UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TYRAN DAVIS,	)	CASE NO. 5:14CV956
	)	
	)	
PETITIONER,	)	JUDGE SARA LIOI
	)	
vs.	)	
	)	MEMORANDUM OPINION
ALAN LAZAROFF, Warden,	)	
	)	
	)	
RESPONDENT.	)	

Petitioner Tyran Davis ("petitioner" or "Harris"), an Ohio state prisoner, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. The habeas petition was referred to Magistrate Judge Kenneth S. McHargh, and the Magistrate Judge issued a Report and Recommendation ("R&R") concluding that the petition should be denied. (Doc. No. 12.) Petitioner filed timely objections to the R&R. (Doc. No. 14 ["Obj."].) For the reasons that follow, petitioner's objections are overruled, the Magistrate Judge's R&R is adopted, and the petition is denied.

I. BACKGROUND

The procedural history of petitioner's underlying state criminal case is fully recounted in the Magistrate Judge's R&R and need not be repeated in great detail here. For purposes of framing the pending objections, the case may briefly be summarized as follows. Following a jury trial in state court, petitioner was convicted of felony murder via felonious assault and felonious assault, both with a firearm specification. He was acquitted of the charge in the first count of the indictment—purposeful murder under Ohio Rev. Code § 2903.02(A).

On direct appeal, the state appellate court rejected petitioner's argument that he was entitled to a new trial because the trial court refused to instruct the jury on the crime of voluntary manslaughter under Ohio Rev. Code § 2903.03. While the court noted that voluntary manslaughter was a lesser included offense of the crime of purposeful murder under Ohio Rev. Code § 2903.02(A), it determined that any failure to give an instruction on voluntary manslaughter as to purposeful murder was harmless error inasmuch as petitioner was acquitted on this charge. The state court further determined that petitioner was not entitled to such an instruction on the second count—felony murder via assault under § 2903.02(B)—as voluntary manslaughter is not a lesser included charge of that offense. *See State v. Davis*, No. 25826, 2012 WL 1080530, at *5 (Ohio Ct. App. Mar. 30, 2012). Nonetheless, the court remanded the matter to the trial court for resentencing because it found that the counts yielding convictions should have been merged for sentencing purposes. *Id*. at *6. On resentencing, petitioner was sentenced to a term of imprisonment of eighteen years to life.

After unsuccessful state court direct and collateral attacks upon his sentence, petitioner filed the present federal habeas petition. Davis raised two grounds for relief, both of which focused on the trial court's failure to instruct the jury on the crime of voluntary manslaughter. In his first ground, petitioner alleged that he was denied his rights, under the Sixth Amendment, to a fair trial because he "arrived on the scene and saw [the] victim punch out [petitioner's] pregnant girlfriend and [his] pregnant sister." (Doc. No. 1 (Petition ["Pet."]) at 5.) In his second ground, petitioner alleged that there was "Adequate Evidentiary Support to instruct [the] jury on Voluntary Manslaughter[.]" (*Id*. at 7, capitalization in original.) In support, petitioner noted that he "was threatened by [the] victim to engaged [sic] him in a fight, then punch [sic] out his

girlfriend[.]" (*Id*.)

The R&R recommends that the habeas petition be denied because these grounds failed to establish that the state court decision denying his direct appeal was contrary to, or involved an unreasonable application of, clearly established federal law. (*Id*. at 318.) In particular, the R&R observed that the Sixth Circuit has adopted the majority view that, in non-capital cases such as the present case, the failure to instruct the jury on a lesser included offense is generally not cognizable in federal habeas proceedings. (*Id*. at 315-16, citing, among authority, *Todd v. Stegal*, 40 F. App'x 25 (6th Cir. 2002); *Bagby v. Sowders*, 894 F.2d 792, 975-97 (6th Cir. 1990).)

II. STANDARD OF REVIEW

This Court makes "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge." Local Rule 72.3(b). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004); *see also* Fed. R. Civ. P. 72(b)(3) "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to"); L.R. 72.3(b) (any objecting party shall file "written objections which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections"). After review, the district judge "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

III. PETITIONER'S OBJECTIONS

Petitioner fails to address the Magistrate Judge's recommended finding that petitioner's grounds for relief present claims that are not cognizable in a federal habeas petition. Rather, his objections are confined to his insistence that there was adequate evidence offered at trial to support his request for an instruction on voluntarily manslaughter. In his objections, petitioner "asserts that he was sufficiently provoked to shoot [the victim], only after [the victim] knocked out his pregnant girlfriend and his pregnant sister. Petitioner attempted to reason with [the victim] when he arrived on the scene at the request of his sister and girlfriend. The attempt to reason with him was to no avail, as he was in a fit of rage for reasons, only he knew of [sic]." (Obj. at 321.) He insists that the Magistrate Judge's R&R is "clearly wrong[,]" and that to deny his habeas application would amount to a "ratification" of the trial court's "wrongdoing." (*Id*.)

To the extent that petitioner's filing sets forth proper objections under Rule 72.3(b), the objections are overruled for two reasons. First, as noted above, the Sixth Circuit has concluded that the failure to instruct on lesser included offenses in noncapital cases generally "is not such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Todd*, 40 F. App'x at 28 (citing *Bagby*, 894 F.2d at 797).[1] Second, petitioner has failed to even challenge the state appellate court's determination that petitioner was not entitled, under Ohio law, to a voluntary manslaughter

[1] Petitioner's reference to *State v. McClendon*, No. 23558, 2010 WL 3834985 (Ohio Ct. App. Oct. 1, 2010), *vacated in part by* 944 N.E.2d 235 (Ohio 2011), and his suggestion that "this case is a capital case like *McClendon*; but, is distinguished on the facts and circumstances," gains him no traction. (*See* Obj. at 322.) Initially, the Court notes that there is nothing in the record that would suggest that petitioner's case was tried as a capital case, and, in any event, petitioner was neither sentenced to death nor was the question of the appropriateness of a death sentence ever submitted to the jury for its consideration. Moreover, the *McClendon* case involved a direct appeal of a state court conviction, and not a federal habeas petition. The fact that the state appellate court ruled that, where there is evidence of serious provocation, Ohio law requires an instruction on voluntary manslaughter, does not establish the right to pursue such a claim in a federal habeas petition.

instruction on Count 2—felony murder—because voluntary manslaughter was not a lesser included offense of felony murder, let alone demonstrate that the trial court's failure to instruct as to voluntary manslaughter "'by itself so infected the entire trial that the resulting conviction violates due process.'" *Id*. (quoting *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (further citations omitted)).

IV. CONCLUSION

For all of the foregoing reasons, petitioner's objections to the R&R are overruled, the R&R is adopted, the habeas corpus petition is denied, and the case is dismissed. Further, because the Court concludes that reasonable jurists could not find that a dismissal of petitioner's purported constitutional claims was debatable or wrong, the Court certifies that an appeal from this decision could not be taken in god faith and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: April 4, 2017

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE