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

MAX P. FUNMAKER, JR.,

Petitioner, OPINION AND ORDER

v. 00-C-625-C

JON E. LITSCHER, Secretary,
Wisconsin Department of Corrections,

Respondent.

Max P. Funmaker, Jr., a Wisconsin prisoner currently incarcerated at the Whiteville Correctional Facility in Whiteville, Tennessee, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1995 conviction in the Circuit Court for Sauk County for first degree intentional homicide while using a dangerous weapon. Petitioner raises three claims in his petition: 1) his trial lawyer was ineffective for failing to pursue a voluntary intoxication defense, including failing to request a jury instruction on voluntary intoxication; 2) his trial lawyer was ineffective for failing to object to the jury instruction on imperfect defense of others; and 3) petitioner was denied a fair trial because the jury instructions were confusing. In his substantive reply, petitioner has added a claim that the trial court answered a jury question erroneously and failed to record its conference with the attorneys regarding the jury question. Petitioner requests an evidentiary hearing on this claim. Respondent concedes that the petition is timely and that petitioner has

exhausted his state court remedies as required by § 2254(b) with respect to the claims raised in his petition.

Because petitioner cannot show that the state court of appeals's adjudication of the merits of his first three claims resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, I must deny the petition. I do not reach the merits of petitioner's new claim of "plain error" because petitioner waived it by failing to raise it in his habeas petition and in the state court proceedings. Finally, because petitioner cannot make the showing required by 28 U.S.C. § 2254(e)(2), I am denying his request for an evidentiary hearing.

The following facts are drawn from the state court record and from the Wisconsin Court of Appeals unpublished opinion in *State v. Funmaker*, No. 98-1672-CR (Ct. App. June 10, 1999), attached to Answer, dkt. #16, at exh. B.

FACTS

The events leading up to petitioner's conviction and sentence occurred on May 7, 1995. Petitioner and his two brothers, Sterling and Eric Funmaker, were staying at the Evergreen Motel in Lake Delton, Wisconsin. On the morning of May 7, the brothers decided to spend the day getting drunk. Petitioner and Eric bought a bottle of rum shortly before noon and began drinking and playing cards. A couple hours later, the three brothers and Sterling's girlfriend, Alisa Cantwell, went to the beach. They took the rum and a 12-

pack of beer with them. Although Sterling and Cantwell drank some of the alcohol, most of it was consumed by Eric and petitioner.

Some time in the early evening hours, the group returned to the motel room and began playing cards at the kitchen table and drinking more beer. Later in the evening, they were joined by two individuals named Justin Maldonado and Bryan Powless. According to Maldonado, who arrived at the motel room at around 10 p.m., everyone except Cantwell appeared to be drunk. Shortly after Madonado's arrival, the scene got ugly. Eric became angry and belligerent, yelling loudly and accusing the others in the room of stealing his cigarettes. He pushed the cards off the table and stated that he wanted to fight someone. He then reached across the table and struck petitioner with a closed fist, but petitioner did not appear to react to the blow. Eric continued his angry behavior, issuing threats to Maldonado and Powless and stating that he was going to "kick somebody's ass."

Eric then picked up a chair, held it over his head, and threatened to hit someone. Sterling intervened, wrestled the chair away, and attempted to calm his brother down. Calling what he thought was his brother's bluff, Sterling put his hands behind his back and told his brother to go ahead and hit him. Eric responded by delivering three or four hard punches to Sterling's face. Sterling fell into a chair in a daze and apparently lost consciousness for a short period of time, but Eric continued to hit Sterling in the back of the head. Eventually, Sterling got up and attempted to engage Eric. He punched Eric in the face and knocked him to the ground but Eric got right back up. Sterling then grabbed Eric's

upper arms and pushed him back onto the couch while Eric continued to punch Sterling in his lower back.

While Sterling was being beaten by Eric, petitioner got out of his chair, grabbed a butter knife from the kitchen countertop and went towards Sterling and Eric. Although Cantwell attempted to stop petitioner from entering the fight, petitioner pulled his arm away from her and went over to the couch. Petitioner pushed Sterling out of the way, tackled Eric and stabbed him two times with the butter knife. (According to the pathologist who testified at trial, Eric's body had two life-threatening stab wounds: the first in the abdomen and the second in the chest. The stab wound to the chest, which went through the third rib and punctured the aorta, was fatal.) Petitioner testified that he realized immediately that Eric had been hurt seriously. After finding no pulse and realizing that Eric was not breathing, petitioner began performing CPR and told Sterling to call an ambulance. (Petitioner testified that he had received CPR training while he was employed as a casino security guard.)

Lake Delton police officer Tammy Meyer arrived at the scene at 10:20 p.m. Shortly thereafter, petitioner was handcuffed and Meyer placed him in the back of her squad car. While taking him to her squad, Meyer detected the smell of intoxicants and noticed that his eyes were red or bloodshot. She did not see him stagger or sway as she walked him from the motel room to the car and his speech was not slurred or thick-tongued.

Petitioner was taken to the police station, where he was interviewed by officer Janet Klipp between 1:30 and 1:57 a.m.. Petitioner identified himself initially as "Gene Cloud" but admitted his true name when Klipp advised him of the seriousness of the matter. During the interview, petitioner identified the parties who were in the motel room. At first he denied that he had been drinking but then later admitted that he had been drinking Bud Light beer. He stated that Eric was "flipping out" and becoming violent and threatening him. He said Eric had hit him in the face and hit Sterling when Sterling was attempting to cool him down. He said he stabbed Eric because Eric had picked up a sharp knife with serrated edges and had started coming towards him with it. A tape recording of the interview was played for the jury at trial.

Klipp testified that she did not recall observing anything about petitioner during her interview with him that indicated that he had been drinking. However, she had him taken to the hospital after the interview to have blood drawn. The results from the blood draw showed that petitioner's blood alcohol level was .15 percent at 3:10 a.m. The report also showed that Eric's blood alcohol content was .32 percent. The toxicology report showing the BAC levels of both Eric and petitioner was admitted by stipulation as an exhibit at trial.

After the state filed charges against petitioner, petitioner's lawyer moved to suppress the statements made by petitioner during the interview. The court held a hearing on the motion on June 9, 1995. Just before the hearing, the prosecutor provided counsel with a copy of the toxicology report showing that petitioner's blood alcohol level had been .15

percent at 3:10 a.m. At the close of the hearing, petitioner's lawyer contended that it could be assumed fairly that petitioner's blood alcohol content was at least .20 percent at the time he was interviewed and that petitioner was too intoxicated to intelligently waive his Miranda rights. Counsel argued that an expert would be able to "extrapolate back and show us what the actual blood alcohol probably was within very good accuracy." Transcript of Suppression Hearing, dkt. #16, exh. K at 37. The court denied the motion to suppress. On July 12, 1995, a toxicologist for the state crime lab prepared a report indicating that petitioner's blood alcohol content was between .22 to .25 percent when he stabbed his brother.

At trial, petitioner relied for his defense on the privilege to use force to protect another person. He testified that he had been beaten up by Eric numerous times since he was 13 years old. Petitioner testified that he had stabbed Eric because he knew what Eric was "capable of doing" and he believed Sterling was in danger of being severely harmed by Eric. Petitioner testified that he first grabbed the knife in the hope that Eric would see it and leave Sterling alone. When Eric continued to beat Sterling, petitioner testified that "in order to protect [Sterling], I took it upon myself to do something and try to refrain Eric from doing any more damage than he had already done." Transcript of Jury Trial, July 17, 1995, dkt. #16, exh. N at 331-332.

Sterling testified that he had witnessed Eric beat petitioner on three occasions. There was also testimony that on one occasion, Eric was beaten up by petitioner and two other individuals. The jury was instructed that the parties had stipulated that Eric and petitioner

had "in the past engaged in violent acts against others that resulted in serious injury to those other persons and the deceased's and defendant's incarceration."

The court read a modified version of Wisconsin Criminal Jury Instruction 1017 to the jury. The instruction instructed the jury on the elements of first degree intentional homicide, second degree intentional homicide, first degree reckless homicide, second degree reckless homicide and the perfect and imperfect defense of others. The instruction informed the jury that in order to find a perfect or imperfect defense of others, it had to find that petitioner acted on a "reasonable belief" that he was preventing or terminating an unlawful interference with Sterling. The court instructed the jury that the test of reasonableness is "what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense."

