NOT RECOMMENDED FOR PUBLICATION

No. 20-5435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

ALI AL-MAQABLH, Petitioner-Appellant, v. BOBBY TEMPLE, Jailer of Trimble County, KY, et al., Respondents-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

O R D E R

Before: KETHLEDGE, DONALD, and LARSEN, Circuit Judges.

Ali Al-Maqablh, a Kentucky probationer proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

The state of Kentucky charged Al-Maqablh with one count of harassment, in violation of Kentucky Revised Statutes § 525.070, and two counts of falsely reporting an incident, in violation of Kentucky Revised Statutes § 519.040. These misdemeanor charges arose after Lindsey Alley, the mother of Al-Maqablh's child, filed criminal complaints against him, alleging that he had made false reports about her to the Kentucky State Police (KSP) and the Cabinet for Health and Family Services (CHFS).

Al-Maqablh moved to dismiss the charges, arguing that he was entitled to immunity under Kentucky Revised Statutes § 620.050(1) for reporting suspected child abuse. The trial court

denied his motion because "any person who knowingly makes a false report" forfeits that immunity—and Al Maqablh had been charged with making two false reports. Ky. Rev. Stat. § 620.050(1).

The case was tried to a jury in November 2017. After the prosecution presented its case, Al-Maqablh moved for a directed verdict, arguing that the prosecution had presented insufficient evidence to support conviction. He also renewed his argument that Kentucky Revised Statutes § 620.050(1) granted him immunity. The trial court denied his motion, noting that "any person who knowingly makes a false report" forfeits immunity, and concluding that the prosecution had presented sufficient evidence of false reporting to submit the issue to the jury. Ky. Rev. Stat. § 620.050(1).

The jury convicted Al-Maqablh on all three counts. The trial court sentenced Al-Maqablh to 180 days in jail—60 days to be served and 120 days to be conditionally discharged for a period of two years. Al-Maqablh appealed, and the Trimble Circuit Court affirmed his convictions. Al-Maqablh unsuccessfully sought discretionary review in the Kentucky appellate courts. Relevant here, Al-Maqablh argued that the trial court should have granted his motion for a directed verdict. The Trimble Circuit Court held that the trial court lacked the authority to grant that motion.

Al-Maqablh then filed a *pro se* habeas petition under 28 U.S.C. § 2254 raising seven grounds for relief. As his sixth ground for relief, Al-Maqablh asserted that the Trimble Circuit Court violated his constitutional rights by holding that the trial court had no authority to direct a verdict of acquittal. He further argued that he was entitled to immunity under Kentucky Revised Statutes § 620.050, and that—because immunity under that statute is a question of law—the trial judge wrongly permitted the case to proceed to a jury verdict rather than grant him immunity as a matter of law. A magistrate judge recommended that Al-Maqablh's habeas petition be denied as meritless as to his sixth ground for relief and denied as procedurally defaulted as to his other grounds for relief. Over Al-Maqablh's objections, the district court adopted the magistrate judge's recommended disposition and declined to issue a certificate of appealability.

Al-Maqablh appealed, and this Court granted him a certificate of appealability as to his claim that the Trimble Circuit Court's decision affirming the denial of his motion for a directed verdict was contrary to the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). Al-Maqablh has filed a motion for summary reversal and vacatur, while the respondents move to vacate this Court's order granting the certificate of appealability.

In support of their motion to vacate the certificate of appealability, the respondents argue that Al-Maqablh procedurally defaulted his sufficiency-of-the-evidence claim because he did not "fairly present" his claim as a matter of federal law to the state courts. "The federal courts do not have jurisdiction to consider a claim in a *habeas* petition that was not 'fairly presented' to the state courts"—that is, the petitioner must have "asserted both the factual and legal basis for his claim to the state courts." *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). One consideration in determining whether the petitioner fairly presented his federal constitutional claim to the state courts is whether "the petitioner relied upon state cases employing the federal constitutional analysis in question." *Blackmon v. Booker*, 394 F.3d 399, 400 (6th Cir. 2004). In his motion for discretionary review in the Kentucky Supreme Court and the Kentucky Court of Appeals, Al-Maqablh argued that the Trimble Circuit Court ignored the directed-verdict standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991). The *Benham* decision relied on *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983), which in turn cited the sufficiency-of-the-evidence standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Beaumont v. Commonwealth*, 295 S.W.3d 60, 67 (Ky. 2009) (stating that *Jackson*'s "principles are reflected in our familiar *Benham* standard of review for the denial of a directed verdict"). We are satisfied that Al-Maqablh fairly presented his sufficiency claim on state discretionary review. As for whether he presented this claim to the Trimble Circuit Court, a federal claim may also be fairly presented when "the petitioner allege[s] facts well within the mainstream of the pertinent constitutional law." *Blackmon*, 394 F.3d at 400. In his brief to the Trimble Circuit Court, Al-Maqablh's challenge was at least arguably "well within the mainstream" of a *Jackson* claim. We have been reluctant to rely on this *Blackmon* prong when, as here, the petitioner cites no federal authority. *See Harris v.*

Booker, 251 F. App'x 319, 322 (6th Cir. 2007). However, because this may be a close question and because we find that Al-Maqablh's habeas claim fails on its merits, we will assume for purposes of this appeal that he fairly presented his *Jackson* claim to the Trimble Circuit Court as well. Therefore, we will deny the motion for vacatur of the certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

We review *de novo* the district court's denial of Al-Maqablh's habeas petition. *Thompson v. Skipper*, 981 F.3d 476, 479 (6th Cir. 2020). Under the Antiterrorism and Effective Death Penalty Act, a federal court may grant a habeas petition with respect to a "claim that was adjudicated on the merits in State court proceedings" if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is "contrary to" clearly established federal law "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

On appeal to the Trimble Circuit Court, Al-Maqablh challenged the trial court's denial of his motion for a directed verdict. Affirming, the Trimble Circuit Court repeatedly stated that the trial court did not have the authority to weigh the evidence, quoting the following rule: "[A] trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases." *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). This rule applies to the pretrial dismissal of an indictment and is not the same as the *Jackson* standard that applies after the presentation of evidence. *See Jackson*, 443 U.S. at 319. Therefore, the Trimble Circuit Court's opinion was contrary to clearly established federal law.

Contrary to Al-Maqablh's arguments in support of his motion for summary reversal and vacatur, this does not end our review. "When the state court issues a decision that is contrary to federal law, we review the merits of the petitioner's claim de novo." *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006). In reviewing the sufficiency of the evidence to support a conviction, "the relevant question 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." *Jackson*, 443 U.S. at 319.

The jury convicted Al-Maqablh on one count of harassment. Under Kentucky Revised Statutes § 525.070(1)(e), "[a] person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he or she . . . [e]ngages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." Harassment under this subsection has three elements: "a course of conduct; alarm or serious annoyance of another person; and no legitimate purpose." *Hensley v. Gadd*, 560 S.W.3d 516, 527 (Ky. 2018) (quoting the commentary to Ky. Rev. Stat. § 525.070).

The harassment charge involved Al-Maqablh's call to KSP on Easter Sunday, March 27, 2016. Al-Maqablh and Alley argued via text message about his visitation rights on Easter. Al-Maqablh wanted visitation with the child on Sunday, but Alley told him that his legal day was Saturday and that she was taking the child to her parents' house to celebrate Easter with her family. Al-Maqablh objected and said to "expect the police to be visiting your family's house on that day." On Easter Sunday, Al-Maqablh called KSP to report that Alley was refusing visitation with his child and that, every time that he did not get visitation, there was something wrong with the child. Trooper Stuckey conducted a welfare check and found nothing wrong with the child, who was hunting Easter eggs with the family. Alley testified that Al-Maqablh sent the police to her house on three occasions and to her parents' house on two occasions for welfare checks "for absolutely no reason" and that she felt harassed by his actions. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that Al-Maqablh, with intent to harass Alley, engaged in a course of conduct by threatening her with calling the police and following up on that threat by making a baseless request to KSP for a welfare check which seriously annoyed Alley.

The jury also convicted Al-Maqablh on two counts of falsely reporting an incident. The criminal complaints used the language of Kentucky Revised Statutes § 519.040(1)(b), alleging that Al-Maqablh "reported to law enforcement authorities an offense or incident within their official

concern knowing that it did not occur." The trial court, however, instructed the jury under a different subsection of Kentucky Revised Statutes § 519.040, instructing the jury to find Al-Maqablh guilty if he knowingly made a false report of child abuse to the CHFS with the intent of implicating Alley in a criminal offense. *See* Ky. Rev. Stat. § 519.040(1)(d). To the extent that Al-Maqablh challenges the variance between the charges as alleged in the criminal complaints and the charges as presented to the jury, he did not present this argument to the Kentucky appellate courts or in his habeas petition, so we will not consider it now. *See Chandler v. Jones*, 813 F.2d 773, 777 (6th Cir. 1987).

The first false-reporting charge involved Al-Maqablh's call to CHFS on April 2, 2016. On March 31, 2016, the child stayed with Al-Maqablh overnight. Al-Maqablh texted Alley about a scratch near the child's eye, and Alley told him that it was an accident. Alley testified that the child had been playing with a stick in the yard and that, when she heard him crying, she turned and saw that he had fallen. Al-Maqablh returned the child to Alley the next day but threatened to call child protective services. On April 2, 2016, Al-Maqablh called CHFS and reported that the child had bruises next to his left eye and on his left cheek. Al-Maqablh told CHFS that the mother said that the child fell on a stick but he thought that the child had been hit. That same day, Sidney Jones, an employee with CHFS, and a KSP trooper went to Alley's house and had Al-Maqablh bring the child there. Jones observed and photographed the child and saw a small dot or mark on the child's face. On April 8, 2016, Chelsea Clapp, another CHFS employee, talked to Alley and photographed the child, who did not have any bruises. CHFS ultimately determined that the report was unsubstantiated. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that Al-Maqablh made a false report of child abuse to CHFS implicating Alley when he alleged that he believed that the child had been hit, knowing that he had no information to support that claim.

The second false-reporting charge involved Al-Maqablh's call to CHFS on May 16, 2016. On May 13, 2016, Alley texted Al-Maqablh about his visitation the next day, and Al-Maqablh responded that he was forfeiting his visitation. On May 16, 2016, Al-Maqablh called Clapp and

said that Alley had withheld visitation from him. Al-Maqablh asked Clapp to check on the child, asserting that, every time Alley withheld the child from him, it was because the child was injured. Julia Alley, the child's grandmother, brought the child to Clapp's office. Clapp viewed the child from head to toe and did not observe any injuries. Again, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that Al-Maqablh made a false complaint of child abuse to CHFS implicating Alley when he alleged that she had withheld visitation to hide the child's injuries, knowing that this information was false.

Finally, Al-Maqablh asserts that, when he moved for a directed verdict, the trial court wrongly rejected his argument that Kentucky Revised Statutes § 620.050 affords him immunity for reporting suspected child abuse. In denying Al-Maqablh's motion, the trial court noted that "any person who knowingly makes a false report" forfeits immunity and concluded that the prosecution had presented sufficient evidence of false reporting to submit the issue to the jury. Ky. Rev. Stat. § 620.050(1). To the extent that Al-Maqablh argues that the trial court erred in submitting the issue to the jury because immunity is a question of law to be determined by the trial court, *see Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012), he raises an issue of state law not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

For these reasons, we **DENY** the parties' pending motions and **AFFIRM** the district court's judgment denying Al-Maqablh's habeas petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk