

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

EDWIN DUANE LEWIS,

Petitioner,

Case Number: 98-71469

v.

HONORABLE ARTHUR J. TARNOW

BRUCE CURTIS,

Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS¹

I. Introduction

Petitioner Edwin Duane Lewis, a state prisoner currently incarcerated at the Southern Michigan Correctional Facility in Jackson, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is incarcerated in violation of his constitutional rights. For the reasons set forth below, the Court denies the petition.

II. Facts

Petitioner's conviction arises out of the murders of Deon Banks ("Banks") and Dawn Nelums ("Nelums"), both of whom were shot outside their duplex apartment in the early morning hours of January 11, 1992. Petitioner testified in his own defense at trial. He admitted that he shot and killed the victims, but asserted that he did so in self-defense and that the bullet that killed Nelums was fired accidentally.

Petitioner testified that he went to the victims' apartment to purchase cocaine. Petitioner further testified that he gave Banks a twenty dollar bill, but told Banks that he wanted only a ten

¹Staff Attorney Mary Beth Collery provided quality research assistance.

dollar piece of rock cocaine. Banks then left the room. He returned carrying a plastic bag filled with approximately twenty pieces of rock cocaine. According to Petitioner, Banks said he had difficulty choosing a piece for Petitioner because they were almost all twenty dollar pieces. Banks finally handed Petitioner what, according to Petitioner, was a ten dollar piece. Petitioner then asked Banks for the ten dollars in change he claimed he was owed. Banks said that Petitioner was not entitled to any change and ordered Petitioner to leave. Petitioner turned to leave. At that point, Banks struck Petitioner's hand with a knife, cutting Petitioner's finger. The two men began struggling as Petitioner tried to wrest the knife from Banks. During this struggle, Petitioner pushed the knife into Banks' chest.

As the two men were struggling to gain control of the knife, Nelums emerged from a back room and struck Petitioner in the head. Nelums then ran into the kitchen and returned with two knives. Petitioner testified that he and Banks fell to the floor while Nelums continued to stab at him with the knives. He was cut once in the legs by one of those knives. According to Petitioner, Banks yelled to Nelums "Go to the room and kill [him]." Nelums ran toward the bedroom. Petitioner followed her because he feared that if she reached that room she would kill him. He caught Nelums before she reached the back room and the three resumed fighting. Petitioner testified that, during the course of the fighting, his arm hit Nelums' arm, which caused the knife she was holding to stab Banks. After that, Petitioner fell to the floor whereupon Nelums and Banks both fled the apartment.

Petitioner stated that he feared that if Nelums and Banks reached the street outside they would send their friends back to the apartment to harm Petitioner. Petitioner testified that he knew that these friends carried firearms. Petitioner then ran to the door, took out his semi-automatic handgun, and cocked it. Then, because he did not believe he had properly cocked the gun, he

cocked it again, ejecting an unspent bullet. Petitioner stepped onto the landing outside of the apartment and saw the silhouette of a man on the stairs leading up to the landing. Petitioner testified that he told the man to stay away from him to which the man replied, “No, we’re going to kill [you].” Petitioner saw the man raise his hand, so, Petitioner testified, he “threw [his hand] up in self defense” and fired his gun. Banks was later discovered to be the man that Petitioner shot on the stairs.

Petitioner testified that, after shooting Banks, he ran down the stairs from the victims’ apartment to the front of the house and fell on the porch steps. He then heard someone yell and rush toward him. As he was lying fallen on the porch, he claimed he threw his hand up in defense and, accidentally, fired a shot. That bullet struck and killed Nelums, although Petitioner testified that, at that time, he did not know that he had shot her. Petitioner further stated that both times his gun discharged he was in fear for his life.

Petitioner then fled the scene. He ran to his home where he cleaned and bandaged his bleeding hand. He also washed the gun and hid it under a couch. The following morning, after attending church, he went to the hospital because his hand was still bleeding. He received approximately five stitches in his hand. Petitioner then returned to his home, where the police were waiting for him and arrested him.

At trial, the coroner testified that Banks had two stab wounds in his head, three in his chest, and a bullet wound behind his left ear. Nelums had four stab wounds on the top of her head, a bullet wound behind her right ear, and a bullet wound in her right hand. The coroner testified that the bullet that struck Nelums in the head likely had first traveled through her right hand. The coroner further testified that he observed powder burns on Nelums right hand, which indicated that the gun had been fired within one to two inches of her hand.

Eyewitness Evander Scott testified that, on the morning of January 11, 1992, he was standing on Cornelia Street, across from the Banks-Nelums house, waiting for a friend to pick him up when he heard a woman screaming for help. He looked toward the Banks-Nelums house and saw a woman run from the side of the house onto the front porch. Scott testified that she banged on the downstairs duplex door, screaming for help. He then saw a man run across the front porch. Scott heard a gunshot and saw the woman fall to the ground. Scott then heard what may have been another gunshot and observed the man run away from the house across an empty field. Scott ran to a nearby house and told the residents to call the police. He then spotted a police car, flagged it down and told the officers what he had seen.

The jury convicted Petitioner of two counts of first-degree murder and two counts of felony firearm.

III. Procedural History

On September 22, 1992, following a jury trial in Saginaw County Circuit Court, Petitioner was convicted of two counts of first-degree murder, M.C.L.A. 750.316, and two counts of felony-firearm, M.C.L.A. 750.227. He was sentenced to two concurrent terms of life imprisonment for the first-degree murder convictions and two concurrent two-year terms for the felony-firearm convictions, to be served consecutively to the life terms.

Petitioner filed an appeal of right in the Michigan Court of Appeals, raising the following issues:

- I. Did the court err reversibly in failing to instruct *sua sponte* correctly on [Petitioner's] primary defense?
- II. Did the trial court err reversibly in giving a flight instruction where there was no evidence to support it?
- III. Was defense counsel ineffective in failing to request proper

instructions and in failing to object to the improper instructions given?

- IV. Did the prosecutor, through his misconduct in distorting and disparaging the elements of premeditation and deliberation, deny [Petitioner] a fair trial?
- V. Did the court err reversibly in failing to include the presumption of innocence and the burden of proof in the printed version of the instructions given to the jury?
- VI. Did the prosecutor create reversible error by repeatedly stating his opinion that [Petitioner] was lying in his testimony?
- VII. Was defense counsel ineffective in failing to present critical evidence on [Petitioner's] behalf?

The Michigan Court of Appeals affirmed Petitioner's convictions. People v. Lewis, No. 158638 (Mich. Ct. App. May 21, 1996).

Petitioner then filed an application for leave to appeal in the Michigan Supreme Court, presenting the same issues presented to the Court of Appeals. The Michigan Supreme Court denied leave to appeal. People v. Lewis, 456 Mich 857 (1997).

Petitioner filed the pending habeas corpus petition on May 6, 1998, raising the same issues raised on direct appeal in the state court. This Court conducted an evidentiary hearing on September 25, 2000, during which the following witnesses testified: Petitioner, Petitioner's trial counsel E. Brady Denton, and four character witnesses.

IV. Analysis

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (“AEDPA”) altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because petitioner’s application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

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 proceedings.

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 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28

U.S.C. § 2254(e)(1)²; *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, 120 S. Ct. 1495, 1519-20 (2000).

With respect to the “unreasonable application” clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the “unreasonable application” clause when “a state-court decision unreasonably applies the law of this Court to the facts of a prisoner’s case.” Id. at 1521. 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

² 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

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.

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 1521-22.

With this standard in mind, the Court proceeds to examine the merits of Petitioner's Application for a Writ of Habeas Corpus.

B. Ineffective Assistance of Counsel

Petitioner claims that he is entitled to habeas corpus relief because he was deprived of his constitutional right to the effective assistance of counsel. First, Petitioner claims that trial counsel E. Brady Denton was ineffective, because he failed to object to the trial court's self defense instruction which stated that Petitioner had a duty to retreat. Second, Petitioner asserts that Mr. Denton was ineffective, because he failed to request instructions on the fleeing felon rule, intoxication and involuntary manslaughter. Third, Petitioner claims that Mr. Denton was ineffective, because he failed to object to the court's instruction on flight. Finally, Petitioner claims that trial counsel was ineffective, because he failed to present critical evidence in Petitioner's defense.

There exists clearly established Supreme Court precedent governing ineffective assistance of counsel claims. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-pronged test for determining whether a habeas corpus petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient, which "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A petitioner may establish

prejudice by “showing that counsel’s errors were so serious as to deprive the defendant of a fair trial.” Id.

The Supreme Court emphasized that, when considering an ineffective assistance of counsel claim, 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 in 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 citations omitted).

The Court further explained that, to establish deficient performance, a petitioner must identify acts that were “outside the wide range of professionally competent assistance.” Id. 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 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), *cert. denied* 520 U.S. 1257 (1997).

1. Failure to Request Involuntary Manslaughter And Accident Instructions

Petitioner claims that he is entitled to habeas corpus relief because his trial counsel was ineffective in failing to request jury instructions regarding involuntary manslaughter and accident. The Michigan Court of Appeals denied the claim with respect to the involuntary manslaughter instruction with a cursory two-sentence explanation:

Defendant also claims that he was denied effective assistance of counsel because counsel did not request an instruction on involuntary manslaughter. Defense counsel's failure to request the instruction could be a matter of trial strategy, e.g. an attempt to force the jury into an "all or nothing" decision. People v. Rone, (*on second remand*) 109 Mich. App. 702, 718; 311 N.W. 2d 835 (1981).

People v. Lewis, slip op. at 3.

The Michigan Court of Appeals did not address Petitioner's claim that his attorney should have requested an accident instruction. Therefore, this Court must conduct an independent review of that claim. *See Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000).

With respect to the death of Deon Banks, Petitioner testified that he shot Banks in self-defense. Under Michigan law, involuntary manslaughter is the unintentional killing of another without malice, by an unlawful act that does not amount to a felony, nor naturally tend to cause death or by negligently doing some lawful act. People v. Datema, 533 N.W.2d 272, 276 (Mich. 1995). The evidence presented at trial, including Petitioner's testimony that he shot Banks in self-defense, therefore did not support an involuntary manslaughter instruction. Accordingly, Petitioner's attorney did not err in failing to request an involuntary manslaughter instruction with respect to the victim Banks.

In contrast, Petitioner's testimony regarding the shooting of Dawn Nelums involved a claim of accidental shooting. Petitioner argues that his attorney erred in failing to request instructions

regarding involuntary manslaughter and accident with respect to the charges as to Dawn Nelums.

At trial, Petitioner testified that, after shooting Banks, he was running across the front porch of the house when he stumbled. As he was lying on the front porch, he saw a figure coming toward him. He tried to get up, and, according to his testimony, the gun accidentally discharged. Although Petitioner's version of events would have supported instructions on both involuntary manslaughter and accident, Petitioner's counsel did not request either instruction. Assuming that counsel's failure to request such instructions was error, Petitioner must also show that such error resulted in prejudice in order to establish ineffective assistance of counsel. This Petitioner cannot do.

As discussed above, in order to establish prejudice, a Petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 689. The Court in Strickland further articulated the application of the prejudice prong as follows:

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 694-695. Thus, in assessing whether Petitioner was prejudiced by his trial counsel's failure to request involuntary manslaughter and accident instructions, this Court must presume that the jury acted in accordance with the jury instructions it received.

The jury convicted Petitioner of the first-degree premeditated murder of Dawn Nelums.

The trial court instructed the jury that a conviction for first-degree premeditated murder requires a finding of specific intent, that is, that Petitioner intended to kill Dawn Nelums. The jury was given the following instructions with respect to specific intent:

The crime of murder in the first degree premeditated requires proof of a specific intent. This means that the prosecution must prove not only that the Defendant did certain acts, but that he did the acts with the intent to cause a particular result. For the crime of murder in the first degree premeditated, this means that the prosecution must prove that the Defendant intended to kill, in Count I, Deon Banks; in Count II, Dawn Nelums.

The Defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence. You must think about all the evidence in deciding what the Defendant's state of mind was at the time of the alleged killing.

The Defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the Defendant, and any other circumstances surrounding the alleged killing.

You may infer that the Defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the Defendant intended the usual result that follows.

Tr., 9/22/92, pp. 7-8.

Thus, the jury was adequately instructed with respect to the specific intent element of first-degree premeditated murder. Petitioner had an opportunity to testify before the jury and present his claim that the gun had discharged accidentally. If Petitioner's testimony that the gun discharged accidentally were believed, the element of specific intent could not have been satisfied. That is, if the jury had believed Petitioner's testimony that the gun had discharged accidentally, the jury would have returned a verdict of not guilty with respect to the charge of first-degree murder as to Dawn Nelums. This Court must presume that the jury followed the trial court's instructions. *See*

Strickland, 466 U.S. at 694-95. Accordingly, the Court concludes that the jury did not find Petitioner credible, at least with respect to his claim that he accidentally shot Nelums.

Consequently, Petitioner was not prejudiced by his trial counsel's failure to request an involuntary manslaughter or accident instruction. First, the jury necessarily did not believe Petitioner's claim that he shot Nelums by accident. Therefore, even if the jury had been instructed on accident as a defense, the outcome of the trial would not have been different. Second, under Michigan law, involuntary manslaughter is an unintentional killing without malice. *See People v. Richardson*, 293 N.W.2d 332, 336 (Mich. 1980). Because the jury held that Petitioner had the intent to kill Nelums, the jury would not have held that the killing was "unintentional." Accordingly, Petitioner was not prejudiced by his attorney's failure to request these instructions.

This case is distinguishable from Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999), in which the Sixth Circuit granted habeas corpus relief because a state trial court failed to specifically instruct a jury that the Petitioner would have been justified in using deadly force to repel a rape. In Barker, Stacey Barker, a companion worker at a senior citizens' complex, was convicted of murdering an eighty-one year old resident. Barker claimed that the victim was touching her repeatedly and pulling on her clothing. He refused to stop when she asked him to do so. Barker then hit her on the head several times with a small wooden statue. The victim continued to grab her, pull at her clothes and then attempted to kiss her. During the struggle, the victim backed Barker into the kitchen where Barker grabbed a knife. Barker then stabbed the victim, who subsequently died of his injuries.

In Barker, the trial court denied defense counsel's request for a jury instruction that a defendant is entitled to use force, even deadly force, if the defendant is in danger of death or grave bodily harm, including a sexual assault. The trial court, instead, gave a general self-defense

instruction.

The Michigan Supreme Court held that the trial court erred in refusing to instruct the jury specifically that a defendant may use force to repel a sexual assault. Id. at 870. But the Michigan Supreme Court further held that the error was harmless because no reasonable juror would have believed Barker's claim of self defense. Id. The Sixth Circuit Court of Appeals granted habeas corpus relief on the ground that the Michigan Supreme Court had improperly invaded the province of the jury:

The Sixth Amendment and the Due Process clause guarantee a defendant's constitutional right to a trial by jury. As the Supreme Court has recognized, the Sixth Amendment protects the defendant's right to trial by impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' . . . This right is further interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury. . . . However, that is precisely what the Michigan Supreme Court did by finding that the erroneous jury instruction was harmless because no reasonable juror would have believed Barker's claim of self defense. . . .

. . . . [I]t is apparent to this panel that the Michigan Supreme Court's determination that the erroneous jury instruction was harmless necessarily means that the court believed some evidence but discredited other evidence. This, however, it cannot do and remain in compliance with our constitutional guarantees. It is neither the proper role for a state supreme court, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. . . .

Id. at 874-75.

Thus, in Barker, because the court failed to instruct the jury that deadly force may be used to repel a sexual assault, the jury could have found Barker's testimony to be credible, yet still have convicted her of the crime of murder. In contrast, in the instant case, if the jury had believed Petitioner's testimony that the gun accidentally discharged, the jury would not have convicted him

of first-degree murder. Therefore, in finding that Petitioner was not prejudiced by his attorney's failure to request involuntary manslaughter and accident instructions, this Court is not weighing the credibility of witnesses or otherwise invading the province of the jury. Instead, this Court finds that because the jury necessarily found that Petitioner had the specific intent to kill Nelums and Banks, instructions on involuntary manslaughter and accident would not have impacted the outcome of the trial.

Petitioner, therefore, has not satisfied the prejudice prong of Strickland, and, consequently, has not established ineffective assistance of counsel. Accordingly, he is not entitled to habeas corpus relief with respect to this claim.

2. Failure to Request Fleeing Felon Jury Instruction

Petitioner claims that his trial counsel was ineffective because he failed to request instructions consistent with the fleeing felon rule. Under Michigan law, the use of deadly force to prevent the escape of a fleeing felon is justifiable where the following three circumstances are present:

- (1) the evidence must show that a felony actually occurred,
- (2) the fleeing suspect against whom force was used must be the person who committed the felony, and
- (3) the use of deadly force must have been "necessary to ensure the apprehension of the felon."

People v. Hampton, 487 N.W.2d 843 (Mich. Ct. App. July 6, 1992) (*citing* People v. Whitty, 292 N.W.2d 214 (Mich. Ct. App. 1980)).

The Michigan Court of Appeals held that the evidence presented at trial did not justify a fleeing felon instruction:

If believed, defendant's testimony indicates that he and Banks

disagreed about the value of the rock Banks gave defendant. Defendant said that he asked for a ten dollar rock and gave Banks a twenty dollar bill. Banks tried to encourage him to spend twenty dollars, but defendant refused. Defendant testified that Banks got a bag with at least twenty rocks in it. . . .

[Defense counsel]: All right. And what happened after you asked for the change?

[Defendant]: He said it wasn't no change.

. . . .

[Defendant]: He said it wasn't any change. And I said, "Well, you don't have to beat me out of my \$10. I don't come by but every now and then." And he replied that "You can get your every now and then ass out of here."

[Defense counsel]: What did you do next?

[Defendant]: I turned around like that, and the next thing I knew I was hit across the hand.

We are not persuaded that this testimony established that Banks committed an armed robbery. Accordingly, no manifest injustice occurred from the court's failure to instruct the jury on the "fleeing felon rule", or from the court's instructing the jury that defendant had the duty to retreat. We reject defendant's contention that his "primary defense" was that "he shot the victims in defending himself from an armed robbery and as they fled or attempted flight." We also reject defendant's contention that counsel's failure to seek instructions consistent with the fleeing felon rule denied him effective assistance of counsel. Based on the evidence, there is no reasonable probability that, but for counsel's alleged errors, the result would have been different. therefore, defendant has not shown prejudice.

People v. Lewis, slip op. at 2.

This Court concludes that the Michigan Court of Appeals' decision was a reasonable application of Supreme Court precedent. "A defendant is not entitled to an instruction on a defense theory absent some evidence to support the theory." U.S. v. Bryant, 716 F.2d 1091, 1094 (6th Cir.

1984); *see also* Todd v. Stegall, 2000 WL 654960, *11 (E.D. Mich. Apr. 24, 2000). During the evidentiary hearing in this Court, Petitioner's trial counsel testified that he believed that the facts did not support a fleeing felon defense.

At trial, Petitioner's testified at length in his own defense. None of his own testimony would have factually supported a fleeing felon defense. Petitioner testified that when he shot the figure on the stairs he did not know at the time that the figure was Banks. He was not trying to apprehend Banks at the time, he was simply trying to leave the Banks' apartment. Likewise, Petitioner stated that when he shot Nelums he did not know who she was and did not intend to fire his gun.

Although Petitioner's testimony possibly supported a finding that a felony occurred, his testimony could not support a holding that he shot Banks and Nelums because they were fleeing felons whom he was trying to apprehend. The Michigan Supreme Court has approved the following jury instruction with respect to the fleeing felon rule:

Both officers and private persons seeking to prevent a felon's escape must exercise reasonable care to prevent the escape of the felon without doing personal violence, and it is only where killing him is necessary to prevent this escape, that the killing is justified, and it is for you as jurors to determine from the evidence in the case the existence or absence of the necessity. If a killing is not justifiable, it is either murder or manslaughter.

People v. Gonsler, 232 N.W. 365, 367 (Mich. 1930). In the instant case, no evidence was presented in support of a finding that Petitioner was trying to prevent a felon's escape.

Therefore, because the evidence presented at trial, including Petitioner's own testimony, did not support an instruction on the fleeing felon rule, trial counsel was not ineffective for failing to request one.

3. Self-Defense Instruction

Petitioner also claims that his attorney erred in failing to object to the self-defense instruction because the trial court instructed the jury that Petitioner had a duty to retreat. Petitioner argues that he was entitled to an instruction that he did not have a duty to retreat.

The trial court gave the following instruction regarding Petitioner's duty to retreat:

By law, a person must avoid using deadly force if he can safely do so. If the Defendant could have safely retreated but did not do so, you can consider that fact, along with all the other facts and circumstances, when you decide whether he went further in protecting himself than he should have. However, if the Defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an imminent threat of death or serious physical injury, the law does not require him to retreat. He may stand his ground and use the amount of force he believes necessary to protect himself.

Petitioner claims that he did not have a duty to retreat under Michigan law. "Generally, Michigan has recognized that there is no duty to retreat and avoid using deadly force in one's own home." People v. Dabish, 181 Mich. App. 469, 474-75 (1990), *citing* Pond v. People, 8 Mich. 150, 175-76 (1860); People v. Crow, 128 Mich. App. 477, 488 (1983). Petitioner did not claim that he was in his own home. Therefore, his claim that he had no duty to retreat is not supported by Michigan law.

Because the trial court's instruction on Petitioner's duty to retreat was appropriate, trial counsel was not ineffective in failing to object to it.

4. Intoxication Instruction

Petitioner claims that his trial counsel was ineffective, because counsel failed to request an intoxication instruction. Petitioner argues that, because intoxication is a complete defense to first-degree murder, his trial counsel was constitutionally ineffective for failing to request such an instruction.

The Michigan Court of Appeals held that trial counsel's decision not to request such an instruction constituted reasonable trial strategy:

[C]ounsel specifically told the court that he did not want the court to instruct on intoxication as a defense. This could also have been a matter of trial strategy, particularly because there was little evidence to support the instruction and it would not have been a defense to second-degree murder. Defendant has not overcome the presumption that counsel's decision might be considered sound trial strategy.

People v. Lewis, slip op. at 3.

Trial counsel testified at the evidentiary hearing that he believed that an intoxication defense was inconsistent with Petitioner's detailed testimony in support of the theory of self-defense. The only evidence presented at trial regarding intoxication was Petitioner's testimony that on the evening of the murders he and his wife shared a half-pint of brandy. Petitioner did not claim that his thinking was impaired or that he was confused as a result of the alcohol he consumed. He testified that he remembered shooting Banks because he feared for his life and that he shot Nelums, when his gun discharged accidentally. This testimony would not have supported a claim that he was so overcome by alcohol that he could not form the intent to kill the victims.

Thus, where the only evidence presented at trial regarding alcohol use, Petitioner's own testimony, did not support an intoxication defense, the Michigan Court of Appeals' decision that trial counsel was not ineffective for failing to request an intoxication instruction was a reasonable application of Supreme Court precedent.

5. Flight Instruction

Petitioner claims that his trial attorney was ineffective for failing to object to the giving of a flight instruction to the jury. The Michigan Court of Appeals held that the counsel's failure to object did not constitute ineffective assistance of counsel. People v. Lewis, slip op. at 2.

The trial court gave the following instruction with respect to flight:

There has been some evidence that the Defendant ran away after the alleged crimes. 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 a 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.

This instruction fairly presented the defense and prosecution theories. Petitioner testified at trial that he fled out of fear and confusion, while the prosecution argued that Petitioner's flight was evidence of guilt. This instruction allowed the jury, if it found Petitioner's testimony credible, to view Petitioner's flight as driven by innocent reasons and not as evidence of guilt. Therefore, trial counsel's failure to object to this instruction did not constitute ineffective assistance of counsel.

6. Failure to Present Critical Evidence in Defense

Finally, Petitioner argues that trial counsel was ineffective in failing to present critical evidence in his defense. Specifically, Petitioner argues that (1) trial counsel failed to present character evidence; (2) trial counsel failed to present a witness who allegedly could have impeached a prosecution witness; and (3) trial counsel failed to obtain an independent pathologist or to adequately cross-examine the prosecution's pathologist.

With respect to Petitioner's claim that trial counsel was ineffective in failing to call character witnesses, the Michigan Court of Appeals held as follows:

Defendant states that he informed counsel that he had character witnesses, but counsel refused to use them. . . . The decision whether to call witnesses is a matter of trial strategy. . . . Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense. . . . [C]ounsel's failure to present character witnesses did not deprive defendant of a substantial defense.

People v. Lewis, slip op. at 3-4.

Petitioner argues that character witnesses would have testified that he was a stable member of the community, had two children, was employed, and had served in the Army. During the evidentiary hearing, Petitioner presented four witnesses, including his wife and brother, who testified regarding Petitioner's truthful and non-violent character. Petitioner testified at trial regarding his children, that he worked at two jobs and that he had served in the Army. None of these facts was called into question during the course of the trial. Therefore, this Court finds that counsel's failure to call character witnesses did not fall outside the range of professionally competent assistance nor did it impact the strength of Petitioner's defense.

Petitioner also claims that trial counsel failed to produce a witness who could have impeached prosecution witness Evander Scott. Scott testified at trial that he was standing on a corner about half a block from Banks' house when he heard a woman scream. He testified that he saw a woman run from the side of Banks' house across the front porch. He then saw a man run onto the porch behind her, he heard a shot and saw the woman fall. Scott further testified that he saw the man run away from the house. Scott then flagged down a patrol car.

Petitioner argues that, prior to his trial, he informed his attorney that Scott, who apparently was incarcerated for an unrelated crime at the time, had told someone else in jail that after witnessing the shooting Scott had approached the female body and moved a knife away from her body. Scott also allegedly told someone in jail that he had turned over the male body.

The Michigan Court of Appeals held that trial counsel's failure to find the person to whom Scott allegedly spoke was not ineffective:

Defendant claims that counsel was ineffective for failing to present critical evidence on defendant's behalf. To support this claim, defendant has attached his affidavit, which states that he informed

counsel that Scott:

had told police in jail that he had approached the bodies, moved the knife away from the female body and turned over the male body. Counsel did not attempt to find this witness.

. . . Defendant's affidavit does not persuade us that trial counsel's failure to locate an unnamed witness who heard Scott make these statements . . . deprived defendant of a substantial defense.

People v. Lewis, slip op. at 3-4.

This Court is persuaded that this was not an unreasonable application of Supreme Court precedent. Petitioner did not claim that Nelums had a knife when he shot her on the front porch. He testified that he did not know who was approaching him on the porch and that he did not intend to shoot. He did not testify that he fired his gun because he saw a knife. Thus, the missing witness's testimony would not have served to substantiate Petitioner's version of events.

Moreover, Scott's testimony that he saw a man run up to Nelums on the porch of the house and shoot her was substantiated by the coroner's testimony that the gun that shot Nelums was fired within one to two inches of her head. Therefore, although the missing witness's testimony may have impacted the juror's assessment of Scott's credibility, it did not contradict the coroner's testimony which supported Scott's version of events.

Petitioner claims that trial counsel was ineffective because he failed to effectively cross-examine the pathologist. The Michigan Court of Appeals denied this claim:

Although defendant asserts that the pathologist's testimony at the preliminary examinations was "confused and contradictory", defendant does not establish that the pathologist's testimony at trial was inaccurate nor does he present an affidavit indicating that an independent pathologist would have provided testimony beneficial to the defense. We are not persuaded that defendant has established ineffective assistance of counsel . . .

People v. Lewis, slip op. at 4.

Having reviewed Petitioner's counsel's cross-examination and re-cross-examination of the pathologist, the Court determines that counsel adequately questioned the pathologist with respect to the nature and cause of the victims's wounds. Accordingly, the Court of Appeals' conclusion that counsel was not ineffective was a reasonable application of Supreme Court precedent.

Finally, Petitioner claims that trial counsel was ineffective for failing to present an independent pathologist's testimony to rebut the state pathologist's testimony. Other than the conclusory assertion that his attorney should have presented an independent pathologist's testimony, Petitioner provides no evidence to support his argument that an independent pathologist would have in any way contradicted the state pathologist. Such conclusory allegations are insufficient to establish that trial counsel erred.

C. Prosecutorial Misconduct

Petitioner claims that the prosecutor's remarks during his closing statement regarding Petitioner's credibility violated his right to a fair trial. Petitioner also asserts that the prosecutor's statements during closing argument distorted the meanings of premeditation and deliberation.

"Prosecutorial misconduct may warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." Caldwell v. Russell, 181 F.3d 731, 736 (6th Cir. 1999). The determination whether the trial was fundamentally unfair is "made by evaluating the totality of the circumstances." Angel v. Overberg, 682 F.2d 605 (6th Cir. 1982). The Court must examine "the fairness of the trial, not the culpability of the prosecutor.'" Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), *quoting* Serra v. Michigan Department of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993).

The Sixth Circuit has identified the factors a court should consider in weighing the extent of prosecutorial misconduct:

In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Id. at 964, *quoting Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982).

During his closing remarks, the prosecutor argued that Petitioner lied when he testified.

Petitioner argues that these statements deprived Petitioner of his constitutional right to due process.

The Michigan Court of Appeals held that the prosecutor's closing statement was proper:

We also reject defendant's contention that the prosecutor acted improperly by arguing that defendant lied in his testimony. The prosecutor is permitted to comment on the testimony and argue that, upon the facts presented a witness is not worthy of belief or is lying. . . . That is precisely what the prosecutor did in this case.

People v. Lewis, slip op. at 4.

The prosecutor's remarks did not misstate the evidence or attempt to manipulate the burden of proof. The trial court instructed the jury that the closing arguments were not to be considered evidence and that they were to consider only the evidence introduced at trial. Moreover, the weight of the evidence against Petitioner was overwhelming. Thus, while the Court does not condone the prosecutor's remarks, the Court finds that they did not render Petitioner's trial fundamentally unfair.

Petitioner also asserts that the prosecutor deliberately distorted the meaning of premeditation and deliberation during jury *voir dire* and his closing argument. The Michigan Court of Appeals rejected this argument, holding:

Any error in this regard was cured by the court's instruction to the

jury to take the definitions of premeditation and deliberation from the court's instruction and disregard anything that the attorneys said that deviates from that.

People v. Lewis, slip op. at 4. The Court finds that this was not an unreasonable application of Supreme Court precedent. As the Court of Appeals noted, the trial court gave the following instruction:

It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something differently about the law, follow what I say. At various times I have already given you some instructions about the law. You must take all of my instructions together as the law you are to follow.

Additionally, as Petitioner acknowledges, the trial judge's final instructions complied with Michigan's standard jury instructions on premeditation and deliberation. Given these instructions, the Court finds that the prosecutor's remarks did not render Petitioner's trial fundamentally unfair.

Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

V. Conclusion

For the foregoing reasons, the petition for a writ of habeas is **DENIED** and the matter is **DISMISSED WITH PREJUDICE**.

/s/
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATE: January 4, 2001