
UNITED STATES COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit

FOR THE TENTH CIRCUIT

July 25, 2017

CHRISTOPHER WAYNE WEBB,

Petitioner - Appellant,

v.

JOE ALLBAUGH,

Respondent - Appellee.

Elisabeth A. Shumaker
Clerk of Court

No. 16-7072
(D.C. No. 6:13-CV-00265-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO, O'BRIEN**, and **MORITZ**, Circuit Judges.

Christopher Webb, an Oklahoma prisoner proceeding pro se,¹ seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 habeas application and his subsequent Fed. R. Civ. P. 60(b) motion. To obtain a COA, Webb must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because he hasn't made this showing, we deny his COA application and dismiss this matter.

* This order isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. See Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

¹ We liberally construe pro se pleadings. But we do not act as an advocate for pro se litigants. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

-Appendix-A-

I

In July 2009, the State of Oklahoma charged Webb with one count of second-degree rape by instrumentation. *See* Okla. Stat. tit. 21, § 1111.1 (2008) (defining rape by instrumentation); *id.* § 1114(B) (classifying rape by instrumentation as second-degree rape unless (1) bodily harm occurs or (2) victim is under 14 years of age). To prove this offense, the state had to establish, beyond a reasonable doubt, that Webb penetrated the anus or vagina of the victim who was under the age of 16 years, that he did so with an inanimate object or body part other than his penis, and that he did so without the victim's consent. *See* Okla. Unif. Jury Instr. CR 4-127 (listing elements of second-degree rape by instrumentation).

At Webb's November 2009 preliminary hearing, A.S. testified that she was 14 years old; that in the summer of 2009 she was with Webb—her mother's then-boyfriend—at Shannon Billey's house; that she fell asleep after several days of being high on "dope"; and that when she woke up, Webb's fingers were inside her vagina. R. vol. 2, 15. The state court found probable cause to bind Webb over for trial and Webb's case was tried to a jury in January 2012.

At trial, A.S. testified that during the summer of 2009, when she was 14, she would "hang out and do drugs" with Webb. *Id.* at 132. But A.S. responded, "No," when the prosecutor asked her if Webb ever touched her at Shannon Billey's house. *Id.* at 134. And A.S. replied, "Nope," when the prosecutor asked her if she ever woke up in bed with Webb. *Id.* A.S. also claimed not to remember whether she gave contrary testimony at the preliminary hearing, explaining that she was "high that day that [she] testified." *Id.* A.S.

further denied telling a forensic interviewer that she woke up with Webb's fingers in her vagina.

After the prosecutor recited A.S.' preliminary hearing testimony concerning the incident with Webb, A.S. testified that she recalled providing her preliminary hearing testimony. But when the prosecutor asked if her preliminary hearing testimony was true, A.S. inquired, "Do I have to answer that?" *Id.* at 136. Finally, the prosecutor directly asked A.S. if A.S. woke up with Webb's fingers in her vagina. A.S. refused to answer.

Following a brief recess, A.S. testified that her preliminary hearing testimony was true, and that she told an investigator with the District Attorney's Office, David Cathey, and a forensic interviewer, Ange Edwards, about the incident. When defense counsel asked A.S. what she told Edwards, A.S. replied, "I'm not repeating myself"; punctuated her refusal with profanity; and testified that she only showed up for trial because Cathey threatened her with "jail" or "very bad consequences" if she refused. *Id.* at 149-50. Cathey also testified at trial, but he denied threatening A.S.

A.S.' mother testified for the State that she would allow A.S. to go to Shannon Billey's house and that she was "pretty sure" that A.S. was using drugs at the time. *Id.* at 165. The state also presented testimony from C.O. and her cousin, A.A. Both witnesses claimed that when they were between the ages of 10 and 12, they lived with Webb—who was then the live-in boyfriend of C.O.'s mother—and that Webb molested them.

After the state rested, Webb moved for a directed verdict. He argued that A.S.' testimony wasn't "strong enough to support a conviction." *Id.* at 229. In denying the motion, the trial court stated, "Certainly if the jury were to believe her testimony beyond

a reasonable doubt it wouldn't support a conviction. And it hasn't been corroborated by other evidence, so the Motion for Directed Verdict and/or a Motion of Acquittal is denied, exception allowed." *Id.* at 229.

Webb's cousins Shannon Billey and Brandy Billey testified as defense witnesses. Shannon testified that Webb would frequently visit her home during spring and summer 2009, and that Webb was present when A.S. spent the night on one occasion during that time period. She also testified that she never saw Webb touch A.S. inappropriately and that A.S. never told her that Webb touched her inappropriately.

Brandy—who is also A.S.' former stepmother—testified that A.S. never told her during spring and summer 2009 that Webb touched her inappropriately. Brandy also testified that about a year before the trial, A.S. told Brandy that Webb never touched A.S.

The state presented one rebuttal witness over Webb's objection. Salomon Pedraza testified that he lived with Shannon Billey during spring and summer 2009 and that A.S. spent the night on one occasion when Webb was there. He recalled that A.S. and Webb "were carrying on and talking real loud" in the living room when he was trying to sleep and that he asked them to quiet down. *Id.* at 252. The next morning, Pedraza saw Webb and A.S. talking in the bedroom by the kitchen. Pedraza testified that he didn't see Webb and A.S. doing anything inappropriate at that time.

Webb didn't renew his motion for a directed verdict at the close of all evidence,
nor did he object to the court's proposed jury instructions.

The jury found Webb guilty and recommended a 30-year prison sentence. Webb waived his right to a presentence report and the trial court immediately imposed a 30-year prison sentence.

Webb filed a direct appeal, arguing that (1) the trial court violated his constitutional right to a speedy trial, (2) the state presented insufficient evidence to support his conviction, and (3) the trial court imposed an excessive sentence. Regarding his sufficiency-of-the-evidence claim, Webb primarily attacked the strength and credibility of A.S.' testimony. He also cited the trial court's statements in denying his motion for directed verdict as a strong indication that the evidence was insufficient to support his conviction. Additionally, he asserted that the jury's verdict could only be explained by the admission of other-crimes evidence.

In affirming Webb's conviction and sentence, the Oklahoma Court of Criminal Appeals (OCCA) first applied *Barker v. Wingo*'s four-factor balancing test to Webb's speedy-trial claim. *See* 407 U.S. 514, 530 (1972). The court determined that three of the four factors—the reasons for the delay, Webb's assertion of his speedy trial right, and prejudice—weighed against Webb, whereas only one factor—the length of the delay—weighed against the state. Next, the OCCA applied *Jackson v. Virginia*, 443 U.S. 307 (1979), and found that while the trial evidence “was not overwhelming, it was sufficient for a reasonable trier of fact to find beyond a reasonable doubt that Webb committed the crime of rape by instrumentation.” R. vol. 1, 25 (citing *Spuehler v. State*, 709 P.2d 202, 203-04 (Okla. Crim. App. 1985), which relied on *Jackson*). Finally, the OCCA reasoned

< *Spuehler v. State*, 1985 OK.C.R. 5
132, 709 P.2d 202)

that Webb's sentence wasn't excessive because it fell within the statutory range and didn't shock the conscience.

II

Webb then sought federal habeas relief. He ultimately filed an amended § 2254 habeas application, generally reasserting the same three claims he raised on direct appeal: (1) the state violated his Fifth and Fourteenth Amendment due process rights by convicting him without sufficient evidence, (2) the trial court violated his Sixth Amendment right to a speedy trial, and (3) the trial court violated the Eighth Amendment by imposing an excessive sentence.² Because the OCCA adjudicated each of Webb's claims on the merits, Webb had to demonstrate to the district court that the OCCA's adjudication of his claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]; or . . . that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1)-(2).

After thoroughly reviewing the trial evidence, the district court determined that the OCCA's decision on the sufficiency-of-the-evidence claim (1) was neither contrary to, nor an unreasonable application of, *Jackson*³ and (2) wasn't based on an unreasonable

² Webb first filed a habeas application asserting four grounds for relief—i.e., the same three claims he asserted on direct appeal plus an ineffective-assistance-of-counsel claim. He later moved to add four additional grounds for relief. The magistrate judge construed his motion as a motion to file an amended habeas application and granted him leave to amend. Webb then filed the amended application, in which he generally asserted the same three grounds for relief that he raised in his direct appeal.

³ As noted, the OCCA didn't directly cite *Jackson*. But it did cite OCCA precedent that relied on *Jackson*. Thus, the district court correctly applied § 2254(d)(1) in reviewing

determination of the facts. Then, after carefully detailing the events leading up to Webb's trial, the court concluded the OCCA's analysis of the constitutional speedy trial claim "was consistent with Supreme Court law, and . . . was not based on an unreasonable determination of the facts." R. vol. 1, 353-54. The court noted that most of the delay was attributable to Webb's own actions. The court also rejected Webb's assertions that the delay was prejudicial, reasoning that Webb failed to cite any specific testimony that he claimed was lost through the death of witnesses.

Finally, the court determined that Webb failed to identify a federal constitutional violation based on the length of his sentence—30 years—that fell within the state statutory range of punishment for his offense—20 years to life. *See Dennis v. Poppel*, 222 F.3d 1245, 1258 (10th Cir. 2000) (explaining that challenges to state sentencing decisions generally aren't cognizable on federal habeas review "unless . . . the sentence imposed is outside the statutory limits or unauthorized by law"). For these reasons, the district court denied habeas relief and declined to issue a COA.

A few weeks later, Webb filed a Rule 60(b) motion. As relevant to his COA application, Webb asserted that the district court (1) failed to review the sufficiency of the evidence de novo, and (2) overlooked his argument that A.S.' testimony wasn't clear and convincing as required for uncorroborated testimony. Webb further asserted that the court failed to address his claims that the trial court (1) erroneously denied his motion for a directed verdict after expressly finding the trial evidence insufficient to support a

the sufficiency-of-the-evidence claim. See *Turrentine v. Mullin*, 390 F.3d 1181, 1203 (10th Cir. 2004).

before the trial court denied the motion. *Id.* at 408 (quoting R. vol. 2, 228-29). And the court acknowledged “the apparent inconsistency between the trial court’s statement that the victim’s uncorroborated testimony wouldn’t support a conviction, even if the jury believed her beyond a reasonable doubt, and that court’s denial of the motion for a directed verdict.” *Id.* But the court rejected Webb’s directed-verdict and jury-instruction arguments for three reasons.

First, the court rejected Webb’s assertion that state law required the trial court to direct a verdict or instruct the jury on acquittal. The court reasoned that, contrary to Webb’s reading of state law, a trial court’s decision to direct a verdict is discretionary. See Okla. Stat. tit. 22, § 850 (“If, at any time after the evidence on either side is closed, the court deem[s the evidence] insufficient to warrant a conviction, it may advise the jury to acquit the defendant.”).

Second, the court determined that even if the trial court abused its discretion under state law by failing to direct a verdict and instruct the jury on acquittal, those state-law violations wouldn’t necessarily give rise to a cognizable habeas claim. See *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”).

Third, the court concluded that neither the denial of the motion for a directed verdict nor the failure to sua sponte instruct the jury it could acquit him violated Webb’s due process rights because he failed to demonstrate that the evidence was insufficient to

support his conviction. See *Tiger v. Workman*, 445 F.3d 1265, 1267 (10th Cir. 2006) (explaining that absent constitutional mandate requiring particular jury instruction, “a habeas petitioner must show that, in the context of the entire trial, the error in the instruction was so fundamentally unfair as to deny the petitioner due process”); *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000) (explaining that *Jackson* standard applies “[i]n reviewing both the sufficiency of the evidence to support a conviction and a denial of a motion for judgment of acquittal”).

III

Webb now seeks a COA to appeal the district court’s denial of his habeas application and his Rule 60(b) motion.⁵ *See* 28 U.S.C. § 2253(c)(1)(A) (requiring state prisoner appealing denial of § 2254 application to obtain COA); *Spitznas v. Boone*, 464 F.3d 1213, 1218 (10th Cir. 2006) (holding that prisoner appealing denial of Rule 60(b) motion in habeas case generally must obtain COA). Because the district court rejected Webb’s constitutional claims on the merits, we will issue a COA only if Webb shows “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Our task in determining whether to grant a COA isn’t to consider the merits of Webb’s constitutional claims de novo. Rather, our review is limited to “an overview of the claims in the habeas petition and a general assessment of their merits.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). And because the Antiterrorism and Effective Death

⁵ We grant Webb’s motions to supplement his combined opening brief and COA application.

this claim to the district court—either in his habeas application or in his Rule 60(b) motion.

Instead, in his habeas application, Webb asserted an undeveloped double-jeopardy claim arising from the trial court's admission of other-crimes evidence. The district court denied habeas relief on this claim because it was cursory, unexhausted, and subject to an anticipatory procedural bar, and because Webb failed to allege any excuse for failing to challenge the admission of other-crimes evidence on direct appeal. *See O'Sullivan v.*

Boerckel, 526 U.S. 838, 845 (1999) (“[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.”); *Woodruff v. State*, 910 P.2d 348, 350 (Okla. Crim. App. 1996) (“Issues which were not raised on direct appeal, but could have been raised are waived.”); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (explaining cause-and-prejudice showing necessary to overcome anticipatory procedural bar).

Likewise, in his Rule 60(b) motion, Webb suggested only that the OCCA and the district court violated his due process rights and “attached jeopardy” by determining the evidence was sufficient to support his conviction after the trial court stated that same evidence was insufficient. R. vol. 1, 364.

But Webb now argues something different: he asserts that the *trial court* violated his right to be free from double jeopardy when it suggested the evidence was insufficient but then denied his motion for a directed verdict and permitted the jury to convict him. According to Webb, the trial court’s inconsistent ruling—i.e., its statement regarding the

insufficiency of the evidence followed by its denial of his motion for a directed verdict—constitutes an acquittal.

Because Webb raises this particular double-jeopardy claim for the first time in his combined COA application and appellate brief, we decline to consider it.⁶ *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (stating general rule against considering arguments raised for the first time on appeal); *see also Patrick v. Patton*, 634 F. App'x 220, 222 n.4, 223 (10th Cir. 2015) (unpublished) (applying *Viera*'s general rule

⁶ Even if we considered Webb's claim, we would reject it. His claim might have merit if we focused only on what the trial court said. But what matters is what the trial court did. As Webb acknowledges in his statement of this issue, the trial court denied his motion for a directed verdict. Had the trial court granted the motion and then permitted the jury to convict him, Webb might have a valid habeas claim, presuming he could overcome his failure to exhaust this claim in state court. See *Smith v. Massachusetts*, 543 U.S. 462, 465-67 (2005) (concluding that trial court violated double jeopardy clause when it found evidence supporting essential element of offense insufficient, granted defendant's motion for required finding of not guilty under Massachusetts Rule of Criminal Procedure 25(a), later reconsidered and reversed its ruling, and then permitted jury to convict defendant). But the trial court denied Webb's motion for a directed verdict. And nothing in the record suggests that either the state or Webb asked the trial court to reconcile its inconsistent statements with its ultimate ruling.

Moreover, we question whether Webb could have even challenged the denial of his motion on direct appeal. After the trial court denied his motion, Webb proceeded to put on his own evidence. Under Oklahoma law, this means he waived his right to challenge the denial of the motion for directed verdict. See *Smith v. State*, 509 P.2d 1391, 1397 (Okla. Crim. Ct. App. 1973) (adopting rule that "a defendant by offering evidence after a denial of a motion for acquittal waives that motion and thereafter the question of the sufficiency of the evidence to sustain a conviction is to be determined by an examination of the entire record"). Perhaps this explains why Webb merely referenced the denial of his motion in his brief to the OCCA, and didn't frame that denial as a separate trial error, let alone fairly present it as a federal double-jeopardy claim. *See Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) ("[T]he crucial inquiry is whether the 'substance' of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim." (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971))). These circumstances bolster our decision not to consider Webb's belated attempt to recast his due process claim as a double-jeopardy claim.

and refusing to consider habeas petitioner's arguments because they were "not presented in his petition" and were instead raised for first time in his COA application).

B

Next, Webb asserts that the district court failed to adequately address his directed-verdict and jury-instruction arguments. In his habeas application, he asserted both arguments as support for his broader claim that the state violated his due process rights by convicting him based on insufficient evidence. And he again asserts that because the district court didn't rule on these arguments, he shouldn't be required to obtain a COA to raise them on appeal. We disagree with both assertions.

It's true that the district court didn't address these particular arguments in its order denying Webb's habeas application. But Webb asked the court to remedy this oversight when he filed his Rule 60(b) motion. And the court did so. In denying Webb's Rule 60(b) motion, the court expressly acknowledged that the trial court suggested the evidence was insufficient before the trial court denied Webb's motion for a directed verdict. But the district court nevertheless rejected Webb's arguments. First, it reasoned that Oklahoma law doesn't require a trial court to direct a verdict or instruct the jury on acquittal; Oklahoma law instead leaves that decision to the trial court's discretion. See Okla. Stat. tit. 22, § 850 (providing that trial court "may advise the jury to acquit the defendant" if court deems evidence insufficient). Second, the district court concluded that even if the trial court violated state law by failing to direct a verdict or to instruct the jury on acquittal, any such violations wouldn't necessarily give rise to a cognizable habeas claim. See Estelle, 502 U.S. at 67-68. Third, the court reasoned that Webb failed to demonstrate

a due process violation arising from the omitted jury instruction because he didn't show that the omission infected the entire trial. See *Tiger*, 445 F.3d at 1267. Finally, the court determined that Webb didn't establish a due process violation arising from the denial of his motion for a directed verdict because he didn't demonstrate that the evidence was insufficient to support his conviction. See *Wood*, 207 F.3d at 1228.

Because the district court clearly ruled on the merits of the directed-verdict and jury-instruction arguments, Webb needs a COA before we can consider whether the court properly rejected those arguments. See *Spitznas*, 464 F.3d at 1218. But we decline to grant a COA because we conclude that no reasonable jurists would debate the district court's determination that these arguments (don't) entitle Webb to habeas relief on his due process claim. Critically, the common thread running through Webb's directed-verdict and jury-instruction arguments (and even his newly minted double-jeopardy argument) is his belief that the evidence is insufficient to support his conviction. And, as we discuss next, we find no basis for granting Webb's request for a COA to appeal the district court's determination that the OCCA properly evaluated the evidence under the *Jackson* standard. See *Jackson*, 443 U.S. at 319.

C

As his third issue, Webb argues that "the state's evidence is insufficient to sustain" his conviction, Aplt. Br. 21, and asserts that the district court didn't adequately address his specific complaints regarding the sufficiency of A.S.' testimony. There's no question that Webb fairly presented his sufficiency-of-the-evidence arguments to the OCCA and the district court. But Webb has a high hurdle to overcome before he can obtain habeas

relief on a challenge to the sufficiency of the evidence. *See Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (explaining that such challenges “face a high bar . . . because they are subject to two layers of judicial deference”).

“First, on direct appeal, ‘it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial,’” and the appellate court “may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.” *Id.* (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)). “[S]econd, on habeas review, ‘a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was “objectively unreasonable.”’” *Id.* (quoting *Cavazos*, 565 U.S. at 2).

To clarify, the OCCA’s task was to determine whether, “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. 307, 319. And to establish the essential elements of rape by instrumentation, the state had to prove beyond a reasonable doubt that Webb penetrated A.S.’ anus or vagina without her consent, that she was under 16 at the time, and that he did so with an inanimate object or body part other than his penis. *See Okla. Unif. Jury Instr. CR 4-127* (listing elements of second-degree rape by instrumentation).

At trial, A.S. confirmed, albeit reluctantly, the substance of her preliminary hearing testimony. That testimony established every essential element of the crime—i.e.,

that Webb digitally penetrated A.S.'s vagina without her consent when A.S. was 14 years old. *See id.*

The OCCA identified *Jackson* as the appropriate standard for evaluating the trial evidence and, applying *Jackson*, concluded that the evidence was sufficient to support Webb's conviction. Thus, the district court's task was to determine whether the OCCA's adjudication of Webb's sufficiency-of-the-evidence claim "resulted in a decision that was contrary to, or involved an unreasonable application of *Jackson*, or "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1)-(2).

The district court thoroughly considered the evidence when it denied Webb's habeas application and again when it denied his Rule 60(b) motion. Both times, the court determined that there was nothing unreasonable about either the OCCA's (or its own) application of the *Jackson* standard or the OCCA's determination of the facts in light of the evidence presented at trial. Viewing the evidence through AEDPA's doubly deferential lens, we conclude that no reasonable jurist would debate the district court's assessment or its ultimate denial of habeas relief with respect to Webb's due process claim. Thus, we deny his request for a COA on that claim.

D

Finally, Webb asserts that the district court failed to consider the factual support for his speedy trial claim. But we have carefully reviewed the appellate record, the OCCA's decision, the district court's assessment of this claim in its order denying habeas relief, and the applicable law. As the district court concluded, Webb's own actions

contributed to the bulk of the pretrial delay, and Webb failed to demonstrate that the OCCA's treatment of his speedy-trial claim "was [in]consistent with Supreme Court law," or "based on an unreasonable determination of the facts." R. vol. 1, 353-54. Because reasonable jurists wouldn't debate the district court's assessment of this claim, we also decline to issue a COA on this claim.

* * *

In sum, Webb hasn't shown that reasonable jurists could debate the correctness of the district court's denial of his § 2254 habeas application. *Slack*, 529 U.S. at 484. Thus, we deny his request for a COA and dismiss this matter. We also deny as moot his renewed request for appointment of counsel.

Entered for the Court

Nancy L. Moritz
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

CHRISTOPHER WAYNE WEBB,

Petitioner,

v.

JOE ALLBAUGH, DOC Director,

Respondent.

Case No. CIV 13-265-RAW-KEW

OPINION AND ORDER

This matter is before the Court on Petitioner's amended petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and the supplement to the amended petition (Dkts. 21, 22, 27). Petitioner, a pro se inmate currently incarcerated at Lawton Correctional Facility in Lawton, Oklahoma, attacks his conviction and 30-year sentence in Bryan County District Court Case No. CF-2009-387 for Rape by Instrumentation, After Conviction of Two or More Felonies. He sets forth the following grounds for relief:

- I. Insufficient evidence.
- II. Denial of a speedy trial.
- III. Excessive sentence.

★ The respondent concedes that Petitioner has exhausted his state court remedies for the purpose of federal habeas corpus review. The following records have been submitted to the court for consideration in this matter:

- A. Petitioner's direct appeal brief.
- B. The State's brief in Petitioner's direct appeal.

-Appendix-B-

- C. Summary Opinion affirming Petitioner's judgment and sentence. *Webb v. State*, No. F-2012-101 (Okla. Crim. App. May 3, 2013).
- D. Transcripts and state court record.

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act, federal habeas corpus relief is proper only when the state court adjudication of a claim:

(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).

Ground I: Sufficiency of the Evidence

Petitioner was convicted of the rape by instrumentation of A.S., a 14-year-old girl.

He alleges the State failed to introduce sufficient evidence of the crime, and in particular, the victim's testimony was insufficient to sustain his conviction. On direct appeal the Oklahoma Court of Criminal Appeals (OCCA) denied relief on this claim:

[W]e find that although the evidence presented against Webb at trial was not overwhelming, it was sufficient for a reasonable trier of fact to find beyond a reasonable doubt that Webb committed the crime of rape by instrumentation. *Head v. State*, 146 P.3d 1141, 1144 (2006). See also *Spuehler v. State*, 709 P.2d 202, 203-04 (Okla. Crim. App. 1985).

Webb v. State, No. F-2012-101, slip op. at 2 (Okla. Crim. App. May 3, 2013).

"Sufficiency of the evidence can be considered to be a mixed question of law and fact." *Case v. Mondagon*, 887 F.2d 1388, 1392 (10th Cir. 1989), *cert. denied*, 494 U.S. 1035

(1990). In federal habeas review of a state court 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 v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

The Supreme Court repeatedly has emphasized the deference the reviewing court owes to the trier of fact and “the sharply limited nature of constitutional sufficiency review.” *Wright v. West*, 505 U.S. 277, 296 (1992) (citing *Jackson*, 443 U.S. at 319). “[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Jackson*, 443 U.S. at 326. The court must “accept the jury’s resolution of the evidence as long as it is within the bounds of reason.” *Grubbs v. Hannigan*, 982 F.2d 1483, 1487 (10th Cir. 1993) (citing *United States v. Edmondson*, 962 F.2d 1535, 1548 (10th Cir. 1992)). “To be sufficient, the evidence supporting the conviction must be substantial; that is, it must do more than raise a mere suspicion of guilt.” *Beachum v. Tansy*, 903 F.2d 1321, 1332 (10th Cir.), *cert. denied*, 498 U.S. 904 (1990) (citing *United States v. Troutman*, 814 F.2d 1428, 1455 (10th Cir. 1987)).

A.S., the victim, testified that Petitioner was her mother’s ex-boyfriend, and during the spring and summer months of 2009, when she was 14 years old, she often hung out and used methamphetamine and marijuana with him (Tr. 71-73, 88-89, 106). A.S. and Petitioner would get together and use drugs at the homes of other people, including the home of Shannon Billey in Durant, Oklahoma (Tr. 73-74). A.S. first denied that Petitioner had

touched her or that she woke up in bed with him, but after a recess, she reluctantly changed her story (Tr. 75, 85). She then recalled her preliminary hearing testimony in which she testified that she woke up one morning with Petitioner's fingers in her vagina (Tr. 76-77, 85). She also testified that her preliminary hearing testimony was true, and the act occurred in the spring or summer of 2009 (Tr. 85). She was at Shannon Billey's house when the incident occurred (Tr. 86).

Brandy Webb, Petitioner's estranged wife from whom he was separated, testified that in the late spring to summer of 2009, she learned from Petitioner that he was alone at a home with A.S. (Tr. 99-103). Ms. Webb called law enforcement in Bryan County to report this information (Tr. 102-03).

On June 19, 2009, David Cathey, an investigator with the Bryan County District Attorney's Office, went to the home of Melissa Wright-Sanchez, A.S.'s mother, and spoke to Wright-Sanchez about the matter (Tr. 107-08, 113-14). Investigator Cathey also spoke with A.S. who disclosed the allegations against Petitioner (Tr. 114-15). A.S. then told her mother what she had disclosed to Cathey (Tr. 114-15). Cathey arranged for a forensic interview of A.S. on June 22, 2009, at the ABC House, a facility dedicated to interviewing children who are crime victims (Tr. 115-16).

Ms. Wright-Sanchez told Petitioner about A.S.'s allegations (Tr. 112). Petitioner then took Ms. Wright-Sanchez to Dallas, where they used drugs, causing Wright-Sanchez and A.S. to miss their appointment at the ABC House (Tr. 108, 112). A forensic interview of A.S. eventually was completed, resulting in the removal of all of Wright-Sanchez's children from the home (Tr. 109, 116).

Shannon Miller testified that she was Petitioner's girlfriend from 1989 to 1994 or 1995 (Tr. 128). Petitioner lived with Ms. Miller and her son, her daughter C.O., and her niece A.A. (Tr. 129-30). During that time, Petitioner stayed with the children while Ms. Miller was at work (Tr. 134).

C.O., Sharon Miller's daughter, testified she was 11 years old when she woke up one night with Petitioner's hands in her panties (Tr. 137-38). This happened a couple of times, but it progressed to her sitting on his lap, then to her taking off her panties and sitting on him, and finally to her losing her virginity (Tr. 138-39). C.O. told her friends what was happening, and Petitioner was arrested, but C.O. recanted when Petitioner was able to communicate with her and threatened to kill her, her mother, and her dog (Tr. 138-41). After C.O. recanted, Petitioner's behavior resumed, and he rewarded her silence with bicycle rides, ice cream, and allowing her to play at a friend's house (Tr. 141-42). As C.O. grew older, Petitioner rewarded her silence with marijuana (Tr. 141-42).

A.A. testified she was 11 years old when she came to live with her aunt Sharon Miller, A.A.'s cousin, and Petitioner (Tr. 151-52). Petitioner had A.A. sit on his lap while he moved around, and he touched A.A. on her private area and had her stroke him (Tr. 153). Petitioner threatened to kill A.A., her mother, her brother, and her friend, if she told anyone (Tr. 154-55). A.A. was 12 years old when she told her best friend what was happening (Tr. 153-54). The friend made A.A. tell the school counselor, and A.A. moved out of the home and returned to California to live with her mother (Tr. 153).

Shannon Billey testified on Petitioner's behalf that during the spring and summer of 2009, A.S. visited Petitioner whenever Petitioner was at Shannon's house (Tr. 172-74).

Billey claimed A.S. tried to flirt with Petitioner, but Shannon saw no indication that Petitioner took A.S. seriously or had any interest in her (Tr. 174-75). Shannon also testified that A.S. spent the night at her house one night during that time, and when A.S. helped Shannon cook breakfast the next morning, nothing seemed out of the ordinary (Tr. 175-76).

Brandy Billey, Petitioner's cousin and A.S.'s stepmother at the time of the alleged incident, testified that A.S. told her she was tired of the court system and the DHS, that she did not realize her mother would be in trouble, and if the charges against her mother were dropped, she would not testify (Tr. 179-81). Brandy also testified that A.S. told her that Petitioner did not touch her, but Brandy did not tell the authorities that A.S. had recanted (Tr. 182, 189).

Solomon Pedraza, Shannon Billey's ex-boyfriend, testified he was living with Shannon in the spring and summer of 2009 (Tr. 192). A.S. came to Shannon's house whenever Petitioner was visiting, and they always were happy to see each other (Tr. 193). One night around April 2009, A.S. spent the night, and Mr. Pedraza had to ask her and Petitioner to be quieter, because they were "carrying on and talking real loud" in the living room (Tr. 194-95). Mr. Pedraza assumed A.S. had left when it became quiet, but when he got up the next morning, he saw her and the defendant talking in the bedroom by the kitchen (Tr. 194). The bedroom door was slightly open, because it would not lock (Tr. 195).

To determine whether there was sufficient evidence presented at trial to sustain petitioner's conviction, the Court first must look to Oklahoma law for the elements required for the crime. *Jackson*, 443 U.S. at 324 n.16; *see also Torres v. Mullin*, 317 F.3d 1145, 1152 (10th Cir.), *cert. denied*, 540 U.S. 1035 (2003). The applicable statute for rape by

instrumentation provides:

No person may be convicted of rape by instrumentation in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, penetration of the anus or vagina;

Second, of any other person;

Third, by an inanimate object, or by a part of the human body other than the penis;

Fourth, without her consent;

Fifth, Where the victim is under the age of sixteen (16) years.

Any sexual penetration, however slight, is sufficient to complete the crime of rape by instrumentation.

OUJI-CR 4-127

(Dkt. 33-6 at 149; Okla. Stat. tit. 21, § 1114(A)(5) (2008)).

After careful review, the court finds the evidence was sufficient under the standard of *Jackson v. Virginia*. The testimony of A.S. satisfied the elements of the crime. Furthermore, Petitioner's actions in taking Ms. Wright-Sanchez to Dallas, where she used drugs, resulted in A.S. missing her forensic interview appointment at the ABC house. This circumstantial evidence that Petitioner caused the appointment to be missed is further evidence of his guilt.

The Court further finds the OCCA's decision on this claim was not contrary to, or an unreasonable application of, Supreme Court law, and the decision was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Plaintiff's claim that the

evidence was insufficient fails.

Petitioner also argues some very cursory claims that were not presented on direct appeal. These claims are unexhausted and would be procedurally barred, if Petitioner were to present the claims to the state courts. The unexhausted claims include allegations that A.S. was badgered and threatened to obtain her accusations and testimony, the trial court failed to instruct on impeachment, the spousal privilege was denied, and improper introduction of other crimes. He also claims A.S.'s testimony had no indicia of reliability, and the prosecutor was allowed to present highly inflammatory testimony by irrelevant witnesses. Petitioner further complains that Investigator Cathey had ill will against him, having implicated Petitioner in previous crimes. Petitioner, however, fails to cite to the record or to any authority for these claims.

This Court finds these cursory claims are unexhausted and subject to an anticipatory procedural bar, because any attempt to present the claims in state court in a post-conviction application would be procedurally barred under state law. See *Woodruff v. State*, 910 P.2d 348, 350 (Okla. Crim. App. 1996) ("Issues which were not raised on direct appeal, but could have been are waived."). Petitioner also has failed to even allude to, much less establish, cause and prejudice for the omissions of these claims in his direct appeal. See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In addition, Petitioner does not claim he is factually innocent of the crime, but instead claims only that he is legally innocent, based on these cursory claims.) Therefore, the cursory claims are subject to an anticipatory procedural bar.

Ground II: Speedy Trial

Petitioner next claims he was denied a speedy trial. The OCCA found there was no

constitutional violation:

[W]e find that Webb was not deprived of his constitutional right to a speedy trial. When reviewing a claim of the denial of the right to a speedy trial, we apply the four balancing factor established by the United States Supreme Court in *Barker v. Wingo*, 407 US. 541, 530 (1972): (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his right, and (4) prejudice to the defendant. These are not absolute factors, but are balanced with other relevant circumstances in making a determination. *Ellis v. State*, 76 P.3d 1131, 1136. Although the length of the delay weighed against the State, the remaining three of the four *Barker* factors weigh against a finding that Webb was denied a speedy trial, this proposition requires no relief.

Webb, No. F-2012-101, slip op. at 1-2.

The record shows that Petitioner was charged with rape by instrumentation on July 14, 2009, and he appeared in court on July 23, 2009, at which time his bond was set at \$250,000 (O.R. 1,6). His jury trial was held on January 25, 2012, approximately 2-1/2 years later. The reason for the delay is important, because "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531.

On October 7, 2011, Petitioner filed a state petition for a "writ of habeas corpus for dismissal," concerning the issue of delay in the proceedings (O.R. 57-63) (Dkt. 33-6). After reviewing the entire court file on the case, the trial court denied the petition on November 3, 2011, setting forth thorough Findings of Fact and Conclusions of Law about the reasons for the delay in Case No. CF-2009-387:

The State of Oklahoma filed the information in this case on or about July 14, 2009, and the felony warrant was issued on the same day.

Also, on or about July 14, 2009, the State filed a separate information in CF-09-386 (charging the Defendant with various felonies).

The Defendant was arrested pursuant to an arrest warrant on or about July 22,

2009.

The Defendant appeared for initial appearance on or about July 23, 2009. The Court found the Defendant to be indigent at his initial appearance, and Michael Haggerty, II, Esq., was appointed as the Defendant's attorney. Also, on or about July 23, 2009, this case was set for preliminary hearing on October 6, 2009.

On or about August 6, 2009, the State filed a separate information on CF-09-434. No warrant was issued in that case, because the Defendant was already in custody in lieu of bond.

On or about August 18, 2009, the Oklahoma Indigent Defense System (OIDS) assigned Larry Monard, Esq. to represent the Defendant.

On or about August 27, 2009, the State filed a motion to continue the preliminary hearing, which was by agreement with counsel for the Defendant. The Honorable Trace Sherrill, Special Judge, granted the motion to continue the preliminary hearing, and reset the preliminary hearing for November 30, 2009.

Judge Sherrill heard the preliminary hearing in this case (and in CF-09-386) on or about November 30, 2009, and the Defendant was ordered held for trial.

The Defendant appeared before the undersigned for formal arraignment on or about December 15, 2009, and the Court entered a not guilty plea on behalf of the Defendant (because he stood mute as to entering a formal plea). Also on that date, the Defendant waived his right to a jury trial on the Court's January/February 2010 jury term. The matter was then set on the Court's March 22, 2010, disposition docket.

On or about March 22, 2010, the Defendant appeared before the undersigned and the [sic] requested a jury trial. The case was set on the Court's April/May 2010 jury term.

On or about April 27, 2010, the defense filed a motion to continue the case from the April/May 2010 jury docket, and the State did not object.

On or about May 20, 2010, the Honorable Rocky Powers, Associate District Judge, entered a minute order striking the case from the April/May 2010 jury

docket, and set the matter for the Court's next disposition docket on August 16, 2010.

On or about August 16, 2010, the Defendant again appeared before the undersigned and requested a jury trial. The State elected to proceed first to jury trial in CF-09-386. The Court set that case on the September/October 2010 jury term.

On or about September 16, 2010, the Defendant appeared before Judge Powers, and he advised Judge Powers that he intended to represent himself at jury trial. Further, the Defendant asked Judge Powers to continue the matter from the September/October 2010 jury term. Judge Powers granted the Defendant's request for continuance, and set the matter on the Court's December 13, 2010, disposition docket.

On or about December 13, 2010, the State, again, elected to proceed first to jury trial in CF-386.

Also, on or about December 13, 2010, Larry Monard, Esq., filed a request to be allowed to withdraw as the Defendant's legal advisor for the reason that the Defendant "filed suit in the Oklahoma Supreme Court on the 7th of December 2010 against Larry Monard and the Oklahoma Indigent Defense System for allegedly violating his constitutional rights." Mr. Monard referenced cause number 108981 that was filed with the Supreme Court, in which case the Supreme Court refused to assume jurisdiction. Also, on or about December 13, 2010, Judge Powers allowed Mr. Monard to withdraw as the Defendant's legal advisor. Further, on that date, Judge Powers directed OIDS to provide the Defendant alternate standby counsel.

On or about January 11, 2011, Charles Timothy Laughlin, the Chief of the Non-Capital Trial Division for OIDS submitted a request to Judge Powers to reconsider his decision wherein he directed OIDS to provide alternate standby counsel.

On or about January 11, 2011, the Defendant again appeared before Judge Powers, and Judge Powers again advised the Defendant of his right to counsel. Judge Powers then appointed Whitney Kerr, Esq., as the Defendant's new standby counsel.

On or about January 14, 2011, Judge Powers granted the Defendant's request

to strike the case from the January/February 2100 [sic] jury term, without objection from the State. Judge Powers then set a jury trial date of April 25, 2011.

On or about April 25, 2011, the Defendant filed a pro se "Motion for Continuance and (or) Demurrer." In the Defendant's pro se motion, he referenced various federal claims he has against Mr. Monard, the Bryan County District Attorney's Office, District Attorney Emily Redman, Assistance District Attorney Julie Naifeh and Judge Powers. Judge Powers granted the Defendant's request for a continuance, and then disqualified himself.

On or about August 9, 2011, the Defendant filed a pro se notice that he was seeking a "writ of habeas corpus relief" from the "Federal Court."

On or about August 18, 2011, CF-09-386 was set for a jury trial on the Court's September/October 2011 jury term (specifically on September 26, 2011).

On or about September 23, 2011, the Defendant appeared before the undersigned for a pre-trial hearing in CF-09-386. The Defendant was obviously visibly injured at the pre-trial hearing, which he alleged occurred at the hands of other inmates. The Court continued the Defendant's September 26, 2011, jury trial until September 27, 2011, to allow the Defendant to be medically observed and "cleared" for trial. The Court was notified shortly thereafter that the Defendant's medical condition was such that it was appropriate to proceed to jury trial on September 27, 2011.

Also, on or about September 23, 2011, at the Defendant's appearance before the undersigned, he again tried to put off his case in CF-09-386 when referring to one of his various "writs" he has pursued in federal court he asked the undersigned, "That wouldn't allow me a stay of proceedings until a ruling has come back in that court?" That request for a "stay of proceedings" was denied.

On or about September 27, 2011, the Defendant appeared before the undersigned for a jury trial in CF-09-386. The jury found the Defendant guilty of one felony count, and recommended that he serve a term of five years in the Oklahoma Department of Corrections. Also on or about that date, the Defendant waived his right to a pre-sentence report, and the Court sentenced him instantler in accordance with the jury's verdict and recommendation.

On or about October 11, 2011, the Defendant filed, pro se, the instant request for "Writ of Habeas Corpus for Dismissal." In the Defendant's petition, he alleged that he was the victim of various "speedy trial" violations.

State v. Webb, No. CF-09-387, slip op. at 1-4 (Bryan County Dist. Ct. Nov. 3, 2011) (O.R. 75-78) (Dkt. 33-6). The trial court's factual findings are entitled to a presumption of correctness, unless Petitioner produces clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1).

Citing *Barker* and Oklahoma case law, the trial court also entered Conclusions of Law in its denial of the state petition for a writ of habeas corpus:

As this Court previously held in CF-09-386, wherein the Defendant filed a similar request, clearly, and almost singularly, the Defendant is responsible for the delay in his cases being presented to a jury for trial. Specifically, the Defendant has used scheming and manipulation to put off the inevitable presentation of this matter to a jury by his frivolous filing with this Court, the Oklahoma Supreme Court, the Oklahoma Court of Criminal Appeals and the Federal Courts . . . and by his efforts to remove his legal counsel and the judge previously assigned to this case. The Defendant has continued to file various meritless motions, writs and other rambling documents that appear to be designed to portray himself as a victim. However, these documents contain virtually nothing of any legal relevance, and do nothing but waste the Court's time. Certainly, this case will not be dismissed because of the Defendants's obvious obstructionist tactics, nor will it be dismissed because of his flagrant misuse of courts at almost all levels.

For the reasons set forth above, the Defendant's "Motion to Dismiss" is **DENIED**.

Webb, No. CF-2009-387, slip op. at 4 (Bryan County Dist. Ct. Nov. 3, 2011) (emphasis in original); (O.R. 78; Dkt. 33-6).

After careful review, this Court finds the OCCA's analysis of this claim was consistent with Supreme Court law, and the decision was not based on an unreasonable

determination of the facts. *See* 28 U.S.C. § 2254(d). Furthermore, this Court agrees that the length of the delay weighed against the State, but Petitioner attempted numerous legal tactics to delay or stop his prosecution. *See Webb*, No. F-2012-101, slip op. at 2. He sued the trial judge and the entire indigent defense system, resulting in recusal and disqualifications. In addition, he continually delayed the progress of the case by filing motions to continue the case.

Perhaps most important is whether the defendant has actively asserted his right to a speedy trial. This is not satisfied merely by moving to dismiss after the delay has already occurred. Such a motion could be, indeed may well be, strategic. The question, instead, is whether the defendant's behavior during the course of litigation evinces a desire to go to trial with dispatch. *See Barker*, 407 U.S. at 536 (“[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial.”); *United States v. Dirden*, 38 F.3d 1131, 1138 (10th Cir.1994) (finding that the third factor weighed against a defendant who moved for a continuance and acquiesced when the trial date was vacated twice); *United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) (“We are unimpressed by a defendant who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire.”).

United States v. Batie, 433 F.3d 1287, 1291 (10th Cir.), *cert. denied*, 548 U.S. 908 (2006).

The record shows that on August 9, 2011, Petitioner notified the trial court that he had filed federal actions concerning the length of his detainment (O.R. 37), but he subsequently sought to delay his trial as set forth above.

Finally, this Court agrees with the OCCA's determination that the delay in bringing Petitioner to trial did not prejudice him. In *Barker*, 407 U.S. 534, prejudice was equated with evidentiary problems caused by the delay, such as the death or unavailability of a witness. Petitioner argued on appeal that his defense was “permanently damaged” by the deaths of

witnesses “whose statements never were memorialized.” (Dkt. 32-1 at 14). He has not, however, advised what the testimony of those witnesses would have been. *See Castro v. Ward*, 138 F.3d 810, 820 (10th Cir. 1998) (finding no prejudice when petitioner did not claim any specific witness or evidence was rendered unavailable or less persuasive because of the passage of time). Ground II of this habeas petition is meritless.

Ground III: Excessive Sentence

Petitioner alleges his 30-year sentence is excessive under the facts and circumstances of the case. Under Oklahoma law, the crime of rape by instrumentation, after former conviction of two or more prior felonies, has a punishment range of 20 years to life imprisonment (O.R. 168; OUJI-CR 10-19). *See Okla. Stat. tit. 21, § 51.1(B)* (Supp. 2002).

The OCCA denied relief on this claim:

... [W]e find Webb did not receive an excessive sentence. A sentence within the statutory range will be affirmed on appeal unless, considering all the facts and circumstances, it shocks the conscience of this Court. *Rea v. State*, 34 P.3d 148, 149 n.3 (Okla. Crim. App. 2001). Webb’s sentence does not shock the conscience of the Court.

Webb, No. F-2012-101, slip op. at 2.

This Court finds Petitioner has failed to identify any federal constitutional violation in this claim, which is the core predicate for habeas relief. *See* 28 U.S.C. § 2254(a). He has not even shown that his sentence falls outside the state statutory limits. *See Dennis v. Poppel*, 222 F.3d 1245, 1258 (10th Cir. 2000), *cert. denied*, 534 U.S. 887 (2001) (stating challenges to state sentencing decisions “are not generally constitutionally cognizable, unless it is shown the sentence imposed is outside the statutory limits or unauthorized by law”). This claim also fails.

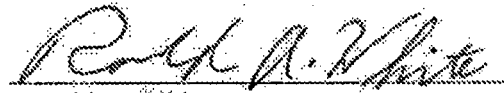
Certificate of Appealability

The court further finds Petitioner has failed to make a “substantial showing of the denial of a constitutional right,” as required by 28 U.S.C. § 2253(c)(2). In addition, he has not shown “at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, a certificate of appealability cannot be issued.

ACCORDINGLY, Petitioner’s amended petition for a writ of habeas corpus is **DENIED**, and Petitioner is **DENIED** a certificate of appealability.

IT IS SO ORDERED this 22nd day of August 2016.

Dated this 22nd day of August, 2016.


Ronald A. White
United States District Judge
Eastern District of Oklahoma

AO450 (Rev. 5/85) Judgement in a Civil Case

UNITED STATES DISTRICT COURT

EASTERN

DISTRICT OF

OKLAHOMA

JUDGMENT IN A CIVIL CASE

CHRISTOPHER WAYNE WEBB

V.

JOE ALLBAUGH

Case Number: CIV-13-265-RAW-KEW

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Petitioner's petition for a Writ of Habeas Corpus is DENIED and the Certificate of Appealability is DENIED.

8/22/16

Date

PATRICK KEANEY

Clerk

s/ A Green

(By) Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

CHRISTOPHER WAYNE WEBB,

Petitioner,

v.

JOE ALLBAUGH, DOC Director,

Respondent.

Case No. CIV 13-265-RAW-KEW

OPINION AND ORDER

On August 22, 2016, Petitioner's amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was denied, and he also was denied a certificate of appealability (Dkt. 36). On September 14, 2016, Petitioner filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 60(b) (Dkt. 38), a motion for appointment of counsel (Dkt. 39), a motion for recusal of the district judge (Dkt. 40), and a motion for complete record of court transcripts (Dkt. 41). Petitioner subsequently filed a notice of appeal to the Tenth Circuit Court of Appeals on September 19, 2016 (Dkt. 42). The Tenth Circuit has abated the appeal, pending a decision on the motion to alter or amend the judgment (Dkt. 49).

Motion for Recusal/Transfer (Dkt. 40)

Petitioner's "Motion for Independent Action/Recusal of Judge/Court" (Dkt. 40), alleges the following:

The - petitioner - moves the Hon. Court to entertain (a) [sic] independent action to relieve the petitioner from judgment; and (or) remove the Hon. Ronald A. White from any further proceedings in direct relation to the petitioner's litigation due to his failure to abide, and follow direct/clear rules

-Appendix-E-

of the Federal criminal/civil procedures, his failure to remain neutral (or) objective by becoming an advocate for the state, by abusing his power/authority, by stepping outside the scope of litigation attempting to publish/write into law his own agenda to specifically deny/violate the backbone of the criminal justice system - namely - DUE PROCESS - which actions have directly/fraudulently denied the petitioner (a) final resolution of multiple claims determined on the actual merits; which has prevented justice from being done; and finally brought to (a) legally binding - due process - ending.

(Dkt. 40 at 1). Petitioner requests that this case be transferred to the Western District of Oklahoma, where he is incarcerated, “in order to protect the integrity of (all) future litigation in reference to the petitioner’s due process claims.” *Id.*

Petitioner’s allegations against the undersigned district judge, which the Court construes as arising under 28 U.S.C. § 144 and § 455, clearly are based upon Petitioner’s disagreement with prior rulings in this case. Section 144 “requires an affidavit of bias and prejudice, which must be timely, sufficient, made by a party, and accompanied by a certificate of good faith” *Glass v. Pfeffer*, 849 F.2d 1261, 1267 (10th Cir. 1988) (citing *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987)). Petitioner, however, has failed to file the required documents.

Addressing Petitioner’s claims under § 455, “factual allegations need not be taken as true, and the test is whether ‘a reasonable person, knowing all the relevant facts, would harbor doubts about the judge’s impartiality.’” *Id.* at 1268 (quoting *Hinman*, 831 F.2d at 938). “In applying § 455(a), the judge’s actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue.” *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (quoting *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993)). The standard is purely objective and the inquiry is limited to “outward manifestations and reasonable inferences

drawn therefrom.” *Nichols*, 71 F.3d at 351; *Cooley*, 1 F.3d at 993. “The statute is not intended to give litigants a veto power over sitting judges, or as a vehicle for obtaining a judge of their choice.” *Cooley*, 1 F.3d at 993; *see also Nichols*, 71 F.3d at 351.

In *Nichols*, the Tenth Circuit listed seven frequently alleged bases that usually do not warrant recusal, including “prior rulings in the proceeding, or another proceeding, solely because they were adverse” *Id.* at 351. Furthermore, the United States Supreme Court has instructed:

[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

Liteky v. United States, 510 U.S. 540 (1994) (internal citation omitted).

Bearing in mind that “a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require,” *Nichols*, 71 F.3d at 351, this Court concludes Petitioner’s motion for recusal or a transfer of this case to the Western District of Oklahoma (Dkt. 40) must be DENIED.

Motion for Appointment of Counsel (Dkt. 39)

Petitioner also has filed a motion for appointment of counsel (Dkt. 39), which reiterates allegations in the motion for recusal and claims counsel should be appointed for the following reasons:

[D]ue to the extraordinary merits of the litigant’s claims, the nature of the factual issues raised in the claims - namely - fraud by the Hon. Court - and - an obvious attempt to cover-up an actual miscarriage of justice by continuing

to refrain from actually addressing - “The petitioner’s dead bang winners on appeal” and refusing to abide by the clear rules/guidelines outlined by the Federal Criminal/Civil procedures; and most especially the Hon. Court actually becoming an advocate for the state.

(Dkt. 39).

It is unclear whether Petitioner is requesting counsel for these proceedings in the district court or for his appeal. Nevertheless, after considering Petitioner’s ability to present his claims and the complexity of the legal issues raised by the claims, the Court finds that appointment of counsel is not warranted. *See Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991); *see also Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995). Therefore, the motion for appointment of counsel (Dkt. 39) is DENIED.

Rule 60(b) Motion (Dkt. 38)

Petitioner’s motion pursuant to Rule 60(b) (Dkt. 38) alleges this Court failed to address all the claims in his amended habeas corpus petition (Dkt. 21). Fed. R. Civ. P. Rule 60(b) allows relief from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). “Rule 60(b) relief ‘is extraordinary and may only be granted in exceptional circumstances.’” *Zurich North America v. Matrix Service, Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005) (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000)). Furthermore, “[i]n a Rule 60(b) proceeding the motion is addressed to the sound discretion of the [district] court.” *Caribou Four Corners v. Truck Ins. Exchange*, 443 F.2d 796, 799 (10th Cir. 1971) (citations omitted).

“A motion for relief under Rule 60(b)(1) is not a substitute for the ordinary method of redressing judicial error--appeal.” *Id.* (internal quotation omitted). Rule 60(b) does not permit a party to reargue an issue by rehashing facts and arguments already addressed or available, yet neglected, in the original proceeding. *See Servants of Paraclete*, 204 F.3d at 1012; *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). For the reasons set forth below, the Court finds Petitioner’s Rule 60(b) motion (Dkt. 38) must be DENIED.

Sufficiency of the Evidence

Petitioner’s Rule 60(b) motion challenges this Court’s determination that the evidence was sufficient to convict him of Rape by Instrumentation, After Conviction of Two or More Felonies, in Bryan County District Court Case No. CF-2009-387 (Dkt. 38 at 10). He argues this Court erroneously failed to conduct a de novo review of the sufficiency of the evidence (Dkt. 38 at 6-7). This Court, however, reviewed the trial record and determined that the evidence was sufficient under the habeas review standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (Dkt. 36 at 3). The record showed as follows:

A.S., the victim who was 17 years old when the trial was held in 2012, was the first witness to testify, but she was reluctant in her testimony. She was friends with some of

Petitioner's relatives, some of whom were listed as defense witnesses, and the prosecutor claimed A.S. had been receiving calls and text messages from Petitioner's family (Tr. 77; Dkt. 33-4 at 78). A.S. also was concerned that her testimony would cause Petitioner to go to prison for a long time (Tr. 82; Dkt. 33-4 at 83).

At trial, A.S. initially denied that Petitioner had touched her, contrary to her testimony at the preliminary hearing (Tr. 75; Dkt. 33-4 at 76). She stated she was high on the day of the preliminary hearing. *Id.* The prosecutor then reminded her of her preliminary hearing testimony:

Q: Was there ever an incident when you woke up in a bed with [the Defendant]?

A: Nope.

Q: Okay. Do you recall testifying at a Preliminary Hearing?

A: Yeah.

Q: Do you recall at Preliminary Hearing testifying contrary to what you've just stated?

A: What?

Q: That's not a good way to ask that question. What did you tell us happened at Preliminary Hearing?

A: I don't remember. I was high that day that I testified.

Q: Okay. Were you high a lot?

A: Stayed that way.

Q: Okay. How long have you been doing drugs, [A.S.]?

A: Five years--four years.

Q: Okay. How old were you when you started doing drugs?

A: Twelve.

Q: At Preliminary Hearing, do you recall me asking you this question about the Defendant: "Did he ever do anything that caused you to be uncomfortable?" And the answer was, "Uh-huh." Do you remember that?

A: No.

Q: Do you remember if he had ever done anything that made you feel uncomfortable?

A: No.

Q: Do you remember telling Ange Edwards, the forensic interviewer with the Department of Human Services, that he had done something that made you feel uncomfortable?

A: Yeah, I recall that.

Q: What did you tell Ange?

A: Nothing.

Q: Okay. You didn't tell her that--

A: Didn't she record me? Can't y'all listen to it?

Q: Okay. Did you--do you recall telling her that you woke up with his fingers in your vagina?

A: No.

Q: Okay. At preliminary Hearing when I asked you about the incident that made you feel uncomfortable, do you recall stating, "I stayed the night at Shannon Billey's house. I was doing dope for a few days and I guess I couldn't get no more dope. I was sleepy and finally went to sleep. When I woke up--and was on my period and I had a tampon in--and his

fingers was in me”? Do you recall that statement?

A: Yeah, I recall it.

Q: Okay. Was that the truth?

A: Do I have to answer that?

Q: Yes, ma’am.

A: Well, I don’t want to.

Q: Okay. Are you friends with persons that are relatives of Mr. Webb?

A: Now?

Q: Uh-huh.

A: Yeah.

Q: Okay. Like who?

A: Brandy and Barbara.

Q: Okay. And they are listed witnesses for the Defense, are they not?

A: I guess. I don’t know. I seen her downstairs.

Q: So, [A.S.], did you wake up with his fingers in your vagina?

A: I’m not answering that question.

(Tr. 75-77; Dkt. 33-4 at 76-78).

The Court then took a short recess (Tr. 78; Dkt. 33-4 at 79). After the recess, A.S. resumed the witness stand outside the presence of the jury, and the trial court discussed with A.S. her concerns about testifying (Tr. 81; Dkt. 33-4 at 82). When A.S. agreed to testify, the jury was returned to the courtroom (Tr. 84, Dkt. 33-4 at 85).

[PROSECUTOR]: [A.S.], at Preliminary Hearing you had testified that you woke up one morning with the Defendant's fingers in your vagina. Was that the truth?

A: Why do you keep asking me that?

Q: [A.S.], I don't like to repeat that question over and over, but you haven't answered my question.

A: Yeah.

Q: Okay. That was the truth, then. And did that happen when you were 14?

A: I don't remember.

Q: Would it have been that spring or summer of 2009?

A: Yeah.

Q: Okay. A.S., you had testified that you had had some drug issues and that you had been to rehab and you had just gotten out. Was that in-- when did you get out of rehab?

A: December 14.

Q: Okay. And have you done methamphetamine since then?

A: No.

Q: Okay. Are you under the--

A: I probably would be feeling a lot better if I did.

Q: Are you under the influence of anything today?

A: No.

Q: How is it that you--where did you wake up with the Defendant's fingers in your vagina?

A: Oh, my gosh. At Shannon's house.

Q: Okay.

(Tr. 85-86; Dkt. 33-4 at 86-87).

Other witnesses supported A.S.'s testimony, as set forth in the Court's earlier Opinion and Order (Dkt. 36 at 4-5). David Cathey, an investigator with the Bryan County District Attorney's Office, testified that A.S. disclosed the allegations against Petitioner to him and to A.S.'s mother Melissa Wright-Sanchez (Tr. 114-15; Dkt. 33-4 at 114-15). After a forensic interview of A.S. was completed, all of Ms. Wright-Sanchez's children were removed from her custody, and Wright-Sanchez was charged with knowing about the molestation (Tr. 109, 116; Dkt. 33-4 at 109, 116). Also, as discussed in the Court's previous Order, two other witnesses testified about instances when Petitioner had touched them inappropriately in a sexual manner, starting when they were 11 years old (Tr. 137-53; Dkt. 33-4 at 137-42; Dkt. 33-5 at 143-53).

The Court has carefully reviewed the evidence presented at trial. Rule 60(b) was designed to address mistakes attributable to special circumstances and not merely erroneous applications of law. *McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993). This Court analyzed Petitioner's claim of insufficient evidence under the correct standard of *Jackson v. Virginia*, and Petitioner has raised no special circumstances. Therefore, his challenge to the Court's decision is not proper for Rule 60(b) relief.

Jury Instructions

Petitioner alleges the respondent and the Court failed to address his claim that the trial court erroneously failed to instruct the jury to acquit him:

The - petitioner - very, very, very, clearly raised the allegation/claim that the - Trial Court - erred by not giving the dutiful/requested - instructions to the jury to acquit/return (a) a verdict of - not guilty - after - the - Trial Court - judge/Hon. Campbell concluded that the evidence was insufficient to warrant/sustain (a) conviction upon motion for (a) directed verdict for insufficient evidence. . . . Once Judge Campbell concluded with [sic] the evidence produced by the State was insufficient to warrant/support (a) conviction, and even detailed why the evidence produced was insufficient the Hon. Court had no choice at that point but to instruct the jury they may acquit/return (a) verdict of non guilty - as - to do otherwise would deny/violate the petitioner's substantial - due process - rights under the 5th/14th U.S. Const. Amend., and the Oklahoma Const. under (Art, 2, § 2/Art. 2, § 7).

Time after time after time the Ok. Court of Crim. Appeals has held, and ruled that it is (made) the (duty) of the (Trial Court) - when it deems/finds the evidence insufficient to warrant/support (a) conviction to advise/instruct the jury to acquit/return (a) verdict of - not guilty - due to the fact as (a) matter of law it is not only the - petitioner's - right to have the instructions given, but the duty of the (Trial Court) to give them. The trial record is very clear the - Trial Court - deemed the evidence insufficient, and then violated the petitioner's - due process - by - Failing/refusing to give the dutiful/requested instructions as (a) Matter of law. See O.S. 22-850 - which states the Trial Court may advise [sic] the jury to acquit upon (a) finding of insufficient evidence; remember - the statute doesn't state - "Maybe advise" it clearly has been interpreted by the Appellate Courts as it is - the duty - of - the (Trial Court) to give the instructions, and the right of the - petitioner - to have the instructions given - when the - Trial Court - finds/concludes/deems the evidence insufficient to warrant/support (a) conviction. . . .

. . . Lets [sic] be clear - when the defense moved for (a) directed verdict due to insufficient evidence the defense definitely expected/was requesting that the instruction to acquit the petitioner be advised to the jury - after - the Hon. Court declared/found/concluded and deemed the [State's] evidence to be insufficient to warrant/support (a) conviction.

(Dkt. 38 at 1-3).

The record shows that the denial of a directed verdict was mentioned in Petitioner's direct appeal as support for his claim that the evidence was insufficient (Dkt. 32-1 at 17).

The appellate brief, however, did not expressly challenge the denial of a directed verdict as a separate claim concerning jury instructions. Therefore, the Court of Criminal Appeals did not specifically address the directed verdict issue in its analysis of the sufficiency of the evidence. *Webb v. State*, No. F-2012, slip op. at 2 (Okla. Crim. App. May 3, 2013) (Dkt. 32-3 at 2).

The trial transcript shows the following exchange after the final witness testified and the jury left the courtroom:

THE COURT: Anything we need to take up, before we recess, by the State?

MS. NAIFEH: Not by the State, Your Honor.

THE COURT: By the Defendant--anything we need to take up by the Defendant before we recess since the jury has left the courtroom?

MS. KERR: Your Honor, we would just simply have a motion for a directed verdict. And we would ask that you find the Defendant not guilty on the basis of the evidence that has been presented so far.

[A.S.'s] testimony is really--the other testimony, obviously, is somewhat relevant, but the question really comes down to [A.S.'s] testimony. And I don't believe it was strong enough to support a conviction beyond a reasonable doubt at this point in time.

THE COURT: Certainly if the jury were to believe her testimony beyond a reasonable doubt it wouldn't support a conviction. And it hasn't been corroborated by other evidence, so the Motion for a Directed Verdict and/or a Motion of Acquittal is denied, exception allowed

(Tr. 170-71; Dkt. 33-5 at 28-29).

This Court notes the apparent inconsistency between the trial court's statement that the victim's uncorroborated testimony would not support a conviction, if the jury believed her beyond a reasonable doubt, and that court's denial of the motion for a directed verdict.

Pursuant to Okla. Stat. tit. 22, § 850, the trial court was not required to grant the motion for a directed verdict. Section 850 states that “[i]f, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice, nor can the court, for any cause, prevent the jury from giving a verdict” (emphasis added). Petitioner’s characterization of the statute is incorrect.

Furthermore, even if the trial court’s denial of the directed verdict had violated § 850, “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (citing 28 U.S.C. § 2241; *Rose v. Hodges*, 423 U.S. 19, 21 (1995) (per curium)).

“[T]he burden on a petitioner attacking a state court judgment based on a refusal to give a requested jury instruction is especially great because an omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.” *Tyler v. Nelson*, 163 F.3d 1222, 1227 (10th Cir. 1999) (quotations omitted). “Unless the constitution mandates a jury instruction be given, a habeas petitioner must show that, in the context of the entire trial, the error in the instruction was so fundamentally unfair as to deny the petitioner due process.” *Tiger v. Workman*, 445 F.3d 1265, 1267 (10th Cir. 2006) (citations omitted).

Here, the Court finds Petitioner was not denied due process. Under Okla. Stat. tit. 22, § 850, the trial court had discretion in directing a verdict of acquittal, which that court exercised. There was no constitutional error in the trial court’s denial of Petitioner’s motion

for a directed verdict. See Barber v. Jones, No. CIV 06-1260-W, 2007 WL 2029000, at *7 (W.D. Okla. July 10, 2007) (unpublished) (holding that the trial court did not commit a constitutional violation through the denial of a motion for a directed verdict, when sufficient evidence supported the conviction). This claim has no merit.

Prosecutorial Misconduct

Under the heading of insufficient evidence, Petitioner claims the prosecutor committed misconduct with respect to A.S.'s testimony:

The - petitioner very, very, very, clearly raised the claim/allegation that the prosecutor (Julie Nafieh) improperly vouched for the credibility of the prosecutrix by personally assuring the jury of the witness's credibility, and by expressing her personal opinion regarding the petitioner's guilt when stating in her closing argument to the jury - "All A.S. had to do was say (NO) deny the allegation, and we could've all went home." Knowing beforehand (just prior) to taking the stand that A.S. had been threatened, and assaulted by (D.A.) investigator - David M. Cathey - along with the fact the prosecutor "conveniently" withheld [sic] A.S.'s] certificate to avoid prosecution herself until - after - her testimony.

(Dkt. 38 at 8-9).

Petitioner claims the prosecutor obtained A.S.'s testimony by threat and coercion. A.S. testified that Investigator Cathey told her she would go to jail or "have very bad consequences," if she failed to show up for the trial (Tr. 91; Dkt. 33-4 at 92). She said she also heard that if she didn't appear for trial, her mother would get a longer prison sentence. *Id.* In addition, shortly before entering the courtroom, A.S. was texting on her phone, and Investigator Cathey decided to take the phone from her. *Id.* A.S. testified that she would not let Cathey have her phone, so he threw her to the ground and handcuffed her, slamming her face against the floor (Tr. 91-92; Dkt. 33-4 at 92-93).

During the break in A.S.'s testimony and outside the presence of the jury, the trial judge spoke to A.S. about her being "very scared and worried" (Tr. 83; Dkt. 33-4 at 84). A.S. claimed the District Attorney's investigator told her she "was going to go to jail or something," because she did not want to testify. *Id.* The judge assured A.S. that she could not be jailed, because she was a child. *Id.* The judge said that if she refused to testify, the prosecutor could ask to have A.S.'s preliminary hearing testimony read into the record (Tr. 83-84; Dkt. 33-4 at 84-85). The judge then told A.S. that "all anybody wants you to do is just tell the truth" (Tr. 84; Dkt. 33-4 at 85). After hearing that statement, A.S. agreed to testify. *Id.* At the conclusion of her testimony, A.S. requested her "certificate," and the prosecutor said "Okay." (Tr. 94, Dkt. 33-4 at 95).

The Court finds these claims by Petitioner were not raised in his direct appeal, so they are unexhausted and subject to a procedural bar. Petitioner also has failed to show cause and prejudice for the omission of these claims on direct appeal.

The Court further finds that Petitioner's claim that the prosecutor vouched for A.S.'s credibility is not supported by the record. This claim also is unexhausted and subject to a procedural bar. In the State's closing argument, the prosecutor stated as follows:

One of the instructions talks about "Credibility of Witnesses." If we could go and pick all honor students and all good church-going people, employed people, kids with no problems, kids with no issues to come in here and be my witnesses, I'd do that.

But during voir dire, we talked about just because [A.S.] has problems and has had a rough life, does that mean that somebody should get away with hurting her or perpetrating on her, and I believe the answer from all of you was no, they should still be held accountable. Who has reasons to make things up and lie? [A.S.]? I mean, she could have said, "It never happened," and we would be done, but she's been here time and again to testify and has told the same

thing.

(Tr. 205-06; Dkt. 33-5 at 63-64).

“Argument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness’ credibility, either through explicit personal assurances of the witness’ veracity or by implicitly indicating that information not presented to the jury supports the witness’ testimony.” *United States v. Magallanez*, 408 F.3d 672, 680 (10th Cir.2005) (internal quotation marks omitted). “[I]t is not improper for a prosecutor to direct the jury’s attention to evidence that tends to enhance or diminish a witness’s credibility.” *Thornburg v. Mullin*, 422 F.3d 1113, 1132 (10th Cir. 2005). Here, the Court finds the prosecutor’s statements did not “so [infect] the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). There is no basis for Rule 60(b) relief on Petitioner’s claim of prosecutorial misconduct.

Victim’s Testimony

Petitioner alleges the Court overlooked his claim that A.S.’s testimony was not clear and convincing and corroborated (Dkt. 38 at 9). This claim was not overlooked, but was considered as part of Petitioner’s claim regarding sufficiency of the evidence.

This Court expressly found that A.S.’s testimony “satisfied the elements of the crime” (Dkt. 36 at 7). Furthermore, the Tenth Circuit Court of Appeals has stated that “[n]o direct Supreme Court precedent requires corroboration of child witness testimony.” *Parker v. Scott*, 394 F.3d 1302, 1314 (10th Cir. 2005). In *Cooper v. State*, 568 P.2d 1300 (Okla. Crim. App. 1977), the Oklahoma Court of Criminal Appeals held that a rape conviction may be

based on uncorroborated, clear and convincing testimony by the prosecutrix. *Id.* at 1302-03. *See also Binder v. State*, 717 P.2d 1143, 1145 (Okla. Crim. App. 1986), *cert. denied*, 479 U.S. 858 (1986). To be found insufficient under Oklahoma law, Petitioner must show the victim's uncorroborated testimony was "contradictory, uncertain, improbable, or impeached." *Holding v. State*, 568 P.2d 332, 334 (Okla. Crim. App. 1977). *See also Hurl v. State*, 674 P.2d 581, 583 (Okla. Crim. App. 1984). Petitioner did not make this showing.

Procedural Bar

Petitioner also complains that "the Hon. Court took it upon itself to advocate for the State whats [sic] exhausted (or) not exhausted . . . [and] opened the door to yet another (Rule) violation which clearly prevents Federal Courts from considering 'mixed petitions.'" (Dkt. 38 at 13-14). To the contrary, the respondent alleged in his response to the amended petition that Petitioner's vague claims were unexhausted and subject to an anticipatory bar. (Dkt. 32 at 10-12).

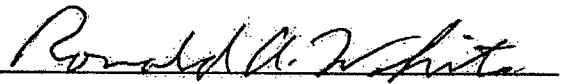
Motion for Complete Record of Court Transcripts (Dkt. 41)

Finally, Petitioner asks the Court to provide him with all the state court records filed in this case, so he can prepare his Rule 60(b) motion and his pleadings for the Tenth Circuit Court of Appeals (Dkt. 41). Petitioner filed this motion for state court records on the same day he filed his Rule 60(b) motion, so he had completed his Rule 60(b) motion prior to asking the Court to provide the state court records. To the extent Petitioner claims to need the records for his appellate proceedings, "indigent prisoners do not have a right to free transcripts to conduct fishing expeditions in search of error in the underlying proceedings." *United States v. Bagby*, No. 10-CR-134-CVE, 2011 WL 810709 (N.D. Okla. Mar. 1, 2011)

(unpublished). This motion (Dkt. 41) is DENIED.

ACCORDINGLY, Petitioner's motion for recusal of the district judge (Dkt. 40) is DENIED, Petitioner's motion for appointment of counsel (Dkt. 39) is DENIED, Petitioner's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 60(b) (Dkt. 38) is DENIED, and Petitioner's motion for complete record of court transcripts (Dkt. 41) is DENIED.

IT IS SO ORDERED this 20 day of January 2017.


RONALD A. WHITE
UNITED STATES DISTRICT JUDGE

FILED

**United States Court of Appeals
Tenth Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

September 1, 2017

**Elisabeth A. Shumaker
Clerk of Court**

CHRISTOPHER WAYNE WEBB,

Petitioner - Appellant,

v.

No. 16-7072

JOE ALLBAUGH,

Respondent - Appellee.

ORDER

Before **LUCERO, O'BRIEN, and MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

-Appendix-C-

**Additional material
from this filing is
available in the
Clerk's Office.**