During closing argument, petitioner's lawyer called the jury's attention to Eric's and petitioner's blood alcohol level as shown on the toxicology report. He also argued that "[i]f [petitioner] were operating with all his faculties and hadn't been imbibing and a little intoxicated, too, he might have thought better. Very frankly, he probably should have." Id. at 518. However, counsel emphasized that Eric, not petitioner, was confrontational and out of control and that petitioner had acted reasonably under the circumstances to prevent serious bodily injury or death to Sterling.

During its deliberations, the jury sent out a note asking the following question:

> Do we have to assume that–"A reasonable person in the circumstances of the defendant" – Would be intoxicated at the time of the act?

Apparently, the court held a conference with the prosecutor and defense counsel regarding how the question should be answered but the conference was not recorded. The court responded with a written note informing the jury that it should "see bracketed section above which is on page 7 of instruction 1017". The "bracketed section" to which the court referred is not part of the record.

The jury returned with a verdict finding petitioner guilty of first degree intentional homicide. Petitioner subsequently filed a postconviction motion, alleging that his trial lawyer had been ineffective for failing to pursue a voluntary intoxication instruction and for failing to augment the record with expert testimony regarding petitioner's level of intoxication at the time of the offense. Petitioner presented testimony from an expert forensic toxicologist who estimated that petitioner's blood alcohol content at the time of the offense was .25 to .35 percent. The expert testified that this level of intoxication would have caused petitioner to be in a confused state, with emotional instability, loss of critical judgment, impaired perception, memory and comprehension, disorientation, mental confusion and exaggerated emotional states of fear, rage and sorrow.

Petitioner's trial lawyer testified that he developed the defense-of-another strategy early in the case. He did not calculate petitioner's estimated level of intoxication at the time petitioner stabbed Eric and he did not recall whether he had discussed with petitioner the viability of the defense of voluntary intoxication. He testified that he should have pursued the defense, stating that it would have been viable and would not have conflicted with his

primary defense. He conceded that he did not ask for a clarifying instruction on defense-of-another, although he believed the instruction as given was difficult and confusing.

The trial court denied the motion. On appeal, the court of appeals affirmed the conviction and the order denying post-conviction relief. The court analyzed the ineffective assistance of counsel claim under the two-pronged test of Strickland v. Washington, 466 U.S. 668, 687 (1984). (Although the court did not cite Strickland directly, it cited a state court case that did.) In concluding that counsel's performance had not been deficient, the court reasoned as follows:

> Trial counsel applied an objectively reasonable trial strategy. In hindsight, counsel believed that he should have presented the involuntary intoxication defense. However, there were two valid reasons for not doing so. First, the evidence introduced at trial did not support the defense. To create a jury issue on the intentional homicide charge, there must be evidence that the defendant's intoxication at the time of the crime rendered him incapable of forming the intent requisite to the commission of the crime. *State v. Strege*, 116 Wis. 2d 477, 486, 343 N.W. 2d 100, 105 (1984). Here, witnesses described Funmaker as not obviously or apparently intoxicated at the time and shortly after the incident. After stabbing Eric, he essentially took control of the situation, giving Eric first aid and instructing others to call for emergency care. Additionally, the jury heard Funmaker's taped statement to the police, in which he clearly recalled the events of the evening, and was able to articulate an exculpatory version of the stabbing.
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> Second, Funmaker staked his strongest defense on evidence that he made a considered, reasonable decision to save Sterling from further injury in Eric's brutal attack. Presenting evidence and argument that he was in a state of drunken confusion at the time is simply inconsistent with that defense. Trial counsel may reasonably choose to avoid inconsistent defenses, to avoid the risk that the jury might reject both. *See Lee v. State*, 65 Wis. 2d 648, 654, 223 N.W. 2d 455, 458 (1974). (Jury presented with contradictory defenses may find merit in neither).

Court of Appeals Opinion, dkt. #16, exh. B at 4-5.

The court also rejected petitioner's claim that his trial lawyer was ineffective for failing to seek jury instructions that would explain the meaning of the term "unlawful interference" in the instruction that petitioner was privileged to use force against Eric if he reasonably believed the Eric was unlawfully interfering with Sterling. The court found petitioner's claim unreasonable, finding that "[t]he undisputed evidence showed that Eric's 'interference' with Sterling was a brutal beating" that the jury surely would have considered to be an unlawful interference without additional clarification. Id. at 5.

The court also rejected petitioner's claim that he was denied a fair trial because the standard jury instructions used at trial were confusing. Noting that trial courts are supposed to use the standard instructions "because they do represent a painstaking effort to accurately state the law and provide statewide uniformity," the court found nothing in the record to indicate that the standard instruction was so confusing as to suggest that the jury did not consider petitioner's defense. Id.

The Wisconsin Supreme Court denied petitioner's petition for review on September 28, 1999.

OPINION

I. STANDARD OF REVIEW

The standard of review governing petitioner's claims is set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. The relevant portion of the Act provides:

> 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– . . .
>
> 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.

28 U.S.C. § 2254(d)(1).

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court expounded on this standard, asserting that 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 that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." Id. at 405; see also Anderson v. Cowan, 227 F.3d 893, 896 (7th Cir. 2000).

The Court then interpreted the "unreasonable application" prong of the statute to encompass situations where "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state

prisoner's case," or "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407.

The Court held that determining whether the state court unreasonably applied clearly established federal law involves an objective inquiry. Id. at 409-10. Acknowledging that the term "unreasonable" defies easy definition, the Court emphasized that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Id. at 410 (emphasis in original). The Court explained that under § 2254(d)(1)'s "unreasonable application" clause, "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. Put another way, a federal court cannot substitute its independent judgment as to the correct outcome. See Washington v. Smith, 219 F.3d 620, 628 (7th Cir. 2000). A federal court must determine that a state court decision was both incorrect *and* unreasonable before it can issue a writ of habeas corpus. Id.

With these standards in mind, I turn to petitioner's Strickland claim.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Voluntary Intoxication

Petitioner contends his trial lawyer was ineffective for failing to pursue a voluntary intoxication defense. Petitioner contends his lawyer should have presented additional evidence at trial, including expert testimony, regarding petitioner's level of intoxication and its effect on him at the time he stabbed his brother. Also, petitioner argues that his lawyer should have requested a jury instruction regarding involuntary intoxication and should have argued in support of the defense in his closing argument.

To establish ineffective assistance of trial counsel, petitioner has the burden of showing both that counsel's performance was deficient and that petitioner was prejudiced as a result. See Strickland, 466 U.S. at 687. To prove that counsel's performance was deficient, petitioner must show that counsel acted "outside the wide range of professionally competent assistance." Id. at 690. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. To prove prejudice, 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. "[B]ecause counsel is presumed effective, a party bears a heavy burden in making out a winning claim based on ineffective assistance of counsel." United States v. Trevino, 60 F.3d 333, 338 (7th Cir. 1995).

A federal habeas petitioner claiming that the state courts applied Strickland unreasonably bears an even heavier burden. As the Seventh Circuit noted in Holman v. Gilmore, "*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . . This means that only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." Id., 126 F.3d 876, 881 (7th Cir. 1997). This is because "*Strickland* builds in an element of deference to counsel's choices in conducting the litigation [and] § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard." Id.

Petitioner cannot overcome this incredibly steep barrier. The state appellate court properly identified the governing legal standard and evaluated petitioner's claim under the two-part test of Strickland. Applying Strickland's presumption, it concluded that trial counsel's performance was not deficient for two reasons. First, the court found that the evidence introduced at trial was not sufficient to support a voluntary intoxication instruction, even if counsel had asked for one. Second, the court found that even if counsel had presented additional evidence and argument to support a voluntary intoxication defense, it was not unreasonable for counsel to have chosen instead to rely solely on the defense-of-another defense instead of presenting conflicting defenses.

Neither of these conclusions was "unreasonable" as that term has been defined in § 2254(d)(1). Petitioner's trial attorney testified that his decision to pursue a defense-of-others defense was a strategic decision that he developed early in the case. A strategic or

tactical decision can be deemed "ineffective assistance" in only the most extraordinary cases. Although counsel testified in hindsight that voluntary intoxication was a viable defense that he should have presented at trial, there were valid, tactical reasons for his decision to not pursue both defenses at trial. Pursuant to Wis. Stat. § 939.42(2), to be entitled to the voluntary intoxication instruction, a defendant must establish "that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime . . . . [T]hat means he was utterly incapable of forming the intent requisite to the commission of the crime charged." State v. Guiden, 46 Wis. 2d 328, 331, 174 N.W. 2d 488 (1970). As the Wisconsin Supreme Court explained in State v. Strege, 116 Wis. 2d 477, 343 N.W. 2d 100 (1984):

> A bald statement that the defendant had been drinking or was drunk is insufficient--insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing. In order to merit an intoxication instruction in this case, the defendant must point to some evidence of mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill.

