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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON ANDREW WRIGHT, Petitioner-Appellant, v. STATE OF OREGON, Respondent-Appellee.	No. 18-35583 D.C. No. 2:14-cv-02058-JE District of Oregon, Pendleton ORDER

Before: TALLMAN and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JASON ANDREW WRIGHT,

Petitioner,

v.

STATE OF OREGON,

Respondent.

No. 2:14-cv-02058-JE

ORDER

HERNANDEZ, District Judge:

Magistrate Judge Jelderks issued a Findings & Recommendation (#78) on March 14, 2018, in which he recommends the Court deny Petitioner's Petition for Writ of Habeas Corpus, dismiss the case with prejudice, and decline to issue a Certificate of Appealability. Petitioner has timely filed objections to the Findings & Recommendation. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the

Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

I have carefully considered Petitioner's objections and conclude there is no basis to modify the Findings & Recommendation. I have also reviewed the pertinent portions of the record *de novo* and find no other errors in the Magistrate Judge's Findings & Recommendation.

CONCLUSION

The Court ADOPTS Magistrate Judge Jelderks's Findings & Recommendation [78], and therefore, Petitioner's Petition for Habeas Corpus [2] is denied and this case is dismissed with prejudice. The Court declines to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 6 day of July, 2018.

Marco Hernandez

MARCO A. HERNANDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JASON ANDREW WRIGHT,

Petitioner,

v.

STATE OF OREGON,

Respondent.

No. 2:14-cv-02058-JE

JUDGMENT

HERNANDEZ, District Judge:

Based on the record,

IT IS ORDERED AND ADJUDGED that this action is dismissed, with prejudice. The Court declines to issue a Certificate of Appealability because Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 6 day of July, 2018.

Marco Hernandez

MARCO A. HERNANDEZ
United States District Judge

1 - JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JASON ANDREW WRIGHT,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Case No. 2:14-cv-02058-JE

FINDINGS AND RECOMMENDATION

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JELDERKS, Magistrate Judge.

Petitioner brings this habeas corpus case pursuant to 28 U.S.C. § 2254 challenging the legality of his state-court convictions for Kidnapping and Attempted Rape. For the reasons that follow, the Petition for Writ of Habeas Corpus (#2) should be denied.

BACKGROUND

The factual background for this case is taken directly from the Oregon Court of Appeals' decision in Petitioner's post-conviction case:

> The victim was a 19-year-old woman who had been at a wedding reception in downtown Baker City, where she had consumed enough alcohol to make her heavily intoxicated. Around midnight, she joined a group that was leaving the reception to go to other bars in the same area. She and another member of the group got in an argument as they were walking toward the bars, and she left the group, eventually sitting down by herself in a downtown alleyway.
>
> The next thing the victim could remember was waking up in a hotel room where she was lying on a bed. She went to the door to leave the room, when petitioner, whom she had not seen in the room, stopped her and pushed her up against the wall and began choking her with enough strength that she had trouble breathing. He told her to stop struggling, and, once she did, he released her and told her that she had consented to have sexual intercourse with him and she could not leave until she did. The victim told petitioner she would die first before she agreed to his request for sexual intercourse. Petitioner then requested that the victim give him a "blow job" instead, which she also refused. For the next few hours, petitioner kept the victim in the room with him, repeatedly

> insisting that she had agreed to have sexual intercourse with him. The victim conversed with petitioner during this time, telling him that he could not keep her locked in this room, to which he replied that he could not let her go, because she would run, and "they always run." The victim tried to escape two or three times more, but, each time she tried to unlock the door, petitioner would push her against the wall and choke her until she stopped struggling.
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> Eventually, the victim was able to convince petitioner to let her out of the motel room, on the agreement that she would not report him to the police and would have breakfast with him. When petitioner opened the door, the victim ran out of the room, crossed the street to a gas station, and received assistance from a station attendant there until she was sure she was safe from petitioner. Petitioner was eventually arrested, indicted, and, after a jury trial, convicted of attempted rape and kidnapping.

Wright v. Nooth, 264 Or. App. 329, 331-32, 336 P.3d 1, 2-3 (2014).

The trial court sentenced Petitioner to 90-months in prison. Petitioner took a direct appeal, but the Oregon Court of Appeals affirmed the trial court without opinion, and the Oregon Supreme Court denied review. *State v. Wright,* 198 Or. App. 614, 220 P.3d 664, *rev. denied*, 339 Or. 609, 127 P.3d 650 (2005).

Petitioner next filed for post-conviction relief ("PCR") in Malheur County where he raised 137 claims. Among his claims, he asserted that his trial attorney was ineffective for failing to object to inadmissible character evidence by two witnesses. That evidence is summarized as follows:

> During the trial, the trial court admitted the testimony of two women, J. and K., who had encountered petitioner earlier on the

> same night in downtown Baker City. J. and K. each testified that they had walked out of a bar to get some fresh air and that petitioner had come out of the bar after them. He approached them, saying that he needed them to pay for a motel room and that he wanted them to come with him to the room. Petitioner then made sexual remarks to J. about her breast size and asked K. if he could "eat her," which referred to, K. testified, deviate sexual intercourse. The two women ignored him, and, as they walked back into the bar, petitioner grabbed K.'s arm. In her testimony, K. said that she was surprised by petitioner's strong grip due to petitioner's physical disability—petitioner does not have forearms; his hands are connected at his elbows. She pulled her arm away and walked into the bar. J. and K. did not have further contact with petitioner that evening.

Wright, 264 Or. App. at 332 (footnote omitted).

The PCR court denied relief on all of Petitioner's claims, and specifically found that there was no basis for counsel to object to the testimony of J. and K. Respondent's Exhibits 130-132. The Oregon Court of Appeals affirmed the PCR court's decision in the written opinion referenced above, and the Oregon Supreme Court once again denied review. *Wright v. Nooth*, 356 Or. 517, 340 P.3d 48 (2014).

Petitioner filed this 28 U.S.C. § 2254 habeas corpus case raising 72 grounds for relief. Respondent asks the Court to deny relief on the Petition because: (1) many of the claims are procedurally defaulted; and (2) Petitioner's fairly presented claims (Grounds 1(1), 1(4), 1(30), 1(33), 1(38), 4(4), and 4(8)) were properly denied in decisions that were neither contrary to, nor unreasonable applications of, clearly established federal law.

DISCUSSION

I. Standard of Review

An application for a writ of habeas corpus shall not be granted unless adjudication of the claim in state court resulted in a decision that was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's findings of fact are presumed correct, and Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary to . . . clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] 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 [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant relief "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id* at 410. Twenty-eight U.S.C. § 2254(d)

"preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

II. Unargued Claims

As noted above, the Petition for Writ of Habeas Corpus contains 72 grounds for relief, all of which the State answered. In his supporting memorandum filed with the assistance of appointed counsel, Petitioner elects to argue a single claim: whether trial counsel was ineffective for failing to object to the testimony of J. and K. Petitioner does not argue the merits of his remaining claims, nor does he address any of Respondent's arguments as to why relief on these claims should be denied. As such, Petitioner has not carried his burden of proof with respect to these unargued claims. *See Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (Petitioner bears the burden of proving his claims).

III. Failure to Object to Testimony

Petitioner argues that J. and K. offered testimony at trial that amounted to inadmissible character evidence under Oregon law such that trial counsel was constitutionally obligated to object to its admission. Because no Supreme Court precedent is directly on point that corresponds to the facts of this case, the court uses the general two-part test established by the Supreme Court to determine whether Petitioner received ineffective assistance of counsel. *Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009).

First, Petitioner must show that his counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Due to the difficulties in evaluating counsel's performance, courts must indulge a strong presumption that the conduct falls within the "wide range of reasonable professional assistance." *Id* at 689.

Second, Petitioner must show that his counsel's performance prejudiced the defense. The appropriate test for prejudice is whether Petitioner can show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. *Id* at 696. When *Strickland's* general standard is combined with the standard of review governing 28 U.S.C. § 2254 habeas corpus cases, the result is a "doubly deferential judicial review." *Mirzayance*, 556 U.S. at 122.

According to Petitioner, there was no permissible non-character purpose underlying the testimony at issue such that it was inadmissible under the Oregon Evidence Code. As previously noted, the PCR court specifically determined that "there was no basis for trial counsel to object to the testimony provided by [K.] and [J.]." Respondent's Exhibit 131, p. 3.

Petitioner pursued the same claim on appeal, and the Oregon Court of Appeals chose to resolve the issue on prejudice grounds, "[a]ssuming, for the sake of argument, that trial counsel should have objected to evidence of petitioner's sexual advances toward

J. and K. . . ." *Wright*, 264 Or. App. at 334. It engaged in a lengthy analysis and determined that "in considering the totality of the circumstances, this evidence did not have a tendency to affect the result of the proceeding and, therefore, petitioner was not prejudiced by trial counsel's failure to object to the evidence." *Id.* It reasoned as follows:

> In this case, any potential prejudice from the admission of J.'s and K.'s testimony must be considered in light of petitioner's theory of defense. At the criminal trial, the uncontroverted testimony of witnesses other than the victim included evidence from the motel desk clerk that petitioner arrived some time before 4:00 a.m., driving a van, and that he wanted to rent a motel room for "his girlfriend" and himself. Further uncontroverted testimony from the service clerk at the gas station was that, around 5:50 a.m., the victim came into the gas station, crying and asking for help to get home; that petitioner appeared soon thereafter, saying, "Well, come on and I'll take you to breakfast;" and that the victim did not respond to petitioner's request.
>
> In light of that evidence, petitioner's trial counsel focused his defense on the state of mind of both petitioner and the victim when they were in the motel room together. Trial counsel outlined his theory of the case in the opening statement, explaining that the anticipated evidence would show that the victim voluntarily came with petitioner to the motel room and that petitioner intended to have *consensual* sexual relations with the victim and, therefore, he did not have the requisite intent for attempted rape or kidnapping. The emphasized "anticipated evidence" included that petitioner was physically incapable of taking the victim against her will, or holding her against her will, that the victim was left alone in the van while he rented the motel room at the service desk, and that the motel walls were

thin, so any noise of a struggle would have been heard by residents in the neighboring motel rooms. The anticipated evidence also included that petitioner "repeatedly asked [the victim] to engage in sexual intercourse or sexual acts. We don't believe there's going to be any [testimony] that he intentionally tried to force her to compel her to perform a sexual act. * * * [A]ny force [petitioner] used was to keep [the victim] there in the room so he could continue to ask her to try and get her to change her mind."

In other words, petitioner's defense theory pertained to his lack of physical strength to confine the victim, evidence of the victim's voluntary presence with petitioner, and evidence of his subjective intent to have *consensual* sexual relations with the victim. Petitioner offered evidence in support of each facet of his defense. As to his physical inability to confine the victim, petitioner called an expert who had tested petitioner's lifting strength and grip strength and had concluded that petitioner would be unable to lift dead weight that would have equaled the victim's weight and that the grip strength in his hands was very low. The expert explained that, without forearms, petitioner's strength is significantly less than that of the average male of petitioner's age. Petitioner further elicited testimony on cross-examination from the victim that she had played high school sports, was currently a fire fighter in the forest service, and was in good physical shape.

As to the victim being voluntarily with petitioner, petitioner elicited testimony on cross-examination from the motel desk clerk that the victim was alone in the van while petitioner rented the room. Petitioner further offered testimony from one of the motel's maids that the motel room walls were thin and that one would be able to hear loud voices and a person bumping against a wall in the next room.

> As to petitioner's subjective intent, petitioner elicited testimony on cross-examination from the motel desk clerk that petitioner had signed his real name and address when he rented the motel room, and defense counsel argued in his closing statement that using defendant's real name and address indicated that he was expecting consensual sexual intercourse with the victim. On cross-examination of the victim, counsel elicited testimony that petitioner had asked the victim 15 to 20 times for consensual sexual intercourse or sexual acts while he kept her in the motel room.
>
> In essence, petitioner's defense was that the victim, who had been heavily intoxicated and could not remember how she had arrived at a motel room, had voluntarily ridden in the van with petitioner to a motel, voluntarily stayed in a motel room with him for at least two hours in the early morning, during which time petitioner asked the victim 15 to 20 times for sexual intercourse or sexual acts—all of which the victim refused—and that the victim eventually left the motel room and went to a gas station crying and asking for help. Petitioner never denied that he was focused during the entire episode on having sex with the victim. In fact, trial counsel actually used the testimony of J. and K. to support his theory that petitioner had sexual intent but was not a rapist. * * *
>
> Given that theory of the case—which petitioner does not argue was unreasonable—we cannot conclude that the admission of J.'s and K.'s testimony was prejudicial to him. Again, petitioner's only "prejudice" argument with regard to J.'s and K.'s testimony is that it "cast petitioner in a bad light and made it easier for the jury to believe that he was lewd enough to commit rape." Yet, petitioner's own trial theory acknowledged facts from which a jury would readily find that he was desperate for a sexual encounter with the victim and had behaved in a lewd manner toward her, leaving the jury to decide whether defendant intended to use force to have his desired sexual encounter.

> Considering the distinctions that trial counsel drew between sexual intent and the intent to rape, as well as undisputed evidence that petitioner was desperate for a sexual encounter (asking the victim more than 15 times to consent, and requesting a blow job if she would not have intercourse), we are not persuaded that the additional evidence of petitioner's lewdness or desperation had a tendency to affect the outcome of petitioner's trial. That is, as the issues were framed at trial, J.'s and K.'s testimony was unlikely to have colored the jury's view of petitioner in a way that harmed his case. We therefore reject petitioner's arguments on the ground that he failed to demonstrate that he was prejudiced by his trial counsel's failure to object to evidence of his sexual advances toward J. and K.

Wright, 264 Or. App. at 334-36 (emphasis in original, internal citation and footnotes omitted).

As an initial matter, although Petitioner argues that Oregon evidentiary law proscribed the testimony of J. and K., the PCR court specifically determined that there was no basis for an objection. Respondent's Exhibit 131, p. 3. While the Oregon Court of Appeals did not revisit this issue and instead proceeded directly to a prejudice analysis, it left the PCR court's evidentiary ruling intact. This Court is not empowered to second-guess an Oregon state court's application of Oregon evidentiary law to Petitioner's case. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

As noted, the Oregon Court of Appeals focused on Petitioner's inability to establish prejudice. Petitioner

believes that decision was in error, reasoning that his case turned on the credibility of the victim, and the evidence was not overwhelming. He believes the Oregon Court of Appeals' decision involves an unreasonable application of *Strickland's* prejudice prong because the jury had significant reason to doubt the victim's version of events such that an objection to J. and K.'s testimony might have made the crucial difference in the outcome of the trial.

Petitioner points out that: (1) intoxication could have affected the victim's memory; (2) she did not initially wish to report what had happened; (3) she admitted that she was embarrassed to have ended up in a motel room with Petitioner; (4) the red marks she claimed Petitioner left on her throat were no longer visible the following day when she made her report to the police; (5) although she was crying and upset when she met the gas station attendant, she did not tell him what had happened; (6) Petitioner had given his real name and address when securing the room and the motel; and (7) the motel walls were described as "thin," and the rooms adjacent to Petitioner's were occupied on the night in question.

Petitioner asks the Court to infer that the jury erred when it obviously found the victim's testimony to be truthful. The jury was in the best position to make such a determination and, contrary to Petitioner's assertions, the record does not suggest that this was a close case due to issues with the victim's credibility. Consequently, Petitioner's challenge to the Oregon Court of Appeals' well-reasoned prejudice analysis is unavailing.

Because Oregon law did not contemplate the objection Petitioner believes counsel should have made, and as the Oregon Court of Appeals' did not unreasonably apply *Strickland's* prejudice prong to the facts of Petitioner's case, habeas corpus relief is not warranted.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (#2) should be denied and a judgment should be entered dismissing this case with prejudice. The Court should decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

SCHEDULING ORDER

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within 17 days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

DATED this 14 day of March, 2018.

John Jelderks
United States Magistrate Judge