UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 20 2019

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

EDWARD YARBROUGH, Jr.,	No. 19-55051
Petitioner-Appellant,	D.C. No. 2:17-cv-02824-VBF-MRW Central District of California, Los Angeles
v.	
J. SULLIVAN, Warden,	ORDER
Respondent-Appellee.	

Before: TALLMAN and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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.

"Appendix A"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EDWARD YARBROUGH, JUNIOR,
Petitioner,
v.
DEBBIE ASUNCION (Warden),
Respondent.

No. LA CV 17-02824-VBF-MRW
FINAL JUDGMENT

Final judgment is hereby entered in favor of respondent and against petitioner Edward Yarbrough, Junior. IT IS SO ADJUDGED.

Dated: December 3, 2018

Valerie Baker Fairbank

Honorable Valerie Baker Fairbank
Senior United States District Judge

"Appendix B"

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

EDWARD YARBROUGH, JR., Petitioner, v. DEBBIE ASUNCION, Warden, Respondent.	Case No. CV 17-2824 VBF (MRW) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, Senior United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. The Final Report is revised at page 19 to correct a typographical error regarding Petitioner's trial testimony as noted in the objections that Petitioner filed in response to the original Report. Petitioner's objections will be forwarded to the district judge for consideration. No further submissions will be accepted. 28 U.S.C. § 636.

"Appendix B (cont'd)"

SUMMARY OF RECOMMENDATION

This is a habeas action involving a state prisoner. A jury convicted Petitioner of several counts of domestic violence and related charges. On federal habeas review, Petitioner raises numerous challenges to the conduct of his trial and his attorneys' performance (many of which he withdrew or abandoned in his reply submission to the Court).

The Court concludes that the state court decisions denying Petitioner's claims were neither contrary to, nor unreasonable applications of, clearly established federal law. As a result, the Court recommends that the petition be denied.

FACTS AND PROCEDURAL HISTORY

Petitioner physically assaulted a series of girlfriends with whom he lived. He was charged with assaulting and injuring two of the women; both testified against him at trial. A third former girlfriend also testified that Petitioner assaulted her several years earlier, which led to a previous criminal conviction. Additionally, the prosecution presented recorded calls from jail in which Petitioner inculpated himself. Petitioner testified at length in his own defense to deny the attacks. His most recent girlfriend testified that he had not assaulted her during their brief relationship. (No criminal charges in the case involved that woman.) (Lodgment # 5 at 3-6.)

A jury convicted Petitioner of assault and domestic violence charges. It also convicted Petitioner of attempting to dissuade one of the victims from testifying, and for failing to appear at his original trial. The trial court sentenced Petitioner to prison for a determinate term of 29 years. (Id. at 7.)

In a reasoned, unpublished decision, the state appellate court affirmed the conviction. (Id. at 14.) The state supreme court denied review without comment. (Lodgment # 7.)

Petitioner sought additional relief in state court habeas proceedings during the pendency of this federal action. (The Court stayed the federal case to allow the state cases to proceed (Docket # 9).) The state appellate court denied Petitioner's habeas petition on procedural grounds. (Lodgment # 12.) The state supreme court summarily denied habeas relief. (Lodgment # 14.)

Following the conclusion of state court habeas proceedings, the Court permitted Petitioner to file his First Amended Petition. (Docket # 20, 20-1). The Attorney General answered the merits of Petitioner's claims. Petitioner filed a reply that withdrew, narrowed, or clarified several of his claims as described below. (Docket # 34.)

DISCUSSION

Standard of Review Under AEDPA

Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

In a habeas action, this Court generally reviews the reasonableness of the state court's last reasoned decision on a prisoner's claims. Murray v. Schriro, 746 F.3d 418, 441 (9th Cir. 2014); Harrington v. Richter, 562 U.S. 86, 99 (2011). Here, the state appellate court's opinion on direct appeal was the last reasoned decision addressing Petitioner's evidentiary (Ground Five) and jury instruction (Ground Six) claims. (Lodgment # 5.) The Court reviews that decision for reasonableness. In doing so, the Court received and independently reviewed the

relevant portions of the state court record. Nasby v. McDaniel, 853 F.3d 1049, 1053 (9th Cir. 2017).

Petitioner presented his remaining claims on state habeas review. The state supreme court decision denying those claims was "unaccompanied by an explanation" of the courts' reasoning. Richter, 562 U.S. at 98. The Court presumes that this decision reached and rejected the merits of Petitioner's constitutional claims.[1] Richter, 562 U.S. at 99; Johnson v. Williams, 568 U.S. 289, 301 (2013) (federal court ordinarily "must presume that [a prisoner's] federal claim was adjudicated on the merits"). AEDPA requires the Court to perform an "independent review of the record" to determine "whether the state court's decision was objectively unreasonable." Richter, 562 U.S. at 98. When the state court does not explain the basis for its rejection of a prisoner's claim, a federal habeas court "must determine what arguments or theories [ ] could have supported the state court's decision" in evaluating its reasonableness. Id. at 102 (emphasis added); Espinoza v. Spearman, 661 F. App'x 910, 912 (9th Cir. 2016)

---

[1] The Attorney General agrees that the state supreme court's silent order denying relief is the relevant decision for Petitioner's Brady (Ground One), prosecutorial misconduct (Ground Two), and insufficient evidence (Ground Seven) claims. (Docket # 29 at 26-27.) However, the Attorney General contends this Court should "look through" that same order to the state appellate court's order denying Petitioner's ineffective assistance of counsel claims (Grounds Three and Four) on procedural grounds. (Id., citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).)

However, Petitioner's ineffective assistance claims in his supreme court habeas action were arguably considerably different than those presented in the appellate court. (Docket # 34 at 13-14, 22.) Moreover, as explained below, they fail to allege any constitutional violation. Accordingly, the Court will deferentially review the state supreme court's order on the merits of the claims. See, e.g., Dixon v. Yates, No. CV 10-0631 JAM AC, 2014 WL 66523, at *16 (E.D. Cal. 2014) (declining to "look through" the unexplained denial of state supreme to the rationale of lower court because petitioner's IAC claim was expanded when presented to the higher court); c.f. Wilson v. Sellers, ___ U.S. ___, 138 S. Ct. 1188 (2018) (presumption that silent state supreme court decision adopted lower court reasoning is subject to rebuttal).

(prisoner "still bears the burden of showing there was no reasonable basis for the state court to deny relief" on independent review) (quotation omitted).

* * *

Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19 (2013). On habeas review, AEDPA places on a prisoner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" among "fairminded jurists." Richter, 562 U.S. at 101, 103; White v. Wheeler, ___ U.S. ___, 136 S. Ct. 456, 461 (2015). Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction" in the state court system. Richter, 562 U.S. at 102.

Sufficiency of Evidence (Ground Seven)

Petitioner contends there was insufficient evidence to support his convictions for willfully inflicting corporal injury to a cohabitant (P.C. § 273) (counts 1, 5, and 6) and assault (P.C. § 245) (count 2). (Docket # 20-1 at 20, 22-26.) The gist of his claims on habeas review is that the testimony of the complaining victims was "filled with hearsay, contradictions, and many statements" that Petitioner contends were untrue. (Id.)

* * *

On independent review, the Court summarily concludes that Petitioner is not entitled to relief. The state supreme court denied this claim on collateral review without comment or citation. However, the law on a sufficiency of evidence claim is well-established: a criminal defendant may be convicted only by proof beyond a reasonable doubt of every element necessary to constitute a charged crime or enhancement. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The relevant issue under Jackson "is whether, after 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." Id. (emphasis in original).

Moreover, a federal habeas court has "no license" to evaluate the credibility or reliability of a witness who testified in a state court case. Marshall v. Lonberger, 459 U.S. 422, 434 (1983). Instead, a reviewing court "must respect the province of the jury to determine the credibility of witnesses" who give evidence at trial. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). A "jury's credibility determinations are [ ] entitled to near-total deference" on federal habeas review. Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004). The testimony of even a single witness on an evidentiary issue can be sufficient to support a conviction under the Jackson standard. Id. at 957-58.

* * *

Both victims testified clearly, dramatically, and at considerable length about the injuries that Petitioner caused them during their relationships. (RT at 685-691, 704-05, 1332-44, 1551.) Petitioner's presentation on habeas review quibbles with aspects of that testimony, or contrasts it with other evidence that Petitioner finds to be contradictory. (Docket # 34 at 36-39.)

But the state supreme court could certainly have determined that the jury gave full weight to the victims' testimony. If so, then their testimony (plus the additional medical evidence and testimony from other witnesses) easily established the elements of the assault and corporate injury charges. Jackson, 443 U.S. at 319; Bruce, 376 F.3d at 957. Neither the supreme court nor this Court may properly reweigh the trial evidence in the manner that Petitioner requests. Habeas relief is not warranted.

***Brady* Claim (Ground One)**

While Petitioner was in pretrial custody, jail authorities recorded his phone calls to a victim. Prosecutors produced transcripts or recordings of seven of those calls to the defense before trial. Petitioner contends that the prosecution withheld an eighth recording in violation of the Constitution.[2] (Other additional calls were not relevant to the criminal case.)

* * *

The state court's silent denial of this claim survives deferential federal habeas review. A prosecutor has a constitutional obligation to provide exculpatory evidence to the defense when that evidence is "material" to the defense and in the possession of the government. Brady v. Maryland, 373 U.S. 83, 87 (1963). Favorable evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 682 (1985). The "mere possibility that undisclosed information might have helped the defense, or might have affected the outcome of the trial, is insufficient to establish materiality" on habeas review. Cooper v. Brown, 510 F.3d 870, 925 (9th Cir. 2007).

* * *

Petitioner offers no non-speculative reason to believe that information on the single missing recording was material to his defense. At most, he argues that this jailhouse call must be "material and favorable" because the prosecution chose not to use it against him. That is far too weak of an explanation to demonstrate that the state court acted unreasonably in denying habeas relief. Cooper, 510 F.3d at 925.

---

[2] In his reply, Petitioner modified his original contention that the state withheld four of the eight calls. (Docket # 34 at 15.)

Moreover, even if Petitioner somehow established that the recording was material because it revealed that he acted "unintentional[ly]" when he struck the victim (Docket # 20-1 at 9), he offers no explanation as to how this recording was admissible evidence in his defense at trial.[3] Inadmissible evidence like a self-serving recording could not plausibly have affected the jury's verdict. Bagley, 473 U.S. at 682. Petitioner has not demonstrated that the state supreme court acted unreasonably in denying his thin Brady claim.

Prosecutorial Misconduct (Ground Two)

Petitioner claims that the prosecutor committed misconduct by (1) vouching for witnesses during closing argument; and (2) appealing to the prejudice of the jury. (Docket # 20-1 at 8, 10.)[4]

Relevant Facts

During closing argument, Petitioner contends that the prosecutor expressed a personal belief in the believability of the testimony of the victims. (Docket # 20-1 at 8.) Specifically, the prosecutor stated that the charges involving one of the victims "would be difficult on its own [ ] but if you look at the totality of everything we have, you know [the victim] is telling the truth." (6RT at 2439; Docket # 20-1 at 10; Docket # 34 at 16-17.) The prosecutor also said, "[Y]ou know these women are telling the truth because their stories match

---

[3] The prosecution was entitled to use the recordings against him as a party admission under Evidence Code section 1220.

[4] Petitioner repeats his Brady claim (discussed infra) in this section of his amended habeas petition.

Petitioner makes an additional cursory and not fully understandable claim that the prosecutor somehow "misstated" evidence regarding the jail calls. (Docket # 20-1 at 10, # 34 at 17.) As the government correctly notes, the trial issues about which Petitioner complains involve questions that the prosecutor asked witnesses to elicit information about the calls, not the prosecutor's argument to the jury. (Docket # 29 at 32.) That is far too tangential to demonstrate, "in the larger context of the trial," that the prosecutor's conduct "render[ed] the proceedings fundamentally unfair." Ortiz v. Stewart, 149 F.3d 923, 934-35 (9th Cir. 1998).

up [ ] when they did not know of each other at the time when these happened." (6RT at 2440-41.)

* * *

Petitioner also claims that the prosecutor improperly appealed to the prejudices of the jury during closing argument. (Docket # 20-1 at 11.) Petitioner's then-recent girlfriend (A.H.) testified on his behalf during the defense case. The girlfriend stated that Petitioner was not violent with her during their brief relationship. (6RT at 2141-43.)

During closing argument, the prosecutor said, "I ask you to do the right thing because he's going to go back and do the same thing to [A.H.], even though she takes the stand and she says [ ] everything is fine." (Id. at 2441.) The trial court sustained the defense lawyer's immediate objection to the prosecutor's comment. The court also instructed the jury that the lawyers' comments during closing argument "are not evidence" to be considered during deliberations. (Id. at 2476.)