Id. at 486, 343 N.W. 2d at 105.

As the state appellate court recognized, pursuing this defense would have been inconsistent with petitioner's contention that he made a reasoned decision that interference was necessary in order to prevent Sterling from further harm at the hands of Eric. Petitioner's explanation for why he stabbed Eric reflected the fact that he had sized up the situation, and, from what he saw and his own knowledge of Eric's violent behavior, determined that stabbing his brother was necessary in order to protect Sterling. This is not

consistent with his present contention that he was so intoxicated as to have lacked the ability to form the intent to kill. The state appellate court properly recognized that, presented with two conflicting defenses, the jury might have rejected both.

One could argue colorably that presenting both defenses to the jury would not necessarily have been inconsistent or that counsel could have asked the jury to consider the defenses in alternative sequence. However, the issue is not whether counsel *could* have pursued both defenses but whether it was "outside the wide range of professionally competent assistance" for him to choose one over the other. When the jury returns a guilty verdict, it is easy to say that counsel should have pursued a different approach. However, trial counsel's performance will not be deemed constitutionally deficient "merely because of a tactical decision made at trial that in hindsight appears not to have been the wisest choice." United States v. Grizales, 859 F.2d 442, 447 (7th Cir. 1988). The reasonableness of counsel's decisions must be evaluated in light of the circumstances at the time of trial and courts must apply a "heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 689, 691. Applying this deferential standard, the state court of appeals determined that it was reasonable for counsel to focus solely on the defense-of-another defense rather than present a contradictory voluntary intoxication defense that was likely to have diluted the primary defense. Applying § 2254(d)(2)'s deferential standard, I conclude that this was a reasonable application of Strickland.

Next, petitioner contends that counsel was ineffective in failing to request a jury instruction on voluntary intoxication. Petitioner argues that the jury heard evidence and argument indicating that petitioner had been drinking all day and was intoxicated at the time of the stabbing but "did not know how to deal with" that evidence during deliberations. Petitioner points to the jury question regarding intoxication as proof that he was prejudiced by his lawyer's failure to seek the instruction.

I have already concluded that the state courts reasonably concluded that trial counsel was not ineffective for failing to pursue a voluntary intoxication defense. Because requesting an instruction on voluntary intoxication would have been tantamount to pursuing that defense, counsel's failure to make such a request was not deficient performance. Moreover, the state appellate court found implicitly that petitioner was not prejudiced by this omission because the evidence introduced at trial would not have supported an instruction on involuntary intoxication. Evidence militating against a voluntary intoxication instruction included the witnesses who described petitioner as not obviously or apparently intoxicated at the time and shortly after the incident; petitioner's post-attack actions, including administering CPR to Eric and instructing others to call for emergency care; and petitioner's taped statement to the police, in which he clearly recalled the events of the evening and was able to articulate an exculpatory version of the stabbing. Deferring, as I must, to the state court's judgment, I cannot conclude that the state appellate court was unreasonable in

concluding that the evidence presented at trial did not warrant a voluntary intoxication instruction.

The fact that the jury may have had questions regarding the role intoxication played in the case does not prove that the instruction should have been given. As petitioner points out, the context of the jury's note indicates that it was questioning the role that intoxication played in the defense-of-another defense. Intoxication was simply one of the factors in the case that the jury was entitled to consider when deciding whether petitioner had an objectively reasonable belief under the circumstances that he was preventing or terminating an unlawful interference with Sterling and whether he reasonably believed that the amount of force used was necessary. However, the voluntary intoxication instruction that petitioner says should have been given pertains to whether the defendant *possessed the intent to kill*, which is a different inquiry. The instruction would not have aided the jury because it relates to a different element of the case from the one to which the jury's note referred.

B. Unlawful Interference

In his petition, petitioner also contends that his attorney was ineffective for failing to request an instruction clarifying the term "unlawful interference" in the instruction that petitioner was privileged to use force against Eric if he reasonably believed Eric was unlawfully interfering with Sterling. The state appellate court found that counsel acted reasonably in deciding not to seek clarifying instructions. Specifically, the court found that

no clarifying instruction was needed in light of the fact that the evidence at trial showed clearly that Eric's "interference" with Sterling was a "brutal beating."

Petitioner has not offered any arguments to support his contention that the state appellate court decided this claim unreasonably. As noted previously, counsel is presumed to have rendered effective assistance and the state courts are presumed to have applied Supreme Court law reasonably. Having reviewed the trial transcript against this deferential backdrop, I conclude that the state court of appeals applied Strickland reasonably when it found that counsel was not ineffective for failing to request clarifying instructions.

In sum, petitioner has not shown that the state appellate court committed clear error when it applied Strickland to his claims of ineffective assistance of counsel. Accordingly, he is not entitled to a writ of habeas corpus on this ground.

III. DUE PROCESS–CONFUSING JURY INSTRUCTIONS

Petitioner claims in his petition that he was denied his right to a fair trial because the jury instructions were confusing. Again, petitioner has not offered any arguments to show that he is entitled to habeas relief on this claim under § 2254(d). In the state courts, petitioner argued that the instructions regarding perfect and imperfect defense of others should have been delineated clearly instead of incorporated into the substantive elements of the offenses and that the compound instruction given to the jury was confusing. The

Wisconsin Court of Appeals rejected this claim as mere speculation, noting that the trial court had used the appropriate standard jury instruction.

The court of appeals's conclusion was reasonable. Petitioner does not and did not contend that the instructions contained any misstatements of law or shifted the burden of proof improperly. As the court of appeals noted, Wisconsin's standard jury instructions "represent a painstaking effort to accurately state the law and provide statewide uniformity." State v. Foster, 191 Wis. 2d 14, 27, 528 N.W. 2d 22, 27 (Ct. App. 1995). The record is devoid of any evidence to suggest that the jury was so confused by the instructions so as to deny petitioner his right to a fair trial.

IV. TRIAL COURT'S RESPONSE TO JURY'S NOTE

Finally, petitioner contends that the trial court committed "plain error" when it responded to the jury's question concerning whether it was to consider petitioner's intoxicated state when considering the reasonableness of his actions. First, petitioner alleges that the trial court failed to record its discussion with the attorneys regarding how to answer the jury question. Second, petitioner contends that even without a transcript, the jury's note and the court's handwritten answer indicate that the court instructed the jury erroneously. In support of this claim, petitioner hypothesizes that the language the jury enclosed in quotation marks–"a reasonable person in the circumstances of the defendant"–was extracted verbatim from the portion of the instruction regarding second degree intentional homicide,

which was set forth in relevant part on page 9 of the 1017 jury instruction. In answering the jury's question, the judge instructed the jury to "see bracketed section above which is on page 7 of instruction 1017." Dkt. #16, exh. E, at A106. Without a copy of the bracketed language, petitioner argues, one must assume that the court was referring to the language beginning at the bottom of page 6 and ending at the top of page 7, which instructs the jury to consider "what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense." This constituted plain error, argues petitioner, because page 6 and 7 were the instructions for *first* degree intentional homicide.

There are two problems with petitioner's claims. First, petitioner has waived these claims by failing to raise them until his substantive reply. Arguments raised for the first time in a reply brief are waived. See United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000).

Second, even if this court were to excuse his waiver, petitioner has procedurally defaulted this issue because he never presented the claims during post-conviction proceedings in state court and no longer can do so. See O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999) (holding that habeas petitioners may not resort to federal court without first giving the state courts a fair opportunity to address their claims and to correct any error of constitutional magnitude); Wilson v. Briley, 243 F.3d 325, 327 (7th Cir. 2001). A procedural default in state court bars this court from considering the merits of his claim

unless petitioner can show cause and prejudice for the default or that a fundamental miscarriage of justice will result unless this court considers his claim.

Invoking Rule 52(a) of the Federal Rules of Criminal Procedure, petitioner contends that the allegedly erroneous jury instruction constitutes "plain error" affecting his substantial rights and therefore this court may consider it despite his failure to raise it in the state courts. I construe this as a claim that failure to consider his claims would result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991) (procedural default can be overlooked when petitioner demonstrates cause for default and consequent prejudice, or when he shows that fundamental miscarriage of justice will occur unless federal court hears his claim); United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir. 1984) (court will find plain error in event of "an actual miscarriage of justice, which implies the conviction of one who but for the error would have been acquitted"). To make this showing, petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 315, 327 (1995).

Petitioner cannot make this showing. Petitioner's contention that the jury's question demonstrates that the jurors would have acquitted him of first degree intentional homicide had they not been "improperly" instructed is mere speculation. Even if I accept petitioner's hypothesis that the jury's question was derived from the instructions on second degree

intentional homicide, it does not necessarily mean that the jury had already ruled out first degree homicide.

Further, there is no support for petitioner's contention that the court instructed the jury erroneously regarding the standard for evaluating the reasonableness of his actions. The court's note refers the jury to unidentified "bracketed" language on page 7 of the 1017 jury instruction. Page 7 in its entirety reads as follows:

> [. . .]person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.
>
> With respect to the belief that the unlawful interference presented an imminent danger of death or great bodily harm and the belief that the force used was necessary to prevent or terminate such danger, the reasonableness of the belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these belief [sic] are reasonable is important if you later consider whether the defendant is guilty of second degree intentional homicide.
>
> If you are satisfied beyond a reasonable doubt that the defendant caused the death of (Eric S. Funmaker) with the intent to kill and that the defendant either did not reasonably believe that he was preventing or terminating an unlawful interference with the person of Sterling Funmaker or did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to Sterling Funmaker, you should find the defendant guilty of first degree intentional homicide.
>
> If you are not so satisfied, you must not find the defendant guilty of first degree intentional homicide, and you must consider whether the defendant is guilty of second degree intentional homicide, as defined in § 940.05 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree intentional homicide.
>
> You should make every reasonable effort to agree unanimously on the charge of first degree intentional homicide before [. . .]

Even though the record does not indicate which of this language was bracketed by the court, I agree with petitioner that we can fairly conclude that it was the first partial paragraph and

perhaps the next full paragraph because these are the only paragraphs containing language that addresses the jury's question. However, contrary to petitioner's contention, this language did not misinform the jury of the law governing their evaluation of the reasonableness of defendant's actions. Although page 7 of the jury instructions was part of the instruction on first degree intentional homicide, it sets forth the same standard for evaluating reasonableness as that for second degree–"what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense." See Wis. JI 1017. This same language was set forth again within the instruction on second degree intentional homicide on page 9 of the 1017 jury instruction.

The Supreme Court has long held that jury instructions "must be viewed in the context of the overall charge," and a "single instruction to a jury may not be judged in artificial isolation." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); see also Cage v. Louisiana, 498 U.S. 39, 41 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole."). Here, where the language to which the court referred set forth the proper legal standard, the jury had the complete typewritten version of instruction 1017 to review during deliberations, and petitioner has not contended that the typewritten instructions were erroneous, there is simply no support for petitioner's claim that he would probably have been acquitted of first degree intentional homicide had the court not referred the jury to page 7 of the instructions when it answered

its question. "The Court presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instruction given them." United States v. Linwood, 142 F.3d 418, 426 (7th Cir. 1998). There was ample evidence adduced at trial from which the jury could have concluded that petitioner either did not reasonably believe that he was preventing or terminating an unlawful interference with Sterling or that he did not actually believe that the force he used was necessary to prevent imminent death or great bodily harm to Sterling. This includes the testimony from witnesses that indicated that Sterling was defending himself rather adequately against Eric at the time petitioner intervened, the violent and forceful nature of the fatal wounds inflicted by petitioner and the fact that petitioner stabbed Eric more than once.

Because petitioner cannot show that no reasonable juror would have convicted him of first degree intentional homicide but for the trial court's alleged error in answering the jury's question, this court has no basis for excusing his procedural default. For this same reason, petitioner's request for an evidentiary hearing on this issue is denied. See 28 U.S.C. § 2254(e)(2)(B) (court may not hold evidentiary hearing unless facts underlying claim would establish "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

ORDER

IT IS ORDERED that petitioner Max P. Funmaker, Jr.'s request for an evidentiary hearing and his petition for a writ of habeas corpus are both DENIED. The clerk of court is directed to enter judgment in favor of respondent and close this case.

Entered this 20th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge