 (S.D.N.Y 1993). Even where error is found, reversal is not automatically warranted because the error must be assessed in the context of both the original and supplemental instructions as a whole. *Ibid*.

The state court of appeals found that the supplemental instruction was proper because giving the "mere presence" instruction above, in response to the jury's request, would have created confusion. *Marcicky*, 1998 WL 1989478, at *4. This Court agrees. The trial court's decision to reread the aiding and abetting instruction, as well as the "mere presence" instruction, did not deprive the petitioner of a fair trial. The jury asked the court to clarify whether the defendant would be equally guilty of the murder just by his presence at the scene if the jury believed that it was the other defendant who committed the murder. The trial court's supplemental charge was responsive to the jury's request for clarification, because the aiding and abetting instruction informed the jury of the elements that the prosecutor would need to prove to establish that the petitioner aided and abetted in these offenses, while the mere presence instruction informed the jury that the petitioner's mere presence at the crime would be insufficient to convict him of these offenses. The aiding and abetting instruction provided context for the mere presence instruction, because the aiding and abetting instruction described the conduct and intent that would be required to prove that the petitioner was more than merely present, and hence, guilty of being an aider and abettor. Moreover, the instruction itself accurately stated the law. Giving the supplemental instruction did not deprive the petitioner of a federal right.

D.

In his fifth claim, the petitioner contends that he was deprived of a fair trial by prosecutorial misconduct.

When a petitioner seeking habeas relief makes a claim of prosecutorial misconduct, the reviewing court must focus on the fairness of the trial, not the culpability of the prosecutor. On habeas review, a court's role is to determine whether "the conduct was so egregious as to render the entire trial fundamentally unfair." *Serra v. Michigan Department of Corrections*, 4 F.3d 1348, 1355-1356 (th Cir. 1993). The Court must initially decide whether the challenged statements were improper. *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). If it is improper, the court then examines whether the statements or remarks are so flagrant as to constitute a denial of due process and warrant granting a writ. *Ibid*. In evaluating prosecutorial misconduct in a habeas case, consideration should be given to the degree to which the challenged remarks had a tendency to mislead the jury and to prejudice the accused, whether they were isolated or extensive, whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof against the accused. *Mason v. Mitchell*, 320 F.3d 604, 634 (6th Cir. 2003) (citing *Hill v. Brigano*, 199 F.3d 833, 847 (6th Cir. 1999).

The petitioner first alleges that the prosecutor injected facts not in evidence when he argued that the victims were targeted because they were homosexual. The petitioner contends that this argument deprived him of a fair trial because there was no evidence presented at trial that this was a hate crime directed against the victims because of their sexual orientation.

Misrepresenting facts in evidence by a prosecutor 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. 637, 646 (1974)). Likewise, it is improper for a prosecutor during closing argument to bring to the jury any facts that have not been introduced into evidence and that are

prejudicial. *Byrd*, 209 F.3d at 535. However, prosecutors may argue reasonable inferences from the evidence. *Ibid*.

In the present case, the prosecutor's arguments that the victims were chosen because they were homosexual logically flowed from the evidence. The testimony established that the petitioner and his co-defendant went to a "gay" bar. At the bar, the co-defendant introduced the petitioner to one of the bar patrons by using a false name. That patron testified that the petitioner told him that he was bisexual, perhaps leading the patron to believe that the petitioner was attempting to pick him up. The evidence established that the petitioner and the co-defendant acquainted themselves with Rocus and Padgett and went with them to Rocus' home, where the crime took place. It was therefore a reasonable inference that the petitioner and the co-defendant specifically targeted homosexuals as their victims.

The petitioner also claims that the prosecutor used a number of derogatory or negative terms about homosexuals in his opening and closing arguments. The petitioner suggests that the prosecutor used the term "gays" twenty-six times, and used other terms like "fags," "straight people," "cross-dress," "very tight posture," "gayer," and "gayest" in his opening and closing arguments.

As an initial matter, it is unclear how the prosecutor's use of disparaging remarks about the victims would have prejudiced the petitioner. Moreover, as mentioned above, there was evidence from which a finder of fact could reasonably infer that the petitioner and the co-defendant went to Ken's Pub for the purpose of targeting homosexual victims. Therefore, the prosecutor's reference to homosexuals was arguably relevant to the motives of the petitioner and the co-defendant in this case. *Cf. Strouse v. Leonardo*, 928 F.2d 548, 556-557 (2d Cir. 1991) (holding that defendant's due

process rights were not violated when the prosecutor accused him of homosexuality; the remarks referring to the defendant's homosexual activities were limited to demonstrating the source of friction between the defendant and his mother, the murder victim). There is no evidence that the prosecutor in this case suggested to the jury that the petitioner should be convicted because his victims were homosexual, nor did the prosecutor imply that the petitioner was a bad person because he associated with homosexuals.

The petitioner next contends that the prosecutor injected facts that had not been introduced into evidence and that were based solely on the prosecutor's personal knowledge. The petitioner first points to the prosecutor's remarks that the petitioner stayed at the bar waiting for Curtiss Padgett, after Rocus and Schema had left the bar together, because Padgett was scheduled to go to Rocus' house and the petitioner had to check to make sure nothing went wrong. The prosecutor further argued that the petitioner was at the bar to lure Padgett to Rocus' house to help create "the comfortable aura" that would follow. The prosecutor later argued that the conversation at the bar between Schema and Rocus was for the purpose of finding out if Rocus was a worthy robbery target, and that during this conversation, Schema discovered that Rocus worked for Ford Motor Company and had wealth. The prosecutor also suggested that Rocus was probably defending himself when he was being attacked. The petitioner contends that all of these comments were improper because there was no evidence presented at the trial about the conversation at the bar between Schema and Rocus, nor was there any evidence presented that Marcicky was assigned a role to ensure that Padgett would appear at Rocus' house. The petitioner further argues that there was no evidence that both defendants assaulted Rocus. However, a review of these remarks shows that they were reasonable inferences drawn from the evidence presented at trial. These remarks did not deprive the petitioner

of a fair trial.

Finally, the petitioner contends that the prosecutor attempted to generate sympathy for the victim in his opening statement and closing argument. In the opening statement, the prosecutor stated that the police would testify that they were greeted by "poor bloody Mr. Padgett, with his head completely scarred and bruised and battered from being pummeled with a pool cue himself." The prosecutor also asserted that Padgett's injuries were "ugly, but not life threatening." The prosecutor contended in his opening statement that the victims were beaten to a "pulp" and that pool sticks were used to "batter and bash the heads of these two individuals." In his closing argument, the prosecutor argued that this was a "horrible conspiracy to target innocent victims" and went on to say that "the gays are the victims in this case."

The prosecutor's opening statement is contained in nineteen pages of transcripts, *see* Trial Tr., 10/31/95, at 3-22, and his closing argument took up thirty-four pages, *see* Trial Tr., 11/07/95, at 9-34, 49-56. In complaining of broad-based prosecutorial misconduct, the petitioner points to only four pages of an opening statement, and one isolated comment in the closing argument. These brief comments by the prosecutor, even if improper, did not so infect the entire trial in a manner that would entitle the petitioner to relief. *See Rodriguez v. Peters*, 63 F.3d 546, 565 (7th Cir. 1995) (holding that victim impact comments comprising one of thirty-five pages of a closing argument did not render trial unfair). In the present case, even assuming that the statements by the prosecutor invoking sympathy for the victims were improper, they do not meet the stringent standard necessary for avoiding a conviction on habeas appeal. The remarks were relatively isolated, not extensive, and only a small part of opening statement and closing argument that focused heavily on summarizing the evidence that would be presented or was presented at trial. *Byrd*, 209 F.3d at 532. When

combined with the instruction from the trial judge that the attorneys' statements were not evidence, the prosecutor's isolated comments did not render the entire trial fundamentally unfair. *Id*. at 533. The Court notes that the trial court also instructed the jury that they were not to let sympathy or prejudice influence their decision. *Id*. at 57; *see also Welch v. Burke*, 49 F. Supp. 2d 992, 1006 (E.D. Mich. 1999).

The petitioner is not entitled to habeas relief on his fifth claim.

III.

The decision of the Michigan Court of Appeals affirming the petitioner's convictions was neither contrary to, nor an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1).

Accordingly, it is **ORDERED** that the petition for writ of habeas corpus is **DENIED**.

It is further **ORDERED** that the petitioner's motion for an evidentiary hearing [dkt #15] is **DENIED**.

_____/s/_____
DAVID M. LAWSON
United States District Judge

Dated: September 30, 2003

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