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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD FORBES, Petitioner-Appellant, v. L. ELDRIDGE, Warden, Respondent-Appellee.	No. 21-16301 D.C. No. 2:16-cv-01884-MCE-GGH MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted November 14, 2022
San Francisco, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and CARDONE,[**] District Judge.

Howard Forbes appeals the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Reviewing "the denial of a Section 2254 habeas corpus petition de novo," we

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

affirm. *Patsalis v. Shinn*, 47 F.4th 1092, 1097 (9th Cir. 2022).

The parties agree that the state trial court erred by failing to instruct the jury against drawing an adverse inference from Forbes's decision not to testify. *See Carter v. Kentucky*, 450 U.S. 288 (1981). Forbes argues the state appellate court's decision that the *Carter* error was harmless "involved an unreasonable application of[ ] clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1).

The state appellate court offered three bases for its harmless error decision. First, it noted that the trial judge had previously advised the jury panel not to draw an adverse inference from the defendant's decision not to testify. This observation was consistent with federal law. *See United States v. Padilla*, 639 F.3d 892, 896–898 (9th Cir. 2011); *United States v. Castaneda*, 94 F.3d 592, 596 (9th Cir. 1996); *United States v. Payne*, 944 F.2d 1458, 1466–67 (9th Cir. 1991). Second, the appellate court noted that the prosecutor did not directly comment on Forbes's decision not to testify. There is no established federal law to the contrary. Although the prosecutor stated in summation that the defense had presented no evidence to rebut the state's case, the Supreme Court has not established that a prosecutor may not comment on the weight of the evidence in a way that indirectly refers to the defendant's silence. *Cf. Griffin v. California*, 380 U.S. 609, 610–11, 615 (1965) (addressing only direct prosecutorial references to the defendant's choice not to testify). And third, the court reasonably concluded that the weight of

the evidence against Forbes was strong. The victim vividly remembered the night in question and identified Forbes as her assailant. Although Forbes claimed that the sexual encounter was consensual, there was evidence he had committed a sexual battery in the past. And the victim was injured and traumatized after her encounter with Forbes. *See United States v. Soto*, 519 F.3d 927, 930–31 (9th Cir. 2008) (noting that because the uncontradicted evidence was "overwhelming," the *Carter* error was harmless). The court therefore did not unreasonably apply federal law.

AFFIRMED.