The state court denied Petitioner's claims of prosecutorial misconduct on habeas review without comment.

Relevant Federal Law

In evaluating a claim that a prosecutor engaged in misconduct, a court must determine whether the prosecutor's comments or actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986). Considerations include whether the prosecutor's remarks or conduct were improper; if so, the court must then consider whether the remarks or conduct affected the trial unfairly. Tak Sun Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005). Such unfairness may occur when there is an "overwhelming probability" that the prosecutorial misconduct was "devastating to the defendant" at trial. Davis v. Woodford, 384

F.3d 628, 644 (9th Cir. 2004) (quoting Greer v. Miller, 483 U.S. 756, 766 n.8 (1987)); Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012).

Vouching for a trial witness is a form of prosecutorial misconduct. United States v. Young, 470 U.S. 1, 18-19 (1985). Vouching consists of "placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993). A prosecutor's personal assurance of a witness's honesty constitutes improper vouching. United States v. Weatherspoon, 410 F.3d 1142, 1146 (9th Cir. 2005).

It is not vouching, however, for the prosecutor to argue the truthfulness of a witness's statements based on the record. Necoechea, 986 F.2d at 1279. Similarly, an argument that the prosecution's witnesses "told the truth, rather than [defendant], was not vouching but was simply an inference from evidence in the record." United States v. Wilkes, 662 F.3d 524, 540 (9th Cir. 2011) (internal quotation marks omitted)). In a trial where a jury must decide "which of two conflicting stories is true, it may be reasonable to infer, and hence to argue, that one of [the] two sides is lying." United States v. Alcantar-Castillo, 788 F.3d 1186, 1195 (9th Cir. 2015) (quotation omitted).

Attorneys are given latitude in the presentation of their closing arguments; "courts must allow the prosecution to strike hard blows based on evidence presented and all reasonable inferences therefrom." Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996) (quotation and citation omitted); Wilkes, 662 F.3d at 538 (same). Arguments of a trial lawyer "generally carry less weight with a jury than do instructions from the court." Boyde v. California, 494 U.S. 370, 384 (1990).

Analysis

On deferential, independent review, the Court finds no basis for habeas relief. The state court could reasonably have concluded that the complained-of comments by the prosecutor either were not improper or did not affect the trial unfairly. Tak Sun Tan, 413 F.3d at 1112; Davis, 384 F.3d at 644.

Petitioner has not convincingly demonstrated that the prosecutor's comments regarding the witnesses' veracity constituted improper vouching. The prosecutor argued to the jurors that "you know" the victims told the truth about their interactions with Petitioner. The prosecutor's closing argument expressly did not refer to herself in the first person ("I know") or her office ("We know" or "The People know"). That's the type of personal or institutional vouching that may potentially violate the Constitution. Necoechea, 986 F.2d at 1276; Weatherspoon, 410 F.3d at 1146. However, an argument to the jurors that they may find witnesses believable is not misconduct. Necoechea, 986 F.2d at 1279; Wilkes, 662 F.3d at 540; Alcantar-Castillo, 788 F.3d at 1195. The state supreme court could surely have reasonably denied habeas relief on this basis. Richter, 562 U.S. at 102.

A different analysis applies to Petitioner's claim regarding the prosecutor's comment that Petitioner might abuse another woman in the future. The Court assumes (without deciding) that the prosecutor acted improperly by suggesting to the jury that Petitioner would "do the same thing" to A.H.

But Petitioner offers no convincing reason why that single comment was so "devastating" to him that it rendered his trial unfair under the Constitution. Davis, 384 F.3d at 644; Wood, 693 F.3d at 1113. To the contrary, both the defense lawyer (who immediately objected to the comment) and the trial judge (who (a) sustained the objection and (b) instructed the jury that lawyers' arguments were not evidence) took proper action to remediate the impact of the

remark. Boyde, 494 U.S. at 384. Moreover, the jury was presented with first-hand testimony from three of Petitioner's victims regarding his past acts of significant violence against women. Based on the Court's independent review of the transcript, the prosecutor stayed away from such sensational and improper commentary during the rest of the closing arguments.

As such, there is little reason to believe that the one-time, toss-off comment had any material impact on the jury, particularly in light of the other evidence in the case. Darden, 477 U.S. at 181. The state court decision to deny habeas relief does not represent an "extreme malfunction" of the criminal justice system. Richter, 562 U.S. at 102.

Admission of Prior Conviction (Ground Five)

Petitioner contends that his federal due process rights were violated when the trial court admitted proof of his uncharged domestic violence and his criminal conviction under California Evidence Code section 1109. (Docket # 20-1 at 12, 19.) In his reply submission, Petitioner acknowledges that "section 1109 is not unconstitutional." (Docket # 34 at 29, 35.) Nonetheless, Petitioner still maintains he was unconstitutionally harmed by the admission of evidence of his prior misconduct. (Id.)

* * *

Petitioner cannot lawfully obtain habeas relief on this claim. The admission of evidence at trial and the application of state trial procedural rules generally do not present federal questions on habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011) (state evidentiary ruling cannot form an independent basis for federal habeas relief).

Significantly, there is no clearly established federal law allowing a federal habeas court to review a conviction based on the allegedly erroneous admission

of evidence. The U.S. Supreme Court has "not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant" habeas relief. Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009; see also Greel v. Martel, 472 F. App'x 503, 504 (9th Cir. 2012) ("no clearly established federal law that admitting prejudicial evidence violates due process"; in absence of Supreme Court ruling, "we may not issue the writ" on evidentiary grounds); Pattison v. Morrow, 699 F. App'x 772, 773 (9th Cir. 2017) ("Pattison's due process claim is that the evidence from the mental health facility should have been excluded as excessively prejudicial. This is foreclosed by this court's 2009 decision in Holley.").

To that end, the Ninth Circuit has concluded that a federal court may not issue a writ of habeas corpus based on the admission of evidence of prior similar misconduct under state law.[5] Mejia v. Garcia, 534 F.3d 1036, 1047 (9th Cir. 2009) (no Supreme Court precedent establishing that admission of propensity evidence to lend credibility to sex victim's allegations is unconstitutional); Chavarria v. Hamlet, 472 F. App'x 749, 750 (9th Cir. 2012) ("Because the Supreme Court has expressly left open the question of whether a state law permitting the introduction of propensity evidence would violate due process [ ] the state court's decision rejecting [the] due process challenge to Section 1109 cannot have been contrary to, or an unreasonable application of, clearly established law.").

* * *

[5] The same holds true in federal criminal practice. Federal courts themselves regularly admit such proof of other misconduct under provisions of the Federal Rules of Evidence that parallel the state evidentiary code. See Fed. R. Evid. 413 ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault."), 414 (same regarding child molestation); United States v. LeMay, 260 F.3d 1018, 1025-26 (9th Cir. 2001) (affirming admission of sexual propensity evidence).

The state appellate court affirmed the trial court's decision to admit evidence of Petitioner's previous domestic violence. (Docket # 32-11 at 9-10.) That determination cannot have been an unreasonable application of clearly established federal law; there is none. Holley, 568 F.3d at 1101. Petitioner's cursory claim of unfair prejudice (Docket # 34 at 35) is too conclusory to lead to constitutional relief.

Jury Instruction Claim (Ground Six)

Petitioner originally contended that the use of a form jury instruction regarding prior domestic violence (CALCRIM No. 852) violated the Constitution.[6] (Docket # 20-1 at 20-21.) However, in his reply, Petitioner essentially withdrew this claim and "has no other contentions" in response to the Attorney General's defense of the jury instruction. (Docket # 34 at 35.) Instead, he simply claims that the instruction was "argumentative" and "infected" his trial.

As with his "challenge" to the evidence code provision regarding prior misconduct, Petitioner's claim regarding this jury instruction is not cognizable on federal review. Jury instruction issues are generally matters of state law for which federal habeas relief is not available. McGuire, 502 U.S. at 67-68. As a matter of federal law, the appropriate inquiry is whether a defective jury instruction "so infected the entire trial that the resulting conviction violates due process." Id. at 72; Dixon v. Williams, 750 F.3d 1027, 1032 (9th Cir. 2014) (same). Not every "ambiguity, inconsistency, or deficiency" in a jury instruction

[6] This instruction tells jurors that they "may, but are not required to, conclude from that evidence that [Petitioner] was disposed or inclined to commit domestic violence" in evaluating the charged crime. The instruction further states that this conclusion "is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove" the charged crime. CALCRIM No. 852.

rises to the level of a constitutional violation. Middleton v. McNeil, 541 U.S. 433, 437 (2004).

No federal or state court to consider the issue has ever found CALCRIM No. 852 (or substantially similar instructions) to be unduly prejudicial or an improper statement of California law. See, e.g., People v. Bolin, 18 Cal. 4th 297 (1998); People v. Kelly, 1 Cal. 4th 495 (1992); Curry v. Alfaro, No. CV 15-1309 JCG, 2016 WL 6652685 (C.D. Cal. 2016); Foster v. Valenzuela, 2015 WL 1737829 (N.D. Cal. 2015). Further, Petitioner fails to convincingly explain how an instruction that properly explains a constitutional state evidentiary rule "infected" his trial in a way that offends due process or shifted the burden of proof. Habeas relief is unavailable on Petitioner's truncated claim.

Ineffective Assistance of Trial and Appellate Lawyers (Grounds Three and Four)

Petitioner presents a lengthy list of claims of constitutionally ineffective performance by his lawyers at trial and on appeal. The Attorney General heroically takes up Petitioner's numerous subclaims on their merits. (Docket # 29 at 2-3 (table of contents of response brief).) In doing so, the government argues that the state courts reasonably could have denied relief on all of these claims.

Relevant Federal Law

The Sixth Amendment of the Constitution guarantees a criminal defendant the right to effective assistance of a lawyer. Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance under Strickland, "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 112 (2009). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

The failure of an attorney to raise a meritless claim or take a futile action fails both Strickland prongs. Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (an attorney's "failure to take a futile action can never be deficient performance"); Jones v. Ryan, 691 F.3d 1093, 1101 (9th Cir. 2012) ("It should be obvious that the failure of an attorney to raise a meritless claim is not prejudicial."); Gonzalez v. Knowles, 515 F.3d 1006, 1017 (9th Cir. 2008) ("counsel cannot be deemed ineffective for failing to raise [a] meritless claim"); Red v. Rackley, 727 F. App'x 270, 273 (9th Cir. 2018) (same).

A defense lawyer has a duty to conduct a reasonable investigation before trial. Atwood v. Ryan, 870 F.3d 1033, 1057 (9th Cir. 2017). "A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." Reynoso v. Giurbino, 462 F.3d 1099, 1112 (9th Cir. 2006) (citation omitted). The failure to interview or elicit trial testimony from a key witness may lead to a finding of deficient performance. Howard v. Clark, 608 F.3d 563, 571 (9th Cir. 2010). The duty to investigate includes evaluating the impeachment of a key witness. If a lawyer's "failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute" deficient performance. Reynoso, 462 F.3d at 1112.

However, a trial lawyer is "strongly presumed to have rendered adequate assistance," and should not have a reviewing court "second-guess counsel's assistance." Cullen v. Pinholster, 563 U.S. 170, 189 (2011). A cursory and vague claim of ineffective assistance is insufficient to establish a Strickland violation. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not

warrant habeas relief"). Speculation that a defendant might have suffered prejudice "is plainly insufficient to establish prejudice." Gonzalez, 515 F.3d at 1016.

Further, a prisoner's failure to support a claim of regarding a potential witness's testimony with "a statement of specific facts" is fatal to a claim of deficient performance. Greenway v. Schriro, 653 F.3d 790, 804 (9th Cir. 2011); Allen v. Woodford, 395 F.3d 979, 1002 n.2 (9th Cir. 2005) ("the district court correctly disregarded the failure to call [potential witnesses] because Allen failed to make a showing that they would have testified if counsel had pursued them as witnesses"); Bridges v. McEwen, 525 F. App'x 537, 540 (9th Cir. 2013) ("no proffer of admissible evidence was submitted on habeas under oath as to what, if anything, [potential witnesses] could or would have testified to if called").

* * *

Ineffective assistance by an appellate lawyer is measured by the same Strickland criteria. Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002). An appellate attorney is not required to raise "every colorable" or "nonfrivolous issue" on appeal. Jones v. Barnes, 463 U.S. 745, 750-52 (1983). Rather, the "weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).

Discussion

Failure to investigate or call specific impeachment witnesses – Petitioner contends that his trial lawyer should have impeached one of the victims by presenting evidence that she accused another man of domestic violence. He also claims that the lawyer should have obtained testimony from a police detective in an effort to impeach another victim with her prior statements. Similarly, Petitioner contends that the lawyer improperly failed to inquire as to whether the

two victims "collaborated" and "colluded" in presenting testimony against him. (Petitioner withdrew an additional claim about a putative defense expert witness who analyzed the injuries to one of the victims. (Docket # 34 at 22.))

The state supreme court could properly have denied habeas relief on these claims due to their speculative nature. Petitioner provides no credible proof that any impeachment evidence about previous domestic violence allegations or the other issues raised in the habeas papers ever existed. His hopeful claim that additional witnesses or further investigation could have undermined the victims' testimony is entirely unsupported. Greenway, 653 F.3d at 804; Allen, 395 F.3d at 1002 n.2; Bridges, 525 F. App'x at 540. To the contrary, the trial lawyer could well have concluded that additional efforts at impeaching the victims (they were extensively questioned by both sides at trial) might been a poor strategy that would alienate the jury. As a result, Petitioner's claims are so speculative that they are "plainly insufficient to establish prejudice." Gonzalez, 515 F.3d at 1016. The state court did not act unreasonably in denying habeas relief.

Brady *and Prior Domestic Violence Claims* – Petitioner argues that his lawyer was ineffective for failing to demand and play the "missing" jail recording and for not objecting to the introduction of the evidence of his previous domestic violence conviction.

As explained above, neither legal issue had sufficient merit to warrant reversal of Petitioner's conviction. Petitioner cannot establish any error regarding the production of his own jail calls, nor does he explain how he properly could have introduced his self-serving hearsay statements at trial. Further, his previous domestic violence incident was patently admissible under state and federal law. Any failure to object to these issues at trial would have been futile. Rupe, 93 F.3d at 1445; Jones, 691 F.3d at 1101. There was no unreasonable ruling by the state supreme court on these claims.

Jail Transcript and Closing Argument Claims – Petitioner contends that a transcript of a jail call incorrectly omits the victim's statement that her injury was allegedly incurred "accidentally" (rather than by Petitioner's deliberate assault). Petitioner says that his lawyer should have argued about this during trial. He also chastises the lawyer for not objecting to the prosecutor's "vouching" of the victims discussed above.

The state court could easily have concluded that neither of these alleged errors prejudiced Petitioner. Rios, 299 F.3d at 805; Gonzalez, 515 F.3d at 1017. Regardless of what the informal transcript of the jail call said ("accident" or "unintelligible"), the jury heard the actual recordings and could make up their own mind about their contents. Moreover, Petitioner testified in his own defense and clearly stated that he did not deliberately harm the woman. (underlined text corrected in Final Report) The jury's refusal to believe him cannot be laid as error at the feet of his trial lawyer. And, given that there is no reasonable basis to find that the prosecutor vouched for the victims, the lawyer's conduct cannot be second-guessed on habeas review. Pinholster, 563 U.S. at 189.

Appellate Lawyer's Alleged Errors – The analysis is even simpler regarding Petitioner's claims against his appellate lawyer. Petitioner contends that the appellate lawyer should have raised his Brady and prosecutorial misconduct concerns on direct appeal. (Docket # 34 at 31-32.)

But, as discussed above, neither issue could have had any plausible merit on direct appeal. Petitioner cannot demonstrate that a reasonably competent appellate lawyer would have brought these thin claims on appeal. Jones, 463 U.S. at 750-52; Miller, 882 F.2d at 1434. Finally, Petitioner offers no logical explanation why any alleged factual misstatement in the opening brief prejudiced him such that his conviction would have been reversed on appeal save for that

mistake. Gonzalez, 515 F.3d at 1016. His ineffective assistance claims against the appellate lawyer were not unreasonably denied in state court.[7]

CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the First Amended Petition; and (3) dismissing the action with prejudice.

Dated: October 16, 2018

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

[7] In his reply brief, Petitioner also contends that his appellate lawyer was ineffective for failing to raise ineffective assistance claims about his trial lawyer. (Docket # 34 at 33.)

Without taking up issues of procedural default or the improper timing of asserting this last-ditch argument, the Court observes that California law generally prohibits a claim of ineffective assistance on direct appeal. People v. Anderson, 25 Cal. 4th 543, 569 (2001). Appellate counsel could not have provided deficient performance for declining to advance claims that could not have been considered by the appellate court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 28 2020

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

EDWARD YARBROUGH, Jr.,	No. 19-55051
Petitioner-Appellant,	D.C. No. 2:17-cv-02824-VBF-MRW Central District of California, Los Angeles
v.	
J. SULLIVAN, Warden,	ORDER
Respondent-Appellee.	

Before: FARRIS and MURGUIA, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

"Appendix C"

SUPREME COURT
FILED

DEC 20 2017

Jorge Navarrete Clerk

Deputy

S244525

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re EDWARD YARBROUGH, JR., on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

"Appendix D"

Court Transcript

MS. GILLIAM: I BELIEVE IT'S 57A THAT WE OBJECT TO, THE CD ENDING IN THE LAST THREE DIGITS 393.

THE COURT: OKAY.

MS. GILLIAM: AND THE REASON WE OBJECT IS BECAUSE WE BELIEVE THAT THERE IS A GLARING ERROR IN THE TRANSCRIPT THAT IS AT A PART OF THE CONVERSATION THAT WOULD BE INCREDIBLY DAMAGING TO THE PROSECUTION'S CASE. SO WE OBJECT TO THAT TRANSCRIPT, THAT ERROR BEING PRECISELY AT A POINT WHERE THE VICTIM ADMITS THAT THE INJURY WAS AN ACCIDENT.

THE COURT: OKAY. OBJECTION'S OVERRULED. THOSE LAST TWO EXHIBITS AND THEIR SUB EXHIBITS "A" WILL BE RECEIVED.

(RECEIVED IN EVIDENCE, PEOPLE'S EXHIBITS NOS. 56, 56A, 57, AND 57A.)

MS. BAILEY: AND FOR THE RECORD, THE TRANSCRIPTS -- THIS PARTICULAR TRANSCRIPT WAS PREPARED PROFESSIONALLY AND TURNED OVER TO THE DEFENSE MONTHS BEFORE, SO SHE'S HAD AN OPPORTUNITY TO MAKE ANY CORRECTIONS IF NEED BE.

THE COURT: THAT'S THE TRANSCRIPT IN QUESTION?

MS. BAILEY: YES.

THE COURT: OKAY. ALL RIGHT.

ALL RIGHT. 1118 MOTIONS.

MS. BAILEY: BEFORE WE MOVE ON, CAN I TAKE

(Additional) Attachment 1

Direct Appeal OPENING BRIEF
(pages 23-24)

defendant's right to due process. (*McKinney v. Rees, supra,* 993 F.2d at p.1384, citing *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

McKinney's holding recognizes a federal constitutional prohibition against state law permitting introduction of such evidence for the sole purpose of proving propensity. Since that is exactly what section 1109 purports to do, the introduction of the prior uncharged domestic violence evidence here was reversible error under *Chapman v. California* (1967) 386 U.S.18, 24, as further discussed below.

E. *The Erroneous Introduction Of The 1109 Evidence Requires Reversal.*

• The uncharged 1109 evidence was inherently prejudicial and deprived appellant of a fair trial. (See *People v. Alcala, supra,* 36 Cal.3d at p. 631; *McKinney v. Rees, supra,* 993 F.2d at p. 1384.) Further, the record in this case demonstrates a reasonable probability of a more favorable result had the evidence been excluded.

• In closing argument, the prosecutor relied heavily on the uncharged acts to prove the charged acts. The prosecutor admitted that each of the incidents testified to would have been difficult to prove on its own, but argued that "you know these women are telling the truth" because of the fact that multiple women testified to multiple acts which had certain similarities, even if parts of the women's stories were not credible. (6 RT 2439-2441.) •

• Appellant's defense attorney effectively pointed out the weakness of the prosecution case. For example, Susan took appellant back in after the alleged serious violence and did not report him to the police for weeks. She exaggerated her injuries, testifying her nose was broken and that she was on bedrest for months after the injury, which was not supported by the doctor. (6 RT 2454-2457.) As also brought out by trial counsel, Patricia's case was even weaker in that she never called the

police over the charged incidents, and that there was no proof of her injury. (6 RT 2459-2461.)

Clearly, absent the substantial amount of 1109 evidence that was allowed in, it is reasonably probable that one or more jurors would have had a doubt as to one or more of the charged counts. Therefore, the judgment should be reversed.