IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KENNETH P. SARAUER,

Petitioner,

v.

REPORT AND RECOMMENDATION

MATTHEW FRANK, Secretary, Wisconsin Department of Corrections,

05-C-0057-C

Respondent.

REPORT

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Kenneth Sarauer raises numerous attacks on the validity of his August 24, 2001 conviction in the Circuit Court for Vernon County for one count of substantial battery. As will be explained in detail below, none of Sarauer's claims provide a basis upon which this court can grant him habeas relief. Accordingly, I am recommending that his court deny the petition.

The following facts are drawn from the Wisconsin Court of Appeals' decision in *State v. Sarauer*, 2004 WI App 167, ¶ 11, 276 Wis. 2d 308, 686 N.W. 2d 455 (per curiam) (unpublished decision) and the record.

FACTS

In early 2001, the district attorney for Vernon County filed a complaint against Sarauer charging him with one count of substantial battery. The charges stemmed from a

November 18, 2000 hunting dispute between Sarauer and another man named Joseph Endres. The complaint alleged that Sarauer had struck Endres across the face with the stock of his gun, knocking Endres unconscious and causing bleeding and swelling.

Sarauer executed a valid waiver of his right to counsel and represented himself during all proceedings except sentencing. Before trial, he filed several motions relating to discovery. The trial court ruled that many of Sarauer's requests were beyond the scope of proper discovery because they were requests for the state to gather additional evidence that only might be exculpatory. However, in response to Sarauer's request that the state be ordered to test the crime scene for evidence of Endres's blood, the court ruled that "sometime after the spring thaw, when all the snow melts, that Investigator Bjerkos, at his convenience and the convenience of Mr. Sarauer, go out and examine the scene where this occurred to see whether either of them can locate any evidence of blood or not." Neither Investigator Bjerkos nor any other state investigator ever complied with the court's order, prompting Sarauer to file a motion to dismiss the case. The trial court denied the motion.

Before trial, Sarauer asked the court if he could bring his gun to trial to use for demonstrative purposes, noting that one of the conditions of his bail was a "no carry" order that otherwise prohibited him from bringing the weapon to court. The trial court ordered that "the Assistant District Attorney will arrange for a Sheriff's Deputy to go to [Sarauer's] house and for him to bring the gun back to court and it will remain in the possession of the Sheriff's Department throughout the trial." It later modified this order, saying to Sarauer,

"So you and [the prosecutor] can make those arrangements to go either sometime today or first thing tomorrow to pick this weapon up."

Trial was on August 23 and 24, 2001. Sarauer did not testify. Endres testified that on November 18, 2000, he was hunting on land adjacent to Sarauer's property. Endres shot and wounded a deer, then tracked it as it fled. The blood trail led onto Sarauer's land. Endres, who knew Sarauer and was familiar with his property, stopped at the property line and called to Sarauer, who was walking quickly nearby and carrying a shotgun. Sarauer did not respond to Endres but continued walking until he was out of sight. Endres decided to follow the blood trail onto Sarauer's land.

Endres walked about 25 feet onto Sarauer's land. He had stopped to look at a heavy blood spot when he suddenly heard a shot that he estimated had come from a distance of about 50 yards. Endres looked up and saw Sarauer approaching him quickly. Sarauer had a shotgun in his hand and was shouting that Endres was trespassing. When Sarauer reached Endres, he told him that he was going to take him in for trespassing. He then demanded Endres's gun, which Endres had in a sling that went over his shoulder. Endres refused to give the gun to Sarauer. Sarauer then struck Endres across the left side of his face with the stock of his gun, felling Endres. Endres passed out and awoke bleeding from his nose. Endres, who takes a prescription blood thinner, estimated that he lost about five ounces of blood. He also suffered a bruised and swollen eye, a fractured tooth and a broken denture plate. When he came to, he saw that Sarauer was holding Endres's gun and his back tag. Endres

testified that he used an old rag that he had in his pocket to stop the bleeding. He did not recall looking back at where he had fallen to see if there was blood on the ground.

According to Endres, Sarauer repeated that he was going to take Endres in for trespassing. When Endres replied that if Sarauer did so, Endres would file assault charges against him for hitting him, Sarauer began backing off. Endres showed Sarauer the blood trail and Sarauer agreed to help Endres find the deer. The men found the deer a short distance away, and Sarauer helped drag it out of the woods to Endres's van. Endres testified that after Sarauer helped him load the deer in his car, Endres went to register it at a Red Mound store in Wheatland. Vicki Kumlin, who worked at the store, registered the deer and noticed that Endres was bleeding. When Endres got home, he noticed that one of his teeth was missing. Although Endres had initially decided that he was not going to report the incident to the police, he changed his mind about a week later after discovering that someone had removed several of his belongings from his hunting stand.

In the middle of Endres's cross-examination, Sarauer attempted to introduce between 100 and 200 photographs of the crime scene in order to demonstrate that there was no blood in the snow. He had taken the photographs himself, apparently in April 2001, after he concluded the state was not going to test the crime scene for blood. Sarauer argued the photographs were relevant to show there was no blood at the crime scene and to impeach Endres. The trial court determined that Sarauer could presented a limited number of the photographs, but that in order to introduce them, he would have to lay a foundation by

testifying as to what was described in the photographs. The court told Sarauer that if he testified, he would be subject to cross-examination "on all aspects of the case." Sarauer opted not to introduce the photographs.

During cross-examination, Sarauer asked Endres whom he saw on the day after the incident. When the prosecutor objected to relevance, Sarauer explained that because he couldn't take Endres's deposition, he was "trying to find out who all I might go to see to find out what else I can know about this case." Tr. of Trial, Aug. 23, 2001, dkt. #11, exh. Q, at 225. The trial court sustained the objection, indicating that it was too late for Sarauer to engage in discovery. The trial court also upheld an objection to a question by Sarauer asking Endres how many fist fights he had been in. *Id.*, at 226.

In addition to Endres's testimony, the state presented the testimony of Endres's dentist, who testified that the fracture to Endres's tooth and damage to his denture plate were consistent with traumatic force applied to Endres's face. In addition, two witnesses, Kumlin and Endres's girlfriend, Betty Schroeder, testified that they saw Endres the same day as the incident and saw that his face was bloody and swollen. Schroeder testified that Endres had told her that sometime after the incident, he had stopped at a bar and washed his face because it was full of blood. Sarauer did not ask to recall Endres to question him about Schroeder's testimony.

The state also presented the testimony of Deputy Berkos, the investigating officer. Berkos testified that when he went to Sarauer's house to ask him about his confrontation

with Endres, Sarauer stated that he did not want to talk about it. The prosecutor mentioned Sarauer's silence during both his opening statement and rebuttal closing argument, contending to the jury that this demonstrated Sarauer's consciousness of guilt.

Sarauer called his doctor to testify. The doctor testified that Sarauer had a rotator cuff injury that would have made it difficult, but not impossible, for Sarauer to have raised his arm so as to have struck Endres in the face with the stock of his gun. Sarauer also called one of his friends, a man named Ricky Worden, to whom Sarauer had in the past given permission to hunt on Sarauer's land. Apparently, Sarauer called Worden to attempt to show that Endres and his girlfriend were not credible because they had taken over Worden's hunting spot on one occasion.

After deliberating for 45 minutes, the jury came back with a guilty verdict. Sarauer was subsequently sentenced to a term of two years' confinement followed by three years' extended supervision.

Sarauer appealed, raising the following claims:

> 1) the prosecutor violated petitioner's right to remain silent when he made numerous references during trial to petitioner's refusal to talk to the investigating deputy and to take the stand in his own defense at trial;
>
> 2) the state committed prosecutorial misconduct by failing to obey the trial court's orders to have the crime scene searched for blood and to deliver petitioner's shotgun to trial;
>
> 3) the state committed prosecutorial misconduct and violated the Sixth Amendment's compulsory process clause by failing to provide him with the contact information for witness "AB,"

> whom petitioner contends had information that was relevant to his defense;
>
> 4) the state committed prosecutorial misconduct and violated the Sixth Amendment when it failed to provide him with a list of its witnesses;
>
> 5) the trial judge was biased against petitioner, and should have recused himself;
>
> 6) the trial court violated petitioner's right to remain silent and his right to present a defense at trial when it ruled that in order to present photographs that petitioner had taken of the crime scene, petitioner would have to testify and would be subject to cross-examination;
>
> 7) the trial court deprived petitioner of a fair trial when it restricted petitioner's cross-examination of Endres, sent only items that were favorable to the prosecution into the jury room and allowed witnesses to testify even though the prosecutor had failed to provide petitioner with a witness list; and
>
> 8) the evidence adduced at trial was insufficient to support a finding of guilt beyond a reasonable doubt.

Sarauer also contended that the trial court violated his right to self-representation when it refused to allow Sarauer to proceed pro se at sentencing.

In a decision issued July 29, 2004, the court of appeals agreed that the trial court had denied Sarauer's right to self-representation by requiring him to appear at sentencing with a lawyer, and ordered that the case be remanded for resentencing at which he was entitled to represent himself. *State v. Sarauer*, 2004 WI App 167, ¶ 11, 276 Wis. 2d 308, 686 N.W. 2d 455 (per curiam) (unpublished decision). However, it rejected all of Sarauer's challenges

to his underlying conviction, finding that his arguments either had been waived or were without merit.

On December 15, 2004 The Wisconsin Supreme Court denied Sarauer's petition for review. Sarauer now seeks habeas relief from this court on the same grounds that he presented to the state courts.

Analysis

I. Standard of Review

This court's review is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lambert v. McBride*, 365 F.3d 557, 561 (7th Cir. 2004). Under the AEDPA, if a state court adjudicated a constitutional claim on the merits, a federal court may grant habeas relief only if the state court decision was contrary to, or involved an unreasonable application of Supreme Court precedent, or if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding. 28 U.S.C. § 2254(d)(1), (2); *Early v. Packer,* 537 U.S. 3, 7-8 (2003); *Lambert*, 365 F.3d at 561.

The "contrary to" clause of § 2254(d)(1) pertains to pure questions of law. *Lindh v. Murphy*, 96 F.3d 856, 868-69 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the

state court confronts a set of facts materially indistinguishable from a decision of the Supreme Court but arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The "unreasonable application" clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh*, 96 F.3d at 870. A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[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 411.

The state's entitlement to deferential § 2254 review does not turn on citation to a Supreme Court case; "indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early*, 537 U.S. at 8.

II. Prosecutor's Reference to Sarauer's Pre-Arrest Silence

Sarauer contends that the prosecutor violated his rights to remain silent and to a fair trial when he made numerous references during trial to Sarauer's refusal to talk to the investigating deputy and to take the stand in his own defense. I have read the entire

transcript of the trial and have found no references by the prosecutor to Sarauer's failure to testify at trial. Accordingly, I address only the references to Sarauer's pre-arrest silence.

There is no dispute that the prosecutor introduced evidence of Sarauer's silence during his case-in-chief and referred to this evidence in both his opening statement and rebuttal closing argument. Although the state court of appeals suggested in its decision that in doing so, the prosecutor violated Sarauer's constitutional rights[1], it found that Sarauer had waived his right to appeal on that ground by failing to object to the prosecutor's remarks at trial. *Sarauer*, 2004 WI App at ¶ 13 ("A defendant in criminal proceedings has not only the right to remain silent, but also has the right not to have his silence be used against him at trial . . . we need not review whether the court erred by permitting the state to comment on Sarauer's silence because Sarauer did not object at trial") (citation omitted).

The court's finding of waiver amounts to an "independent and adequate" state ground of decision that bars this court from reviewing the merits of Sarauer's claim. It is well-settled that "[a] federal court will not review a question of federal law decided by a state court if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment." *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir. 2002) (citations omitted). In assessing whether a state court ruling is based on an

[1] The federal circuits are divided on this issue. *See, e.g., Combs v. Coyle*, 205 F.3d 269, 282-83 (6th Cir.) (explaining the circuit split), *cert. denied, Bagley v. Combs*, 531 U.S. 1035 (2000). The Seventh Circuit holds that use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment. *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987).

"independent and adequate" determination of state law, the federal court must refer to the decision of the last state court to have ruled on the merits. *Page v. Frank*, 343 F.3d 901, 905 (7th Cir. 2003). In Sarauer's case, that was the court of appeals.

A state ground is "independent" of the federal claim if the state court "actually relied on a state rule sufficient to justify its decision." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1382 (7th Cir. 1990). It is plain from the court of appeals' decision that it did not adjudicate the federal claim but relied on a state rule of waiver to reject Sarauer's challenge to the prosecutor's references to his pre-arrest silence.

"A state ground is 'adequate' only if the state court acts in a consistent or principled way." *Id*. at 1383. Wisconsin appellate courts long have held that failure to object to a trial court error amounts to a waiver that bars appellate review of the claimed error, even if the error is of constitutional magnitude. *State v. Guzman*, 2001 WI App 54, ¶ 25, 241 Wis.2d 310, 624 N.W.2d 717 ("when a timely objection is not made challenging the closing remarks of the prosecutor, a defendant waives his or her right to a review on that issue"); *State v. Huebner*, 235 Wis. 2d 486, 492, 611 N.W. 2d 727 (2000) ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court"); *State v. Boschcka*, 178 Wis. 2d 628, 643, 496 N.W. 2d 627 (Ct. App. 1992) (describing rule that unobjected-to-errors are generally waived as rule "of long standing").

Contrary to Sarauer's suggestion, Wisconsin's courts do not automatically give a "free pass" to *pro se* litigants. *State v. Benoit*, 199 Wis. 2d 522, n.4, 546 N.W. 2d 578 (Ct. App.

1996) ("Although pro se litigants are entitled to some leniency in complying with procedural requirements, '[t]he right to self-representation is not a license not to comply with relevant rules of procedural and substantive law.'") (quoting *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W. 2d 16, 20 (1992) (internal quotation marks omitted)). The Wisconsin Court of Appeals sometimes will forgive a defendant's failure to object at trial under the "plain error" doctrine or in the interests of justice, as illustrated by cases such as *State v. Neuser*, 191 Wis.2d 131, 140, 528 N.W.2d 49 (Ct. App. 1995) (reviewing prosecutor's improper characterization of law of lesser-included offenses notwithstanding defendant's failure to object). *See also* Wis. Stat. § 752.35 (court of appeals may grant new trial in interests of justice where real controversy has not been fully tried or there is substantial degree of probability that miscarriage of justice has occurred).

However, the willingness of the state courts to excuse compliance with state procedural rules on some occasions but not others does not alone render the state rule inadequate. *Prihoda*, 910 F.2d at 1384. Even if not strictly followed, a state ground will be respected if it is "solidly established," in other words, if it is not regularly *dis*regarded or manufactured seemingly for the occasion. *Id*. As the Seventh Circuit explained in *Prihoda*, "[a]ny other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others." *Id*. Where, as in this case, "the *only* ground given is procedural the federal

court must respect it, even though in some other cases the state court ignores the potential procedural basis and addresses the merits." *Id*. at 1384 (emphasis in original).

In sum, even though the state court of appeals could have overlooked Sarauer's waiver and addressed the merits of his challenge to the prosecutor's references to his silence, its decision to enforce the waiver rule is not subject to review by this court. Moreover, this finding of waiver is an independent and adequate state ground of decision that bars this court from reaching the merits of the claim unless Sarauer demonstrates cause for the default and prejudice resulting therefrom, *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977), or, alternatively, convinces the court that a miscarriage of justice will result if his claim is not entertained on the merits. *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986).

The only "cause" that Sarauer offers for his default is his *pro se* status. However, to establish cause for his default, a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court. *Carrier*, 477 U.S. at 488, 492. A defendant's voluntary *pro se* status is not the sort of "external impediment" sufficient to establish cause for a procedural default. *Haley v. United States*, 78 F.3d 282, 285 (7th Cir. 1996); *Barksdale v. Lane*, 957 F. 2d 379, 385-86 (7th Cir. 1992). "[S]omeone who chooses to represent himself may not turn around and contend that he did not give himself the quality of legal advice a lawyer could have supplied." *Prihoda*, 910 F.2d at 1386 (citing *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975)).

Absent a showing of cause, a "defaulted claim is reviewable only where a refusal to consider it would result in a fundamental miscarriage of justice." *United States ex rel. Bell v. Pierson*, 267 F.3d 544, 551 (7th Cir. 2001). This relief is limited to situations where the constitutional violation has probably resulted in a conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). To show "actual innocence," petitioner must present clear and convincing evidence that, but for the alleged error, no reasonable juror would have convicted him. *Id*. Although Sarauer invokes the "actual innocence" exception, he has not presented any evidence to support it. Thus, there has been no "fundamental miscarriage of justice" as defined by United States Supreme Court precedent.

In sum, because Sarauer has failed to show either cause for his default or that the complained-of error resulted in a fundamental miscarriage of justice, this court may not review the merits of his claim.

III. Other Alleged Instances of Prosecutorial Misconduct

Next, Sarauer contends that the district attorney's office committed prosecutorial misconduct by failing to obey the trial court's orders to have the crime scene searched for blood and to deliver petitioner's shotgun to trial, failing to provide him with contact information for witness "AB," and failing to provide him with a list of the state's witnesses before trial. The court of appeals concluded that none of these claimed errors amounted to prosecutorial misconduct. *Sarauer*, 2004 WI App at ¶¶ 14-21. I agree.

At most, the state's failure to comply with the court's order to examine the crime scene for evidence might have supported a contempt finding; it did not violate any of Sarauer's constitutional rights. *Brady v. Maryland*, 373 U.S. 83 (1963) defines the scope of a defendant's due process right to exculpatory evidence: the state's duty is limited to disclosing the evidence it intends to use against a defendant at trial and material evidence *in its possession* that has the potential to be exculpatory. The state is not constitutionally obliged to gather specific evidence or to execute specific tests at the scene of the crime. One could argue that Sarauer was sandbagged into not conducting his own investigation of the scene by the state court's order, but this would not establish his right to habeas relief. To establish a *Brady* violation, Sarauer would have to show that (1) the state suppressed evidence; (2) this evidence was favorable to Sarauer's defense; and (3) the evidence was material to an issue at trial. *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002). Here, no evidence of any sort was adduced because the state never bothered to investigate. Even if this is characterized as "suppression," Sarauer cannot establish the second and third prongs of the test. All that's available to him is conjecture, and that's not enough.

As for the state's failure to deliver Sarauer's shotgun to the courtroom to be used as evidence at trial, the appellate court noted that the trial court had told Sarauer to arrange with the prosecutor for delivery of the gun. The court of appeals found that "[a]pparently, Sarauer did not make an effort to make these arrangements." *Sarauer,* 2004 WI App at ¶ 20. Nowhere in his submissions to either the state supreme court or to this court does

Sarauer refute this finding that he shared responsibility for the gun's absence from trial. Accordingly, this court must presume that the state appellate court's findings on this point are correct. 28 U.S.C. § 2254(e)(1) (state court's finding of fact presumed correct unless petitioner rebuts it with clear and convincing evidence).

More substantively, Sarauer has not explained how he was prejudiced by the absence of his gun. All he offers is a brief, conclusory assertion that the gun would have "almost proven" that he did not hit Endres with it. At trial Sarauer was able to use the prosecution's simulated shotgun during his cross-examination of Endres. Sarauer has not explained why the simulated gun was inadequate. Sarauer was not denied a fair trial as a result of the gun's absence.

Next, Sarauer complains that the state failed to provide him with information regarding an individual identified only as "AB." According to Sarauer, about six months after the incident with Endres, AB held Sarauer at gunpoint. Sarauer alleges that AB told Sarauer that he was a friend of Endres and that Endres had told AB that Sarauer had tried to kill Endres. Although Sarauer contended at a motion hearing that the state knew AB's identity, the prosecutor denied this and said he knew nothing about the alleged incident. The trial court concluded that AB had no relevance to the case but told the prosecutor that if the state discovered any information about AB to which Sarauer might be entitled, then it should divulge this information. Tr. of Status Conf., Aug. 8, 2001, dkt. #10, exh. O, at 7-8. There are no further references to AB in the record.

Reviewing the record, the state court of appeals found that because there was no evidence that the state ever learned the identity of AB, it could not produce him/her. *Sarauer*, 2004 WI App at ¶ 18. Sarauer has not produced any clear and convincing evidence to rebut this appellate court finding. Therefore, it cannot be a basis for federal habeas relief.

Finally, Sarauer contends that he never received a witness list from the state. The state appellate court found that Sarauer did receive a witness list, *id*. at ¶ 21, but Sarauer contends that this finding is incorrect. Sarauer points to an exchange during trial during which he objected to the state's calling Betty Schroeder on the ground that the state had never provided Sarauer with a witness list; the prosecutor responded that although a witness list had been prepared, he could not tell from his file whether it had been provided to Sarauer. Tr. of Trial, Aug. 24, 2001, dkt. #10, exh. R, at 307.

The record citations provided by Sarauer rebut the state appellate court's finding that he received a witness list. But even if this court presumes that the state failed to give Sarauer a witness list, unless this failure prejudiced Sarauer, it does not establish a constitutional violation. Sarauer has not established prejudice. The only witness to whom he objected at trial on the ground that he had not received a witness list was Schroeder. However, not only did Sarauer later withdraw his objection, he also indicated that *he* had attempted to subpoena Schroeder. *Id*. at 308. Moreover, during a pretrial hearing, Sarauer explained the relevance of one of his proposed witnesses by stating that this witnesses would impeach Schroeder. Tr. of Motions Hrg., Aug. 23, 2001, dkt. #10, exh. P, at 15. Perforce, Sarauer

knew before trial that Schroeder was going to be a witness. Sarauer does not contend in his submissions that he was surprised by Schroeder or any of the other prosecution witnesses. The state's failure to provide Sarauer with a witness list did not deprive him of a fair trial.

In sum, Sarauer has failed to show that he had any constitutional right to the items that he says the state failed to provide to him. Moreover, the state's alleged omissions had no bearing on the outcome of trial. Sarauer's allegations of prosecutorial misconduct are not of constitutional magnitude. The state court of appeals correctly determined that Sarauer was not entitled to relief on this claim.

IV. Trial Court Bias

Sarauer contends that the trial judge was biased against him. As proof of bias, Sarauer points primarily to the court's various adverse rulings both before and during trial. He also points out that the judge commented that Sarauer had been a plaintiff in a previous civil lawsuit that the judge described as the "silliest" case he had ever tried. As further proof of bias, Sarauer avers that in the civil case the judge reduced by $6,000 the jury award to Sarauer.

The Wisconsin Court of Appeals rejected Sarauer's bias claim, noting that a trial court's adverse rulings are not sufficient to demonstrate bias and the record failed to reflect any other bias that would have required the trial judge to recuse himself. *Sarauer*, 2004 WI App at ¶ 24.

This was a reasonable adjudication of Sarauer's claim. As the Supreme Court explained in *Liteky v. United States*, 510 U.S. 540 (1994):

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. (citation omitted). In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.
>
> Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.

510 U.S. at 555-556.

Sarauer has not pointed to any comments by the trial judge that reflect "deep-seated antagonism" or show that he formed an opinion about the case on the basis of an

extrajudicial source. The court remarked that Sarauer had litigated a "silly" civil lawsuit while ruling that Sarauer was competent to waive his right to counsel, indicating that it was personally aware of Sarauer's prior litigation experience as a result of that case. Tr. of Mot. Hrg., July 11, 2001, dkt. #10, exh. N, at 56. Without more, establish bias. Likewise, the court's decision to reduce the Sarauer's damages award in the civil case is not evidence of bias absent some showing that the judge was motivated by animus against Sarauer. Sarauer has not made this showing. The state court of appeals reasonably concluded that Sarauer had no colorable claim of judicial bias.

V. The Trial Court's Refusal to Allow Sarauer to Present Photographic Evidence Unless He Was Subject to Wide Open Cross-Examination

Sarauer contends that the trial court deprived him of his right to present a defense and his right to a fair trial when it ruled that in order to lay a foundation for the photographs that Sarauer had taken of the crime scene, Sarauer would have to waive his privilege against self-incrimination and would be subject to cross-examination "on all aspects of the case." Reviewing this claim, the court of appeals concluded that it was proper for the trial court to require Sarauer to authenticate the photographs before introducing them. *Sarauer*, 2004 WI App at ¶ 26. It also agreed with the trial court that "[o]nce a witness, [Sarauer] could be subjected to a full cross-examination." *Id*. As support for this assertion, the court cited Wisconsin's "wide open cross" rule, Wis. Stat. § 906.11(2), which provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility."

Finally, the court concluded that even if the trial court had erred, the absence of the photographs was harmless because the amount of blood involved had no bearing on whether Sarauer committed substantial battery against Endres. *Id*.

Because Sarauer did not testify, he cannot claim that the trial court's ruling violated his privilege against self-incrimination. *United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002) (defendant waived right to contend that trial court's conditional ruling violated his privilege against self-incrimination when he decided not to testify); *accord Haskins v. State*, 97 Wis. 2d 408, 416, 294 N.W. 2d 25 (1980) (appellate court cannot review defendant's claim that trial court's *in limine* ruling violated fifth amendment unless defendant takes stand).

It's possible, however, that the trial court might have infringed Sarauer's constitutional right to present a defense (namely his personal photographs of the crime scene)[2] by conditioning his ability to present the photographs on Sarauer submitting to an unlimited cross-examination. The federal rule is that a defendant who takes the stand waives his privilege against self-incrimination only as to matters "reasonably related" to his direct testimony. *See McGautha v. California*, 402 U.S. 183, 215 (1971) (defendant who takes stand in his own behalf cannot then claim privilege against cross-examination "on matters *reasonably related* to the subject matter of his direct examination") (emphasis added); *Brown v. United States*, 356 U.S. 148, 154-55 (1958) (breadth of defendant's waiver of privilege against self-incrimination determined by scope of relevant cross-examination). *See also Neely*

[2] *See Chambers v. Mississippi*, 410 U.S. 284 (1973)

v. Israel, 715 F.2d 1261, 1265 (7th Cir. 1983) (declining to reach constitutionality of Wisconsin's wide open cross rule in light of court's conclusion that cross-examination was properly within scope of direct). It is unclear whether this rule is rooted in the language of the Fifth Amendment or is a procedural rule that does not bind the states. *See Neely v. State*, 97 Wis. 2d 38, 44-45, 292 N.W. 2d 859 (1980) (discussing history of federal rule).

However, it is not necessary to resolve this issue in this case. Even assuming the trial court's ruling was an error of constitutional magnitude, Sarauer is not entitled to habeas relief unless he can establish that his custody is a result of that error. *Aleman v. Sternes*, 320 F.3d 687, 690 (7th Cir. 2003) (even if petitioner shows that state court unreasonably adjudicated a federal claim, under 28 U.S.C. § 2254(a) he still must show that constitutional deprivation has resulted in his custody). To do so, Sarauer must show that the error was not harmless, in other words, that it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

I agree with the state appellate court that even if the trial court infringed upon Sarauer's right to present a defense, the error was harmless. Sarauer insists that his photographs impeached Endres's claim that he had bled profusely after Sarauer decked him with the gun. The photographs are not in the record, but Sarauer described them to the trial court as pictures of the crime scene that he took in March or April 2001, apparently while there still was snow on the ground. The photographs showed snow undappled by Endres's blood. To establish a comparison, Sarauer also offered a photograph of snow onto which he

had poured a quarter cup of animal blood. Tr. Transcript, Aug. 23, 2001, dkt. #10, exh. Q, at 200-201.

Although this wasn't a bad idea in theory, by waiting almost four months to take his pictures Sarauer could not possibly have established an adequate foundation for the admission of his photographs. Sarauer wanted to use his photographs to prove a negative: that there was no blood on the ground at the site of the altercation, which meant that Endres was lying. If Sarauer had taken his pictures that same day or maybe the next, then his they might have had probative value. But pictures taken after an intervening season of wind, snow and exposure to wild animals, were useless and inadmissible. It was impossible for Sarauer to establish that his March photographs depicted this outdoor area in its December condition, particularly as to the presence or absence of a small quantity of biodegradable, edible liquid.

Even if Sarauer had taken timely photographs, their impeachment value would have been minimal: Endres did not say that all of the blood he purportedly lost flowed onto the ground; he testified that he used an old rag that he had in his pocket to stop the bleeding and he did not recall looking back at where he had fallen to see if there was blood on the ground.

Finally, as the court of appeals noted, the amount of blood reportedly lost by Endres was largely irrelevant to Sarauer's defense because Endres's broken tooth and loss of consciousness were sufficient to prove substantial bodily harm. For all these reasons, I

cannot conclude that exclusion of Sarauer's photographs had a substantial and injurious effect on the jury's verdict. Even if the trial court violated Sarauer's right to present a defense, this court's error was harmless.

VI. Other Alleged Trial Court Errors

Next, Sarauer complains of several other errors at trial. First, he contends that the trial court deprived him of a fair trial and his right to confront his accusers when it restricted his cross-examination of Endres. Specifically, Sarauer objects to the trial court's refusal to allow Sarauer to ask Endres who he might have seen the day after their confrontation, or to ask him about whether he stopped by a tavern before registering the deer. Neither complaint has traction.

A defendant has a constitutional right to confront and cross-examine the witnesses against him, *Davis v. Alaska*, 415 U.S. 308, 315 (1974), but the Confrontation Clause does not guarantee cross-examination that is effective in whatever way and to whatever extent a defendant might wish. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). Trial judges retain wide latitude to impose reasonable limits on cross-examination to prevent harassment, prejudice, confusion, repetition or irrelevant testimony. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Here, the state court of appeals reasonably concluded that the trial court had not unreasonably curtailed Sarauer's cross-examination of Endres. First, the record does not

support Sarauer's contention that he attempted to cross-examine Endres about whether he visited a bar before registering the deer. Sarauer asked Endres whether he had ever been involved in fist fights, and when the court questioned relevance, Sarauer replied only that he wanted to establish Endres's "disposition." Sarauer said nothing about seeking to establish that Endres had been involved in a fist fight in a bar during the time period between dragging the deer off of Sarauer's property and registering it. In light of this proffer, it was reasonable for the trial court to cut off this line of questioning. It also was reasonable for the trial court to forbid Sarauer from asking Endres about people he might have seen the day after the incident in light of Sarauer's admission that he was asking that question for discovery purposes.

Second, a review of Sarauer's cross-examination of Endres as a whole establishes that the court allowed Sarauer to roam pretty freely. It reined him in only when the questions became repetitive, argumentative or irrelevant. Although the court eventually told Sarauer he would have to wrap up his examination in 10-15 minutes, it did so only after Sarauer had examined Endres extensively. The court did not impinge on Sarauer's Sixth Amendment right to confront Endres.

Next, Sarauer contends that the trial court erred by sending into the jury room only items that were favorable to the prosecution. The state appellate court found that Sarauer waived his right to complain about this because he requested that *all* of the evidence be submitted to the jury. Although the state contends that the state court's finding of default

is an independent and adequate state ground that bars this court from considering the merits of Sarauer's claim, it is unnecessary to address that contention because Sarauer's allegations, even if true, fail to state a constitutional violation. Sarauer asserts that the trial court should have sent in a copy of a written statement that Kumlin provided to the sheriff's department so the jury could see that her statement was not entirely consistent with her testimony. He contends that Kumlin's statement that Endres registered the deer sometime in the afternoon as opposed to the morning on November 18, 2000, would show that Endres lied when he said he went directly from Sarauer's land to register the deer. However, as the trial court pointed out, Sarauer successfully had elicited this inconsistency while cross-examining Kumlin. There was no need for the jury to see on paper what it already had heard during testimony. As the state court of appeals found, the trial court decided what items to send in to the jury based upon its experience with juries. This was a proper exercise of the court's discretion that did not prejudice Sarauer's right to a fair trial.

Finally, there is no merit to Sarauer's contention that the trial court denied his right to a fair trial when he allowed Schroeder to testify even though the prosecutor had not provided Sarauer with a witness list. As explained in Section III, Sarauer knew to expect Schroeder as a witness, so the lack of a witness list inflicted no constitutional injury.

VII. Sufficiency of the Evidence

Sarauer contends that the evidence adduced at trial was insufficient to sustain his conviction. Due process is satisfied if, viewing the evidence in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). At the federal habeas stage, the question is whether the Wisconsin Court of Appeals' decision that a rational jury could have convicted Sarauer was an objectively reasonable application of the *Jackson* standard. It was.

The state established the elements of substantial battery through the testimony of Endres, Kumlin and Schroeder. Sarauer argues that Endres's testimony was not credible because it was inconsistent in places with his previous statements. But determining the weight and credibility of witness testimony is the sole province of the jury, *see, e.g.,United States v. Scheffer*, 523 U.S. 303, 313 (1998), and it is not Sarauer's place to second guess the jury's decision to credit Endres's account. Sarauer "posits" that Endres received his injuries in a bar fight, but he submitted no evidence at trial to support this theory. A review of the trial transcript reveals that the state court of appeals reasonably applied the *Jackson* standard to conclude that the evidence was sufficient to support the jury's guilty verdict.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that Kenneth Sarauer's petition for a writ of habeas corpus be DENIED.

Entered this 5th day of May, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

May 6, 2005

Kenneth Paul Sarauer
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Re: Sarauer v. Frank
Case No. 05-C-057-C

Dear Parties:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before May 20, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by May 20, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge