UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3587

James A. Riggs

Petitioner - Appellant

v.

Jay Cassady, Warden

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:17-cv-03303-SRB)

JUDGMENT

Before LOKEN, BENTON, and GRASZ, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction. The appellant's motion for leave to proceed on appeal in forma pauperis is denied.

December 20, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JAMES A. RIGGS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 6:17-cv-03303-SRB-P
	)	
JAY CASSADY,	)	
	)	
Respondent.	)	

ORDER

Petitioner, a convicted state prisoner currently confined at the Algoa Correctional Center in Jefferson City, Missouri, has filed *pro se* an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 32-2). Petitioner seeks federal habeas relief concerning his October 2014 state conviction for first-degree statutory sodomy. For the reasons set forth below, Petitioner's petition for writ of habeas corpus is denied, a certificate of appealability is denied, and this case is dismissed.

I. Factual Background

In affirming Petitioner's criminal conviction on direct appeal, the Missouri Court of Appeals for the Southern District set forth the facts as follows:

> Defendant was charged by information with committing the unclassified felony of statutory sodomy in the first degree. See § 566.062. The information alleged that Defendant had deviate sexual intercourse with A.A., a child less than 14 years of age, by placing his penis in the child's mouth. In July 2014, a jury found Defendant guilty of statutory sodomy. The court imposed a 15-year sentence.
>
> Defendant does not challenge the sufficiency of the evidence to sustain his conviction. We consider the facts and all reasonable inferences derived therefrom in a light most favorable to the verdict. *State v. Garrison*, 292 S.W.3d 555, 556 (Mo. App. 2009). All contrary evidence and inferences are disregarded. *Id.* Viewed from that perspective, the following evidence was adduced at trial.

A.A.'s family met Defendant's family through the families' involvement in Girl Scouts, and the two families became friends. The families would get together for social events approximately once a month, usually at Defendant's home. Sometimes A.A. and her siblings would spend the night at Defendant's home. On one occasion when A.A. was at Defendant's home watching a movie with her sisters, Defendant took A.A. into a basement garage, covered her eyes with a hat, put frosting on his penis, and then put his penis in her mouth. A.A. was eight at the time.

A.A. did not reveal what happened to anyone until over a year later when Defendant showed up at her home on his motorcycle. A.A. got scared and hid under the trampoline in her yard, prompting her to explain to her older sister, K.A., what had happened. K.A. then reported what happened to her oldest sister, who in turn told their stepmother, C.A. (Stepmother). Stepmother called A.A.'s father, M.A. (Father). Because A.A. was already scheduled to see her therapist, Dr. Sara Wilson (Dr. Wilson), Stepmother took A.A. to Dr. Wilson's office. Father met Stepmother and A.A. there. Dr. Wilson briefly interviewed A.A. so as not to disrupt any future police investigations. She also made a hotline call to the Division of Family Services and told Father and Stepmother to report the incident to police. Father and Stepmother then took A.A. to the county sheriff's office to report the abuse. Father and Stepmother were not aware of anyone else who had ever molested A.A.

Robin Buchanan (Buchanan), who worked at that time for Children's Division as an abuse investigator, was assigned A.A.'s case. When Buchanan inquired whether Defendant had asked A.A. to lick icing off his penis, A.A. nodded her head affirmatively. Based on A.A.'s affirmations and her subsequent forensic interview, Buchanan concluded that "most likely something happened" and found abuse by a preponderance of the evidence.

Sheriff Chris Degase then interviewed Defendant, who initially denied ever being alone with A.A. Thereafter, Trooper Donald Jones interviewed Defendant at police headquarters. At the end of that interview, Trooper Jones handed his business card to Defendant and told him to call if he wanted to talk further. According to Trooper Jones, Defendant responded that "he live[d] his life a certain way for so many years and threw it away for one mistake." When Trooper Jones said "now's the time to get it off your chest[,]" Defendant explained that A.A. "had asked [him] to show her his penis, because her uncle used to show her his" and that Defendant did so. Defendant then wrote out a letter of apology which stated: "I'm sorry for what happened between [sic] the incident with [A.A.] I mad [sic] a big mistake by showing her my penis win [sic] she asked me to so if you can please forgive me[.]"

(Doc. 10-5, pp. 2-4).

II. Procedural Background

After a jury found Petitioner guilty of first-degree statutory sodomy, the Circuit Court of Douglas County, Missouri, sentenced Petitioner to fifteen years' imprisonment. (Doc. 10-5, p. 89). On October 4, 2014 (filed with the court on October 7, 2014), Petitioner timely appealed his conviction to the Missouri Court of Appeals for the Southern District. *Id.* at 92. On September 14, 2016, the Missouri Court of Appeals for the Southern District affirmed Petitioner's conviction, finding without merit Petitioner's ten asserted claims of trial court error. *Id.* at 4-25.

Following his direct appeal, on January 4, 2017, Petitioner sought post-conviction relief pursuant to Mo. Sup. Ct. Rule 29.15 by filing *pro se* a Rule 29.15 motion in the Circuit Court of Douglas County, Missouri. (Doc. 32-2, p. 3). Under Rule 29.15(b), Petitioner had 90 days after the mandate of the appellate court's direct appeal decision was returned to timely file this motion for post-conviction relief. *See* Doc. 2-1, p. 1. Because Petitioner's *pro se* Rule 29.15 motion was not timely filed,[1] Petitioner, through counsel, filed a motion in the Circuit Court of Douglas County to consider Petitioner's post-conviction motion as timely filed. (Doc. 2-1). However, on July 24, 2017, Petitioner, represented by counsel, filed (1) a voluntary motion to dismiss his postconviction relief action (Doc. 12-1) and (2) a waiver of Petitioner's Rule 29.15 postconviction relief action. (Doc. 12-2). Accordingly, the Circuit Court dismissed Petitioner's post-conviction relief action on August 7, 2017. (Doc. 12-3).[2]

Shortly thereafter, on September 18, 2017, Petitioner filed a motion in this Court pursuant to 28 U.S.C. § 2254, seeking federal habeas relief on the ten claims asserted on direct appeal. (Doc. 1). On the same day, Petitioner filed a motion to stay the § 2254 habeas proceeding "pending

[1] Based the Missouri Court of Appeals issued the mandate following Petitioner's direct appeal on September 30, 2016, *see* Doc. 44-5, Petitioner had until December 29, 2016, to file a timely Rule 29.15 motion in the Circuit Court. *Id.* at 1. Petitioner filed the Rule 29.15 motion on January 4, 2017.
2

exhaustion of [Petitioner's] state habeas corpus proceeding" on unspecified claims (Doc. 2, p. 1).[3] The Court granted Petitioner's motion to stay the proceedings. (Doc. 22). In doing so, the Court noted that the state circuit court had already denied Petitioner's state habeas corpus action on January 8, 2018. *Id.* at 2; *see* Doc. 44-2. Specifically, the state court held that, of the claims Petitioner previously raised in direct appeal, Petitioner "cannot receive a second merits consideration of repetitive claims in state habeas proceeding" and, secondly, that Petitioner waived any new or other claims after voluntarily waiving post-conviction review and dismissing his Rule 29.15 motion. (Doc. 44-6). A review of the available record shows that Petitioner subsequently filed a habeas corpus action with the Missouri Court of Appeals for the Western District on April 9, 2018 (denied on May 21, 2018), Docs. 44-3; 32-2, p. 4, and the Missouri Supreme Court on July 31, 2018 (denied on September 25, 2018). (Docs. 44-4; 32-2, p. 4).

After having "exhausted all avenues for relief in state court," Petitioner filed *pro se* a motion with this Court to lift the stay on October 30, 2018, (Doc. 34) and sought leave to file an amended § 2254 petition. (Doc. 32). The Court granted Petitioner's motion to lift the stay on November 20, 2018 (Doc. 38), and granted Petitioner leave to file an amended § 2254 petition on January 2, 2019. (Doc. 39).

In his amended petition, Petitioner asserts eleven grounds for federal habeas relief, including the ten claims raised on direct appeal and asserted in Petitioner's original § 2254 petition (*compare* Docs. 32-2, pp. 26-35; 1, pp. 35-44), and one additional claim for federal habeas relief asserted for the first time in Petitioner's amended petition that Petitioner asserts was raised in his state habeas proceedings. (Doc. 32-2, pp. 3-4, 36-56).

[3] In his amended § 2254 petition, Petitioner states that his Rule 91 state habeas proceedings before the Circuit Court and the Missouri Court of Appeals for the Western District asserted "Claim XI" of his amended § 2254 petition.

III. Legal Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. "[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). When a petitioner seeks federal habeas relief raising a claim that was adjudicated on the merits in the state court proceedings, the federal habeas court's inquiry is limited to whether (1) the state proceedings resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) the state proceedings 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).

A state court decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Jones v. Luebbers*, 359 F.3d 1005, 1011 (8th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (alteration in original). A state court decision unreasonably applies clearly established federal law if "the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (quoting *Williams*, 529 U.S. at 413) (alteration in original). Finally, a state court decision involves an unreasonable determination of the facts only if Petitioner shows the state court's factual findings lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *see Jones*, 359 F.3d at 1011; § 2254(e)(1) (it is Petitioner's burden to rebut the presumption of correctness

applied to state determinations of factual issues by "clear and convincing evidence"). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. 1984) (en banc), cert. denied, 469 U.S. 842 (1984). Because the state court's findings of fact have fair support in the record and because Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous, the Court defers to and adopts those factual conclusions.

IV. Analysis

In this § 2254 petition, Petitioner asserts the following eleven grounds for relief:

(1) the trial court erred by permitting the State to argue in closing that "no other evidence than the [Petitioner]'s testimony rebuts that [Petitioner] was in the basement with A.A." after sustaining the State's objection to allowing the testimony of a defense witness because the witness had been present in the courtroom during the trial after the defense invoked the rule on witnesses;

(2) the trial court erred by "allowing the State to cross-examine [Petitioner] about the details and underlying facts leading to [Petitioner's] prior DUI conviction";

(3) the trial court erred by "overruling defense counsel's objection" and allowing the State to introduce into evidence an 11-page criminal history report regarding Petitioner's prior DUI conviction after Petitioner had admitted to his prior DUI conviction;

(4) the trial court erred by "permitting the State to elicit from Robin Buchanan that she had found A.A.'s allegations by a 'preponderance of the evidence' and that 'in[her] [sic] opinion, there was enough in this child's statement to say that . . . most likely something had happened'";

(5) the trial court erred by "overruling defense counsel's objection to the [State]'s question . . . as to whether anyone else had ever molested A.A. besides [Petitioner]";

(6) the trial court erred by "overruling [Petitioner's] objection and allowing the 'child advocate' to hold a teddy bear at the table in view of A.A., and in front of the jury";

(7) the trial court erred by "granting the State's objection, striking Dr. Schultz' testimony and ordering the jury to disregard her testimony that not following best practices and good interview techniques can affect what the child actually

states to the interviewer," improperly limiting defense witness's expert testimony;

(8) the trial court erred by "overruling [Petitioner]'s objection and permitting Dr. Sara Wilson to testify as a rebuttal witness" where the witness's testimony "did not explain, counteract, or refute evidence offered by the defense";

(9) the trial court erred by "failing to declare a mistrial, sua sponte, when the State argued in closing that Dr. Sara Wilson told the jury that 'this is the way little girls are[']and that she found nothing unusual about it" because these facts were not in evidence;

(10) the trial court erred by "failing to sua sponte instruct the jury to disregard the prosecutor's improper argument vouching for the truth of the witnesses in this case"; and

(11) "under a totality of circumstances the cumulative effect of the Trial Court, Appellate Counsel and Trial Counsel[']s Errors and the State/Prosecutorial Misconduct and Errors . . . undermine confidence in the outcome of the proceedings, and the judiciary, [and also] deprive Petitioner the rights of compulsory Process, Confrontation, [to] Present Witnesses and Evidence, Due Process, Equal Protection of the Law, Ineffective Assistance of Counsel at Trial and Appeal, A Fair Trial by a Fair and Impartial Jury and to present a defense."[4]

(Doc. 32-2).

In response, Respondent argues the Missouri Court of Appeals' decisions regarding the ten claims raised on direct appeal are reasonable and entitled to deference under § 2254(d) and Petitioner's Eleventh Ground for habeas relief is not a cognizable claim.[5] (Doc. 44, pp. 2, 4-15).

A. Ground One is denied.

First, Petitioner argues the trial court "plainly erred" by allowing the State to argue in its closing argument that no evidence outside Petitioner's own testimony rebuts the proposition that

[4] Under this claim, Petitioner proceeds to assert thirty-two claims of trial court error (some overlapping with the ten claims above), one claim of ineffective assistance of appellate counsel, eleven claims of ineffective assistance of trial counsel, and six claims of prosecutorial misconduct. (Doc. 32-2, pp. 36-56). Petitioner asserts these claims in whole under Ground Eleven of his § 2254 petition, seeking habeas relief for constitutional violations "under a totality of circumstances" and "the cumulative effect" of all these alleged constitutional errors. *Id.* at 36.

[5] Respondents also argue Ground Eleven is untimely and procedurally defaulted. Because the Court finds the claim is not cognizable in the first instance, it does not decide whether Petitioner has timely or properly raised his Eleventh Ground for federal habeas relief.

Petitioner was alone in the basement with A.A. because (1) the trial court sustained the State's objection to a defense witness who would have testified that Petitioner was never alone with A.A. after the witness had been in the courtroom during the trial even though defense counsel had invoked the rule on witnesses, and (2) in doing so, "[u]rg[ed] the jury to infer an adverse inference from the absence of evidence which was excluded at the State's request." (Doc. 32-2, p. 26).

In finding this argument to be meritless, the Missouri Court of Appeals reasoned that "the prosecutor did not misrepresent the evidence by claiming that the only evidence to rebut the State's theory was [Petitioner]'s theory" because the testimony the defense witness would have provided, based on an offer of proof by defense counsel, "would not have been sufficient to rebut the allegation that [Petitioner] and A.A. were, at some point, alone in the basement." (Doc. 10-5, p. 23). Specifically:

> Defendant premises his argument on the following portion of Daughter's excluded testimony:
>
> > Q. And to your knowledge, was your dad ever alone with any of the children?
> >
> > A. No. Just me and my sister.
>
> Our review of the entire offer of proof, consisting of seven pages of transcript, reveals the following. On the date in question, Daughter arrived home from school sometime after Defendant had picked up the other children, including A.A. Therefore, Daughter did not, and could not, account for Defendant's activities during the entire time when Defendant was alone with the children.

Id.

Ultimately, "[a] prosecutor's argument violates due process if the prosecutor's remarks 'infected the trial with unfairness.'" *Hall v. Luebbers*, 341 F.3d 706, 716 (8th Cir. 2003) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Accordingly, federal habeas relief on the basis of an improper closing argument is permitted "only if the state's 'closing argument was so

inflammatory and so outrageous that any reasonable trial judge would have sua sponte declared a mistrial.'" *Id.* (quoting *Sublett v. Dormire*, 217 F.3d 598, 600 (8th Cir. 2000)); *see James v. Bowersox*, 187 F.3d 866, 869 n.4 (8th Cir. 1999) (noting that the Supreme Court in *United States v. Young*, 470 U.S. 1, 15 (1985), established that unpreserved error of a prosecutor's closing argument is limited to "particularly egregious" errors). In particular, the Court "consider[s] the weight of the evidence and whether the improper argument misstated evidence or implicated other specific rights of the defendant." *Bucklew v. Luebbers*, 436 F.3d 1010, 1022 (8th Cir. 2006) (citing *Darden*, 477 U.S. at 181).

In closing argument, the prosecutor stated that "[Defendant] admits he was at or near the scene of the crime. Of course, we contend—the State contends he was in the basement with her, and that's not rebutted by anyone other than the Defendant." (Doc. 10-1, p. 585). Ultimately, regardless as to whether the witness would have been allowed to testify but for the rule on witnesses,[6] the proffered testimony shows that the witness's testimony would not have in fact rebutted this argument simply because of the passage of time between when A.A. arrived at Petitioner's home and the point at which the witness could say A.A. was not alone with Petitioner:

> [MS. JOHNSON]. And do you recall the last time the A[....] children stayed at your family's home.
>
> [WITNESS]. The only time I can recall that they stayed at our home would be in 2012.
>
> [MS. JOHNSON]. In 2012. And do you recall when that was in 2012?
>
> [WITNESS]. Between the second week of February and the end of March.
>
> [MS. JOHNSON]. And how did they come to be in your home.

[6] *See* Doc. 10-1, p. 204 (defense counsel invoking the rule on witnesses); *id.* at 381-83 (prosecution objecting and the trial court excluding this witness's testimony because of the witness had been in the courtroom during the trial proceedings).

[WITNESS]. The last time I remember them being at my home, my father picked them up on request by their parent.

[MS. JOHNSON]. By their parent. And what -- what did they do once they arrived?

[WITNESS]. Normally, when the kids arrive at the house, they usually watch movies with us or a television show or chat with us, play with their -- my sister's toys at the time.

. . .

[MS. JOHNSON]. . . . And is that what you did on that date?

[WITNESS]. Yes.

[MS. JOHNSON]. Were you with the children?

[WITNESS]. I normally -- when I was home, I was with them.

[MS. JOHNSON]. And were you on that date?

[WITNESS]. Yes.

[MS. JOHNSON]. Can you tell us more about that, what you did after they arrived, as specific as you can get?

[WITNESS]. That day, I got home. One of my friends brought me home from school and –

[MS. JOHNSON]. Sorry to interrupt. About what time did you get home from school?

[WITNESS]. About 3:45, 4:00.

[MS. JOHNSON]. Three forty-five. Continue.

[WITNESS]. And I got home and my dad asked me to go inside and start taking care of the kids, like, getting them food, like I normally would.

[MS. JOHNSON]. And where was your dad?

[WITNESS]. He was downstairs.

[MS. JOHNSON]. And who is your dad, just for the record?

[WITNESS]. James Riggs.

. . .

[MS. JOHNSON]. And to your knowledge, was your dad ever alone with any of the children?

[WITNESS]. No. Just me and my sister.

Id. at 458-59, 64; *see also* Doc. 10-5, p. 21.

Thus, under this deferential standard of review, Petitioner has failed to show that the prosecutor's remarks rise to a level of unfairness that denied him due process of law and, in addition, the record shows the prosecutor's argument did not misstate the evidence nor was the statement so inflammatory or outrageous that any reasonable trial judge would have declared a mistrial on its own motion. Accordingly, the Court does not find that the state appellate court's decision is contrary to or the result of an unreasonable application of clearly established law to merit federal habeas relief. Ground One is denied.

B. Grounds Two and Three are denied.

In Grounds Two and Three, Petitioner asserts the trial court erred by allowing the prosecution to cross-examine Petitioner about the details and facts of his prior DUI conviction and also by allowing the prosecution, over defense counsel's objection, to introduce into evidence an "11-page criminal history report" concerning Petitioner's DUI conviction. (Doc. 32-2, pp. 27-28).

On direct appeal, the Missouri Court of Appeals denied both claims for relief. *See* Doc. 10-5, pp. 10-14. First, the state appeals court held the cross-examination testimony, admitted without objection, was not "unduly prejudicial" because the information elicited from Petitioner on cross-examination (after taking the stand and opening the door to impeachment) consisted of: (1) the nature of the crime (i.e., that Petitioner was driving a semi-truck at the time); (2) the resulting sentence (i.e., that Petitioner incurred a "hefty fine"); and (3) the resulting sentence imposed "did not involve improper details about the crime itself" (i.e., that a warrant was issued for nonpayment

of the fine). *Id.* at 12; *see* Doc. 10-1, pp. 529-30 (challenged testimony). As to the warrant testimony, the court of appeals held that, under the standard of plain error review, Petitioner had failed to show a "reasonable probability the jury would have reached a different conclusion if the warrant testimony had been excluded." (Doc. 10-5, pp. 12-13). Because the appeals court denied plain error relief as to the elicited testimony, the court also denied Petitioner's claim on direct appeal that the trial court abused its discretion in permitting the State to introduce Petitioner's criminal history report into evidence, reasoning that the report was merely "cumulative of [Petitioner]'s own testimony" and that Petitioner was "not prejudiced by the admission of allegedly improper evidence when the same facts were established without objection by other evidence." *Id.* at 14.

The admissibility of evidence is ultimately a question of state law, for which "federal habeas corpus relief does not lie." *Estelle v. McGuire*, 502 U.S. 62, 67-70 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). Instead, a federal habeas claim on the basis of a state court's admission of evidence rests on "whether the admissions resulted in a trial so fundamentally unfair as to deny [Petitioner] due process of law." *Rainer v. Dep't of Corrs.*, 914 F.2d 1067, 1072 (8th Cir. 1990) (quotation and citation omitted). Simply, the necessary inquiry here is whether the error is "so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford [Petitioner] the fundamental fairness which is the essence of due process" under the totality of the facts. *Id.* (alterations omitted; quotation and citation omitted).

Under the totality of the circumstances, the admission of Petitioner's DUI conviction (in the testimony elicited on cross-examination and in admitting a certified copy of the conviction as an exhibit) did not deny him the right to a fair trial. By choosing to testify, Petitioner opened himself up to impeachment as a witness on cross-examination, and the State elicited this testimony

and produced this document exactly for that purpose. Even if, as Petitioner argues in this habeas petition, Petitioner's conviction "came down to a credibility contest between A.A.'s and [Petitioner]'s version of events," the admission of Petitioner's DUI conviction on cross-examination and with a copy of the criminal history report to impeach Petitioner as a testifying witness did not fatally infect the trial to the degree to effectively deny Petitioner fundamental fairness. Petitioner was not unduly prejudiced because the State did not provide extensive factual details about the crimes other than to establish the nature of Petitioner's prior conviction and did not dwell on Petitioner's prior convictions.

Additionally, Petitioner has failed to satisfy the burden imposed by § 2254(d)(1) to show the state court's decision is contrary to or unreasonably applies clearly established federal law. *See Forrest v. Steele*, 764 F.3d 848, 861 (8th Cir. 2014) (Petitioner's "burden . . . is to show 'the holdings . . . of [the Supreme] Court's decisions,' provide a 'clear answer to the question presented'" in Petitioner's favor.) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008)) (alteration in original). "[I]t is axiomatic that when a defendant takes the stand in his own behalf he may be cross-examined with respect to prior felony convictions," and therefore Petitioner has failed to state a constitutional claim for federal habeas relief. *Montgomery v. United States*, 403 F.2d 605, 611 (8th Cir. 1968) (quotation and citation omitted); *see also United States v. Weber*, 522 F.2d 384, 385 (8th Cir. 1975) (the Supreme Court has found no constitutional infirmity in requiring a defendant to choose between remaining silent or risking impeachment by disclosure of his prior convictions") (citing *McGautha v. California*, 402 U.S. 183, 213-17 (1971); *Spencer v. Texas*, 385 U.S. 554, 560-61 (1967)).

Grounds Two and Three are denied.

C. **Ground Four is denied.**

Next, Petitioner asserts the trial court violated Petitioner's due process and fair trial rights by not excluding Robin Buchanan's testimony that "invaded the province of the jury" and unduly influenced the jury's verdict. (Doc. 32-2, p. 29). On direct appeal, the Missouri Court of Appeals denied Petitioner relief on this claim:

> In the first relevant portion, [Buchanan] gave the following testimony:
>
> Q. All right. So, this, I take it, was not your first investigation of a sexual act, abuse on a child?
>
> A. No, sir.
>
> Q. Do you know – can you tell the jury about how many you did or was it too numerous to lose [sic] track of?
>
> A. It was too numerous to – to lose [sic] track of. In nine years, I would average, oh, several cases – alleged cases a year.
>
> Q. Now, to be fair to the jury, not – were all those always substantiated?
>
> A. No, sir. Uh-uh.
>
> Q. And how about this one?
>
> A. This – this one was found preponderance of the evidence.
>
> Q. All right. Now, you understand that's not the same burden necessarily that we're looking at here today?
>
> A. No, sir. Our — our criteria is [sic] much different than law enforcement and court.
>
> Buchanan was unable to determine from her initial interview with A.A. whether something criminal had happened, so a forensic interview at the Child Advocacy Center (CAC) was conducted. In the second relevant portion of Buchanan's testimony, she recounted her conversation with police after the forensic interview had been conducted:
>
> Q. All right. So, eventually, did you – were you made aware of the fact that the interview was completed and there was a transcript –

A. Yes.

Q. – by the CAC – Child Advocacy Center in West Plains?

A. Yes.

Q. And did you receive a call from Sheriff Chris Degase?

A. Yes, I did.

Q. And what was the purpose of that call, if you recall?

A. The purpose of the call the first time was to find out if the interview had been conducted, which it did. He wanted to know what had happened, and I told him just briefly. And I told him that, in my opinion, there was enough in this child's statement to say that – that most likely something had happened. He requested a copy of my report, and he asked that the CAC send the information, which they automatically do, but he asked anyway, to get the CAC DVD.

Doc. 10-5, pp. 4-5.

The Missouri Court of Appeals found that this testimony "merely explained her role in the investigative process" and also recognized, at the most, that Buchanan's testimony only went so far to the general proposition that "someone had abused A.A.," but she never testified that Petitioner had abused A.A. *Id.* at 7. In addition, the appeals court failed to find open and obvious error by the trial court permitting this testimony where (1) Petitioner's oral and written admissions directly implicated him as "the perpetrator of the offense against A.A.," (2) Buchanan's testimony was brief and not highlighted in closing arguments, and (3) Buchanan's testimony acknowledged that the evidentiary standard used at the investigative stage is much different than the one the jury was required to use. *Id.*

Generally, "[i]t is the exclusive province of the jury to determine the believability of the witness," *United States v. St. Pierre*, 812 F.2d 417, 419 (8th Cir. 1987), and expert witnesses are "not permitted to offer an opinion as to the believability or truthfulness of a victim's story."

Bachman v. Leapley, 953 F.2d 440, 441 (8th Cir. 1992). However, federal habeas relief is not available for claims based on questions of state law, like the admissibility of evidence. *Estelle*, 502 U.S. at 67-70. In other words, the Court's "sole concern is whether the particular evidence admitted infringed on a specific constitutional protection or was so prejudicial as to deny due process." *Maurer v. Dep't of Corrs.*, 32 F.3d 1286, 1289 (8th Cir. 1994) (internal quotation and citation omitted); *see Rainer*, 914 F.2d at 1072 (the operative question is whether "the admission[] [of evidence] resulted in a trial so fundamentally unfair as to deny [Petitioner] due process of law"). Simply, the necessary inquiry is whether the claimed error is "so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford [Petitioner] the fundamental fairness which is the essence of due process" under the totality of the facts. *Id.* To meet this burden, Petitioner "must show that there is a reasonable probability that the error complained of affected the outcome of the trial." *Anderson v. Goeke*, 44 F.3d 675, 679 (8th Cir. 1995). The Eighth Circuit recognizes that when the evidence is close, "it is more likely that evidentiary error will infect a trial with fundamental fairness." *Maurer*, 32 F.3d at 1289. Other factors include: the presentation of the evidence, the persuasiveness of the evidence, whether it was used in closing argument, and whether the defense effectively countered the evidence. *Id.*

While it appears certainly true that in making its decision, the jury necessarily had to determine the respective believability of Petitioner and A.A., Petitioner has not met his burden to show a reasonable probability that the error so affected the outcome of the trial. Petitioner's asserted reliance on A.A.'s inconsistent accounts, the lack of other (physical) evidence of abuse, and that Buchanan was a "State investigator" is not sufficient to make this showing, especially in light of Petitioner's oral and written admissions to police and that Buchanan's testimony was neither drawn out nor highlighted in closing argument. *Cf. Maurer*, 32 F.3d at 1290 (testimony

"vouching" for the sincerity of victim's statements to witnesses denied petitioner due process because of the "extremely close" evidence, repetition of this testimony by four separate witnesses, and re-emphasizing the vouching testimony in closing argument).

D. Ground Five is denied.

For his fifth ground for federal habeas relief, Petitioner argues the trial court abused its discretion in overruling defense counsel's objection to the State's questioning of a witness, the victim's father ("Father"). (Doc. 32-2, p. 30). Specifically, Petitioner asserts a violation of his due process rights when the State asked Father "whether anyone else had ever molested A.A. besides [Petitioner]," invading the province of the jury and amounting to unsworn testimony by the prosecutor. *Id.*

On direct appeal, the Missouri Court of Appeals denied this claim as follows:

> Defendant's fifth point involves the following testimony given by Father during his direct examination at trial:
>
> > Q. Now, I want to ask you one final question, [Father]. To your knowledge, has anyone ever molested [A.A.] besides Mr. Riggs?
> >
> > A. No.
> >
> > [DEFENSE COUNSEL]: Objection, Your Honor. That's what's on trial here.
> >
> > [PROSECUTOR]: Well, I'm asking besides Mr. Riggs.
> >
> > [DEFENSE COUNSEL]: Yeah. But you're alleging that that has happened, and that's what's on trial now.
> >
> > [PROSECUTOR]: Allegedly.
> >
> > THE COURT: Overruled. Overruled.
> >
> > [PROSECUTOR]: Q. You may answer.
> >
> > A. No.

Defendant argues that the "trial court abused its discretion in overruling defense counsel's objection to the prosecutor's question, posed to [Father], as to whether anyone else had ever molested A.A. besides [Defendant], because ... the prosecutor's question invaded the province of the jury and amounted to unsworn testimony by the prosecutor on the ultimate fact at issue[.]"

Defendant's argument ignores the fact that essentially the same testimony was given by Stepmother without objection during her direct examination:

> Q. All right. And the counselor [Dr. Wilson] told you to do what?
>
> A. [Dr. Wilson] hotlined DFS and told my husband and I we needed to report what we had found out to the sheriff's department.
>
> Q. And did you?
>
> A. Yes.
>
> Q. Now, I probably left out a step. At some point, did you call your husband, [Father]?
>
> A. Yes.
>
> Q. And what – do you remember where he was working, by chance?
>
> A. He was working in Mansfield that week.
>
> Q. And did he – did he come down?
>
> A. Yes. He met me at [Dr. Wilson's] office.
>
> Q. Now, I want to ask you: Up until that time, had you ever been aware that [A.A.], your youngest stepdaughter, had ever been touched inappropriately by anybody?
>
> A. No.
>
> Q. Ever been touched since then inappropriately by anyone?
>
> A. No.

On appeal, Defendant has not challenged the admission of this testimony by Stepmother. It is well settled law that "[a] defendant is not prejudiced when allegedly improper evidence was merely cumulative to other evidence admitted without objection establishing the same facts." *State v. Hutson*, 487 S.W.3d 100, 108 (Mo. App. 2016); see also *State v. Davies*, 330 S.W.3d 775, 797 (Mo. App.

2010). Therefore, the trial court's decision to overrule the objection to Father's testimony was not prejudicial. Point 5 is denied.

(Doc. 10-5, pp. 8-9) (alterations in original).

As noted above, federal habeas relief is not available on questions of state law like the admissibility of evidence. *Estelle*, 502 U.S. at 67-70. Instead, a federal habeas court's "sole concern is whether the particular evidence admitted infringed on a specific constitutional protection or was so prejudicial as to deny due process." *Maurer*, 32 F.3d at 1289; *see Rainer*, 914 F.2d at 1072 (the operative question is whether "the admission[] [of evidence] resulted in a trial so fundamentally unfair as to deny [Petitioner] due process of law"). Simply, the necessary inquiry at this stage is whether the claimed error is "so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford [Petitioner] the fundamental fairness which is the essence of due process" under the totality of the facts. *Id.* To meet this burden, Petitioner "must show that there is a reasonable probability that the error complained of affected the outcome of the trial." *Anderson*, 44 F.3d at 679.

After considering the totality of the facts, Petitioner has not met his burden here to show a reasonable probability that the error complained of (the one specific question asked of Father above) affected the outcome of the trial, especially where it is cumulative to evidence given by another testifying witness (without objection). *See Jackson v. Norris*, 573 F.3d 856, 858 (8th Cir. 2009) (testimony challenged in habeas petition did not have "substantial impact on the jury's verdict" where it was cumulative of other evidence in conjunction with other evidence of petitioner's guilt); *Worthington v. Roper*, 631 F.3d 487, 504 (8th Cir. 2011) (on federal habeas review, state court "reasonably concluded" petitioner suffered no prejudice where challenged testimony "would have been cumulative of evidence already before the sentencing court") Petitioner has not demonstrated the state court's decision was contrary to or involved an

unreasonable application of federal law or was based on an unreasonable determination of the facts. Ground Five is denied.

E. Ground Six is denied.

In his Sixth Ground for federal habeas relief, Petitioner asserts the trial court abused its discretion in overruling defense counsel's objection to the child advocate holding a teddy bear "at the table in view of A.A., and in front of the jury." (Doc. 32-2, p. 31). To the extent Petitioner asserts a claim based on violation of state law concerning the procedures for permitting a testifying child to possess a comfort item while testifying (Mo. Rev. Stat. § 491.725.3(4)), Petitioner fails to state a claim for federal habeas relief. *See* § 2254(a) (federal habeas relief is only for claims that a state prisoner is "in custody in violation of the Constitution or laws . . . of the United States"); *Lee v. Norris*, 354 F.3d 846, 847 (8th Cir. 2004) ("a mere violation of state law . . . is not cognizable in federal habeas"); *Estelle*, 502 U.S. at 67-68; *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994) ("A federal court may not re-examine a state court's interpretation and application of state law.") (quotation and citation omitted).

To the extent Petitioner raises a federal constitutional claim, whether a violation of state law "abridges federal constitutional rights," is dependent on the "fundamental fairness and prejudice from the loss of rights afforded to similarly situated defendants." *Powers v. White*, 680 F.2d 51, 52 (8th Cir. 1982). Given the totality of the circumstances, including the other evidence presented, Petitioner has failed to show a reasonable probability that the alleged error affected the outcome of the trial. Ground Six is denied.

F. Ground Seven is denied.

In Ground Seven, Petitioner alleges the trial court abused its discretion by striking testimony by an expert witness concerning the potential implications of not following best

practices and good interview techniques when interviewing a child in a sexual abuse investigation. (Doc. 32-2, p. 32).

On direct appeal, the Missouri Court of Appeals found this claim without merit:

> Defendant's seventh point arises from the following facts. The case was set for a jury trial to commence on July 29, 2014. Defense counsel designated their expert witnesses on July 2, 2014. One of those experts was Dr. Rosalyn Schultz (Dr. Schultz). On July 25, 2014 (the Friday before the trial started on Monday), the prosecutor filed a motion to compel disclosure of Dr. Schultz' report. It was faxed to the prosecutor at 3:39 p.m. that same day.
>
> On the morning trial commenced, the prosecutor moved to strike Dr. Schultz as an expert. The court took that motion with the case. Prior to Dr. Schultz' testimony, the prosecutor renewed the motion to strike due to the lack of opportunity to depose Dr. Schultz or prepare to cross-examine her. The trial court was concerned about permitting Dr. Schultz to testify because her report was provided to the prosecutor such a short time before trial commenced. Out of an abundance of caution, however, the court made the following ruling:
>
> > The Court's order is going to be as such, and this is not fair to the State. But what is going to happen, the Court is going to allow ... Dr. Schultz to testify. It is going to be very – very narrow in scope, especially due to this summary coming in the day – the last working day before trial. The Court will let her testify as to the proper way to conduct a CAC interview or the – or this other interview that Ms. Buchanan conducted, what wasn't proper about it .... [T]he Court will allow her to just testify about proper interview techniques only because this child – and only as it relates to a child this age. This is not going to take very long, and we're not going we're not going on a huge fishing expedition with this, period. And we're not going to get into whether – whether this testimony was truthful or untruthful. It is basically going to be how to do an interview on a seven- or eight-year-old kid, period.
>
> During Dr. Schultz' direct examination, she testified about the following generally accepted guidelines and best practices for first responders in a sexual abuse case: (1) the child's initial interview should be a brief, fact-finding interview; and (2) the interviewer should not name the alleged perpetrator or give any details about the case because that would be leading, suggestive and inappropriate. Defense counsel then adduced the following testimony from the witness:
>
> > Q. So, if best practices are not followed, how could that possibly influence the first interview?

A. It can influence the first interview because the child is receiving initially – the first time the child is being interviewed in the – in the formal investigation, the child is being interviewed and being given information that the child had not yet said, so that it can be that the child – and there can be children that can assume then that they're supposed to be saying what – and giving that information because it was given by an authorative [sic] figure, for example. And it can taint the outcome of the case.

Q. When you say "taint the outcome of the case," what do you mean?

A. It – it could – it could affect what the child actually states.

[PROSECUTOR]: Well, I'm going to object, Judge. That is not a conclusion permissible by this expert.

THE COURT: Sustained.

[PROSECUTOR]: I'm going to ask that her answer be stricken from the record.

THE COURT: Okay. Folks, disregard the last answer.

Dr. Schultz then testified about the following best practices and guidelines for CAC interviews: (1) let the child do the talking; (2) ask open-ended questions; and (3) don't use suggestive questions. Dr. Schultz testified that "there were several significant best-practice guidelines that were not followed" in the CAC interview of A.A.

In Point 7, Defendant contends the trial court abused its discretion in sustaining the foregoing objection and striking Dr. Schultz' answer. Defendant argues that this ruling was an improper limitation upon the expert's testimony. We disagree.

The decision to exclude evidence as a discovery sanction is left to the trial court's discretion. *State v. Hillman*, 417 S.W.3d 239, 245 (Mo. banc 2013). We will reverse a discovery sanction ruling on appeal only when the sanction results in fundamental unfairness to the defendant. *Id.* at 245-46. That standard has not been met here. Dr. Schultz' report was not provided to the prosecutor until late Friday afternoon before the Monday commencement of trial. Because of the timing of that disclosure, the trial court limited Dr. Schultz' testimony to the general topic of the proper method of interviewing a child victim in a sexual abuse case. The court decided that Dr. Schultz would not be permitted to testify about whether A.A.'s testimony would be truthful or untruthful. Dr. Schultz was allowed to testify about best practices and accepted guidelines for both an initial and a CAC interview of a

> child. The trial court's ruling left standing Dr. Schultz' answer that failure to follow best practices could influence the child and taint the outcome of the case. The court only struck Dr. Schultz' testimony that "it could affect what the child actually states." We find no abuse of discretion in this ruling. More importantly, the exclusion of this one answer did not result in fundamental unfairness to Defendant because Dr. Schultz was allowed to testify extensively about best practices and accepted guidelines for child interviews. Point 7 is denied.

(Doc. 10-5, pp. 16-18).

"Questions relating to the admissibility of evidence are matters of state law and are generally not cognizable in an action for habeas corpus." *Wood v. Lockhart*, 809 F.2d 457, 459 (8th Cir. 1987) (citation omitted). To establish a due process violation for federal habeas relief, Petitioner must "prove that the error was 'so gross' . . . 'conspicuously prejudicial' . . . or otherwise of such magnitude that it fatally infected the trial," failing to afford Petitioner "the fundamental fairness which is the essence of due process." *Kerr v. Caspari*, 956 F.2d 788, 789 (8th Cir. 1992) (quoting *Ranier*, 914 F.2d at 1072). To do so, Petitioner must show a "reasonable probability that . . . absent the alleged impropriety the verdict probably would have been different." *Gee v. Groose*, 110 F.3d 1346, 1350 (8th Cir. 1997) (quoting *Anderson*, 44 F.3d at 679). Under this high standard, "[r]ulings on the admission or exclusion of evidence in state trials rarely rise to the level of a federal constitutional violation." *Nebinger v. Ault*, 208 F.3d 695, 697 (8th Cir. 2000).

Here, the record shows that the state trial court, upon the State's objection, struck one answer by defense's witness that not following best practices in the first interview could "affect what the child actually states." However, the court left alone the witness's immediately preceding testimony that not following best practices can "taint the outcome of the case" and the witness was allowed to otherwise testify as to the best practices and guidelines without objection. Accordingly, without more, Petitioner has failed to meet his burden to show the result of the trial probably would have been different had the witness's single statement not been stricken and therefore that the trial

court's evidentiary ruling violated Petitioner's due process and fair trial rights. Ground Seven is denied.

G. Ground Eight is denied.

For his eighth ground for federal habeas relief, Petitioner asserts that the trial court abused its discretion by permitting Dr. Sara Wilson to testify as a rebuttal witness because Dr. Wilson's rebuttal testimony was "not proper rebuttal evidence" that explained, counteracted, or refuted evidence offered by the defense. (Doc. 32-2, p. 33).

The Missouri Court of Appeals denied this claim on direct appeal:

> Defendant's eighth point arises from the following facts. During the State's case-in-chief, the prosecutor presented evidence that Father and Stepmother took A.A. to see her therapist, Dr. Wilson, before A.A. was taken to the county sheriff's office. It was during Defendant's case-in-chief that Dr. Schultz testified about the best practice and guidelines for performing an initial interview of a child sexual abuse victim. As mentioned previously, Dr. Schultz testified that the failure to follow those best practices could influence the first interview and taint the outcome of the case.
>
> After the defense rested, the prosecutor called Dr. Wilson as a rebuttal witness. The prosecutor stated that the purpose of Dr. Wilson's testimony would be "to rebut Dr. Schultz because Dr. Schultz says that you can't basically believe anything [A.A.] said because the interviewing techniques were flawed." Defense counsel objected that Dr. Wilson's testimony would not be proper rebuttal. The trial court ruled that it would allow Dr. Wilson "to testify as to questioning a child of this age ...."
>
> In relevant part, Dr. Wilson gave the following rebuttal testimony. She was a licensed psychologist with a doctorate in clinical psychology. She provided individual therapy to A.A. After A.A. reported the sexual abuse, Father and Stepmother brought A.A. to Dr. Wilson's office. Dr. Wilson was a mandated reporter of child sexual abuse cases. She reported the incident and advised Father and Stepmother to contact law enforcement. Dr. Wilson also talked to A.A. at the office. Dr. Wilson was careful about what she asked A.A., so as not to interfere with a forensic interview or an investigation that might ensue after she made her mandatory report.
>
> In Point 8, Defendant contends the trial court abused its discretion in permitting Dr. Wilson to testify as a rebuttal witness. Defendant argues that Dr.

> Wilson's testimony was not proper rebuttal because "it did not explain, counteract, or refute evidence offered by the defense." We disagree.
>
> A trial court is vested with broad discretion concerning the admission and scope of rebuttal evidence. *State v. Hurley*, 208 S.W.3d 291, 293 (Mo. App. 2006). "Rebuttal evidence may directly or indirectly explain, counteract, repel, or disprove a defendant's evidence either directly or by implication." *State v. Hamilton*, 892 S.W.2d 371, 379 (Mo. App. 1995). An appellate court will not interfere with the exercise of a trial court's discretion unless it is clear that the court's ruling is against the logic of the circumstances and is "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003). We find no abuse of discretion here. Dr. Schultz testified that failure to follow best practices and guidelines during an initial interview of a child sexual abuse victim could influence the interview and taint the outcome of the investigation. The trial court properly allowed Dr. Wilson to testify about the limited nature of her questioning of A.A. to rebut any inference that Dr. Wilson's interview tainted the outcome of the ensuing investigation by the police and forensic interviewers. Defendant's argument that Dr. Wilson's short and focused testimony improperly bolstered Stepmother's testimony is unpersuasive. Point 8 is denied.

(Doc. 10-5, pp. 19-20).

As noted above, a federal habeas court is bound by a state court's application or interpretation of state law unless Petitioner's conviction violates the U.S. Constitution or federal law. *Estelle*, 502 U.S. at 67-68. "Questions regarding admissibility of evidence are matters of state law, and they are reviewed in federal habeas inquiries only to determine whether an alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process." *Rousan v. Roper*, 436 F.3d 951, 958 (8th Cir. 2006) (internal quotation and citation omitted). A state trial court's evidentiary ruling admitting evidence results in denial of due process only if the admission constitutes "an impropriety so egregious that it made the entire proceeding fundamentally unfair." *Skillicorn v. Luebbers*, 475 F.3d 965, 972 (8th Cir. 2007). Federal habeas relief is available here only if Petitioner shows that "absent the alleged impropriety the verdict probably would have been different." *Id.* (quoting *Anderson*, 44 F.3d at 679).

The prosecution called Dr. Wilson as a rebuttal witness after the defense's witness, Dr. Schultz, testified that not following best practices in the initial interview of a child sexual abuse victim could "taint the outcome of the case." (Doc. 10-1, p. 476). When the prosecution called Dr. Wilson to testify, the trial court limited the testimony to the "questioning a child of this age." *Id.* at 541. Dr. Wilson's subsequent testimony concerning the questioning or interview of A.A., after Dr. Schultz testified for the defense that improper questioning could taint the case, is neither fundamentally unfair nor prejudicial, and Petitioner has failed to show in light of the other evidence presented that the verdict probably would have been different if the trial court had not excluded Dr. Wilson's rebuttal testimony. Accordingly, Petitioner has failed to show that the state appellate court's decision was contrary to or an unreasonable application of federal law or was based on an unreasonable determination of the facts. § 2254(d). Ground Eight is denied.

H. Ground Nine is denied.

In Ground Nine, Petitioner alleges the trial court erred by failing to "sua sponte" declare a mistrial" when the State argued facts in closing that were not in evidence. (Doc. 32-2, p. 34). Specifically, Petitioner states that the prosecution's statement in closing argument that Dr. Wilson had told the jury "this is the way little girls are and that she found nothing unusual about it" violated Petitioner's due process and fair trial constitutional rights.

The Missouri Court of Appeals denied this claim on direct appeal as follows:

> In Point 9, Defendant contends the trial court plainly erred in failing to sua sponte declare a mistrial when the prosecutor misattributed testimony that "this is the way little girls are and that she found nothing unusual about it" to Dr. Wilson because those facts were not in evidence. While Dr. Wilson did not give the testimony attributed to her by the prosecutor, similar testimony was received in evidence by two other witnesses, Buchanan and the CAC forensic interviewer, Tina Ahad. This Court has previously found no manifest injustice from a similar situation where the prosecutor referred to facts in evidence but attributed the testimony to the wrong witness. See State v. Farmer, 777 S.W.2d 322, 323-24 (Mo.

App. 1989). Defendant has likewise failed to demonstrate the existence of manifest injustice in this case. Point 9 is denied.

(Doc. 10-5, p. 24).

Pursuant to § 2254, federal habeas relief is available for a claim that was adjudicated on the merits in state court that resulted in a decision that was contrary to or an unreasonable application of clearly established law. § 2254(d)(1). A prosecutor's closing argument violates Petitioner's due process rights where it "so infect[s] the trial with unfairness." *Sublett v. Dormire*, 217 F.3d 598, 600 (8th Cir. 2000) (quoting *Darden*, 477 U.S. at 181). "Federal habeas relief should only be granted if the prosecutor's closing argument was so inflammatory and so outrageous that any reasonable trial judge would have *sua sponte* declared a mistrial." *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Additionally, Petitioner must show a "reasonable probability that the outcome would have been different but for the improper statement." *Barnett v. Roper*, 541 F.3d 804, 813 (8th Cir. 2008).

Petitioner is correct, as a factual matter, to the extent he recognizes that Dr. Sara Wilson did not testify exactly in the manner attributed to her in the State's closing argument. Petitioner is incorrect, however, in asserting that the State's closing argument wholly referred to evidence not in the record. The record shows that other witnesses for the State, including Robin Buchanan and Tina Ahad—both of whom had direct contact and interviewed A.A. in the course of the underlying investigation, did testify in this manner. Accordingly, even considering the mis-attribution of testimony to the exact witness, the nature of the testimony cited by the prosecutor was properly in the evidence presented to the jury. Therefore, Petitioner fails to demonstrate a reasonable probability that the outcome of the trial would have been different but for the mis-attribution by the prosecutor and the Court finds this misstatement by the prosecutor is not so inflammatory or outrageous that any reasonable trial judge would *sua sponte* declare a mistrial. Petitioner has failed

to demonstrate he is entitled to federal habeas relief under the deferential standard of federal habeas review pursuant to § 2254(d). Ground Nine is denied.

I. **Ground Ten is denied.**

In Ground Ten, Petitioner seeks federal habeas relief on the basis that the trial court erred by failing to *sua sponte* instruct the jury to disregard the prosecutor's "improper argument [in closing] vouching for the truth of the witnesses in this case." (Doc. 32-2, p. 35). Petitioner argues the prosecutor "improperly implied" he "had evidence that the jury had not heard [that] establish[ed] the truth of A.A.'s allegations." *Id.* Specifically, Petitioner argues the following statements (and the trial court's failure to instruct the jury to disregard these statements) made by the prosecutor in his closing argument violated his right to due process and a fair trial:

(1) "there are a lot of cases I receive that I don't file on";

(2) "I've got to pick the ones that I think a jury will believe";

(3) "I do try to pick the cases I think are serious, and this is a serious case";

(4) "I happen to believe that the Defendant did just what he's charged with in this case"; and

(5) "we don't want to take things to court that aren't based on truth."

Id.

On direct appeal, the Missouri Court of Appeals denied Petitioner relief on this claim:

> In Point 10, Defendant contends the trial court plainly erred in failing to *sua sponte* instruct the jury to disregard the prosecutor's closing arguments about why he filed charges against Defendant because those comments improperly implied that the prosecutor had evidence that the jury had not heard establishing the truth of A.A.'s allegations. Just before summarizing the evidence, the prosecutor stated:
>
> > There's a lot of charges that come across the desk. I think – I believe it was Tina Ahad that said, hey, most of these are unsubstantiated. I'm talking about these sexual crimes. And there are a lot of cases I receive that I don't file on. It's not necessarily that I don't believe

> the victim, but they're just not provable. Sometimes people are in divorce cases and there's been a bunch of nonsense going on back and forth, and sometimes there's neighbors and there's relative squabbles, you know. And I've got to pick the ones that I think a jury will believe, you know. Of course, sometimes I might see it a little differently than what you all might see. That's why you're here to determine the facts. ... I do try to pick the cases I think are serious, and this is a serious case. And I happen to believe that the Defendant did just what he's charged with in this case. Of course, you'll be the ultimate decider of that.

Defendant maintains that the prosecutor's statements improperly vouched for the truth of the State's case based on evidence not before the jury. We disagree.

Improper vouching occurs when the State implies that it has facts establishing the veracity of witnesses and the truthfulness of its case that are not before the jury for its consideration. *State v. Collins*, 150 S.W.3d 340, 351-52 (Mo. App. 2004). The State may, however, express personal opinions on matters, including guilt, where they are fairly based on the evidence. *Id.* at 352.

The challenged statements here, when taken in context, expressed the prosecutor's view that: (1) this was not a case of unsubstantiated charges between parties as part of an ongoing dispute; and that (2) based on the evidence, Defendant was guilty of the crimes charged. The argument did not imply a knowledge of outside facts, nor did it improperly vouch for the credibility of the state's witnesses. See, e.g., State v. Chism, 252 S.W.3d 178, 187 (Mo. App. 2008). We further note the prosecutor emphasized during the argument that the jury was the ultimate judge of the facts and was not bound by the State's opinion. The trial court did not plainly err in failing to sua sponte intervene in the argument. Point 10 is denied.

(Doc. 10-5, pp. 24-25).

Prosecutors have "wide latitude in making a closing argument." *Clayton v. Roper*, 515 F.3d 784, 792 (8th Cir. 2008). Similar to the standard applied above, a prosecutor may violate a defendant's due process rights where the prosecutor's comments "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-42 (1974)); *see Darden*, 477 U.S. at 181 (a prosecutor's improper closing argument violates due process when the argument is so egregious that it renders the entire trial fundamentally unfair). The relevant question for this Court is "whether the

prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (citation and quotation omitted). "Federal habeas relief should only be granted if the prosecutor's closing argument was so inflammatory and so outrageous that any reasonable trial judge would have *sua sponte* declared a mistrial." *James*, 187 F.3d at 869. In other words, even if a prosecutor's remarks in closing are "undesirable or even universally condemned," federal habeas relief is available only when the remarks "make the entire trial fundamentally unfair." *Kellogg v. Skon*, 176 F.3d 447, 452 (8th Cir. 1999) (quoting *Darden*, 477 U.S. at 181).

After review, the trial court instructed the jury that counsel's closing arguments were not evidence and that the jury must make their decision based on the evidence presented. Moreover, the evidence that was presented to the jury was sufficient to "reduce[] the likelihood that the jury's decision was influenced by argument," making the trial as a whole fundamentally unfair. *See Darden*, 477 U.S. at 182. Because the Court does not find that the Missouri Court of Appeals' decision was contrary to or involved an unreasonable application of clearly established law or resulted in a decision that was based on an unreasonable determination of the facts, § 2254(d), Ground Ten is denied.

J. Ground Eleven is denied.

In his original § 2254 petition, Petitioner asserted only the ten claims analyzed above. *See* Doc. 1. In Petitioner's amended habeas petition, Petitioner asserted the argument that "UNDER A TOTALITY OF CIRCUMSTANCES the cumulative effect" of all errors[7] "deprive Petitioner" of various constitutional rights. (Doc. 32-2, p. 36). However, "cumulative error is not grounds for federal habeas relief as 'each habeas claim must stand or fall on its own.'" *McDowell v. Leapley*,

[7] As "cumulative errors," Petitioner asserts thirty-two claims of trial court error (some overlapping with the ten claims above), one claim of ineffective assistance of appellate counsel, eleven claims of ineffective assistance of trial counsel, and six claims of prosecutorial misconduct. (Doc. 32-2, pp. 36-56).

984 F.2d 232, 235 (8th Cir. 1993) (quoting *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990)). "[I]ndividual constitutionally insignificant errors cannot be aggregated to create a constitutional violation." *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994); *see Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief."). Accordingly, Ground Eleven, alleging constitutional violations with the cumulative effect of all asserted errors, fails to state a cognizable claim for federal habeas relief under § 2254.

V. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To satisfy this standard, Petitioner must show that a "reasonable jurist" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability will be denied.

VI. Conclusion

For the foregoing reasons, Petitioner's amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 32-2) is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH, JUDGE
UNITED STATES DISTRICT COURT

Dated: May 7, 2019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3587

James A. Riggs

Appellant

v.

Jay Cassady, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:17-cv-03303-SRB)

ORDER

The petition for rehearing by the panel is denied.

March 23, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans