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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David Robert Ruderman,
Petitioner,
vs.
Charles L. Ryan, et al.,
Respondents.

CIV 09-887-PHX-GMS (MHB)
REPORT AND RECOMMENDATION

TO THE HONORABLE G. MURRAY SNOW, UNITED STATES DISTRICT JUDGE:

Petitioner David Robert Ruderman, who is confined in the Arizona State Prison Complex-Eyman, Rynning Unit, in Florence, Arizona, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a “Brief in Support of Petition” (Docs. ##1, 3). Respondents filed an Amended Answer on November 12, 2009 (Doc. #18), and Petitioner filed a Reply to Respondents’ Amended Answer on December 9, 2009 (Doc. #19).

BACKGROUND

In May or June 2003, Kim and her boyfriend, Aaron, moved from Nebraska to Chandler, Arizona. (Doc. #18, Exh. A at 9-11, 53; Exh. C at 11.) Initially, Kim’s two children – “K” and “M” – stayed in Nebraska with Kim’s ex-husband, Jason. (Doc. #18, Exh. A at 10-11, 53.) However, in September 2004, Jason was deployed overseas and K and M moved to Arizona to live with Kim. (Doc. #18, Exh. A at 11, 53-54.) Kim normally worked Thursday through Monday from about 4:00 p.m. to 1:00 a.m., and Aaron worked from 8:00 a.m. until 5:00 p.m. or 6:00 p.m., five to seven days a week. (Doc. #18, Exh. A at 12, 55-56.) Considering commuting time to and from work, there was a two to three hour gap during which neither Kim nor Aaron was available to care for K and M. (Doc. #18, Exh.

1 A at 12-13, 56.) Initially, a co-worker of Kim's, who worked the day shift, was able to baby-
2 sit during this time frame, but, after only one week, she got another job and was no longer
3 available to baby-sit. (Doc. #18, Exh. A at 13, 58.)

4 Kim had "one day to find a baby-sitter" and a friend suggested that she go "on line"
5 to try to find one. (Doc. #18, Exh. A at 58.) Kim checked several different baby-sitter web
6 sites, including "baby-sitter.com." (Doc. #18, Exh. A at 58.) Kim called four women she
7 found on baby-sitter.com, but all four wanted \$200 to watch the children over the weekend,
8 more than Kim could afford to pay. (Doc. #18, Exh. A at 58-59.) Petitioner "was the last
9 one [Kim] tried on the list because he was a male." (Doc. #18, Exh. A at 58.) However, Kim
10 was impressed with Petitioner; he was "very polite," and Kim "led the whole conversation."
11 (Doc. #18, Exh. A at 58-59.) Kim explained her situation and asked Petitioner "how much
12 he wanted" to baby-sit "two young kids." (Doc. #18, Exh. A at 59, 64.) Petitioner said
13 "whatever was acceptable for [Kim]," explaining that he "was doing it just to help out
14 parents." (Doc. #18, Exh. A at 64.) Kim said she could afford to pay Petitioner \$120 a week,
15 and Petitioner agreed to that amount. (Doc. #18, Exh. A at 64.)

16 Petitioner began baby-sitting then 6-year-old K and 3-year-old M around mid-
17 September 2004. (Doc. #18, Exh. A at 54, 58.) Kim thought Petitioner was a "great" baby-
18 sitter and "thought the world of him." (Doc. #18, Exh. A at 65.) Petitioner "always brought
19 a lot of toys over" and was "very attentive" to the children. (Doc. #18, Exh. A at 16, 65-66.)
20 K and M "loved him." (Doc. #18, Exh. A at 65.) In fact, Kim's neighbors "were envious
21 of [her] over the type of baby-sitter [she] had." (Doc. #18, Exh. A at 66.) Kim "cared about"
22 Petitioner, and told him so. (Doc. #18, Exh. A at 66.) Aaron also thought that Petitioner was
23 a "[v]ery nice guy." (Doc. #18, Exh. A at 15.) They were "very friendly," and Petitioner
24 often stayed for an additional 10 to 15 minutes after Aaron got home, playing with the
25 children and talking with Aaron. (Doc. #18, Exh. A at 15-16, 46.) On one occasion
26 Petitioner, who "worked at nighttime at a computer place," helped Aaron "with a computer
27 problem." (Doc. #18, Exh. A at 15.) As far as Aaron was concerned, Petitioner was "a great
28 guy, great baby-sitter." (Doc. #18, Exh. A at 40.)

1 In late January 2004, Aaron started a new job and had to work until 8:00 p.m. (Doc.
2 #18, Exh. A at 17, 65.) Petitioner baby-sat for longer hours and requested no additional
3 compensation. (Doc. #18, Exh. A at 65.) On a couple of occasions, Petitioner baby-sat for
4 additional days, again without requesting additional payment. (Doc. #18, Exh. A at 65.)

5 On Friday, February 11, 2005, Aaron called Kim and asked her to ask Petitioner if
6 Petitioner could watch the children until about 11:30 p.m., so that Aaron could go out after
7 work with some friends. (Doc. #18, Exh. A at 16-17, 66.) Aaron cut his outing short,
8 arriving home at about 9:30 p.m. (Doc. #18, Exh. A at 18.) As he entered the apartment,
9 Aaron was talking to his brother on his cell phone, continued the conversation for
10 approximately 45 seconds, then headed towards the children's closed bathroom door. (Doc.
11 #18, Exh. A at 18.) Aaron "heard the kids playing in the bathtub," and opened the door.
12 (Doc. #18, Exh. A at 18-19.) In the mirror, Aaron saw Petitioner "standing up against the
13 wall pulling up his pants." (Doc. #18, Exh. A at 18-19, 30-31.) Petitioner had on "navy blue
14 underwear," and was pulling up a pair of blue denim pants, which were "dry with patches of
15 wet" on the pants. (Doc. #18, Exh. A at 19, 22.) Aaron was "in shock," and, "didn't know
16 what to think." (Doc. #18, Exh. A at 20.) He said nothing, and then turned and walked to
17 the living room and sat on the couch to "collect [his] thoughts." (Doc. #18, Exh. A at 20.)

18 About a minute later, Petitioner came out of the bathroom, "put all the toys in his
19 bag," then walked out of the apartment "with his head down," without saying anything to
20 Aaron. (Doc. #18, Exh. A at 20-21.) This "wasn't the way he acted towards [Aaron]."
21 (Doc. #18, Exh. A at 21.)

22 Aaron did not call the police because he "didn't know what to think of the whole
23 situation." (Doc. #18, Exh. A at 37-38.) He called Kim at work, told her what he had seen,
24 and suggested that she "talk to her kids when she came home." (Doc. #18, Exh. A at 20, 37-
25 38, 47, 66.) Kim "was wondering what was going on," but "wasn't worried about it,"
26 because she thought Petitioner "was the greatest baby-sitter ever." (Doc. #18, Exh. A at 67.)
27 She knew that Petitioner had given the children baths on two prior occasions and "really
28

1 didn't think anything of it." (Doc. #18, Exh. A at 67, 80.) Aaron told Kim to call Petitioner.
2 (Doc. #18, Exh. A at 67.)

3 Kim telephoned Petitioner and told him that Aaron had called her and "made it sound
4 like [she] should be concerned about [Petitioner] in the bathroom with the kids." (Doc. #18,
5 Exh. A at 67.) She asked Petitioner if he had given the children a bath; Petitioner answered
6 "yes." (Doc. #18, Exh. A at 67.) Kim then asked Petitioner "if he got in the bath tub with
7 the kids." (Doc. #18, Exh. A at 67-68.) Petitioner said that he had, explaining that "the kids
8 always ask him to get in the bathtub with them whenever he does give them their bath,"
9 asking Kim "if that was going to be a problem." (Doc. #18, Exh. A at 68.) Kim said "it
10 probably wasn't a good idea" for him to do it any more. (Doc. #18, Exh. A at 68.) Petitioner
11 replied, "okay," and they ended their conversation, leaving Kim with the belief that Petitioner
12 "was just in there playing with them." (Doc. #18, Exh. A at 68.)

13 The following afternoon, while Kim was in her bedroom getting ready to go to work,
14 she called K over and "asked her if there was anything [Kim] needed to know about
15 [Petitioner], if there was ever any touching or any kind of physical contact, if he had ever
16 touched her down there." (Doc. #18, Exh. A at 70.) K "laughed" and said "no." (Doc. #18,
17 Exh. A at 70.) Kim was relieved but, less than five seconds later, K looked up at Kim with
18 an "embarrassed" smile on her face and said, "but [M] sucked his ... wiener." (Doc. #18,
19 Exh. A at 71, 83.) Kim "freaked out" and asked K "if she was sure." (Doc. #18, Exh. A at
20 71, 83.) Kim "couldn't breath[e]," and "didn't know what to do." (Doc. #18, Exh. A at 72.)
21 She "didn't know whether or not to believe it was true." (Doc. #18, Exh. A at 72.)

22 Kim immediately called Petitioner and told him she "didn't need him because [she]
23 didn't have to go into work that day." (Doc. #18, Exh. A at 74.) Petitioner said "okay," and
24 asked if she needed him to work the following day, Sunday. (Doc. #18, Exh. A at 74.) Kim
25 said she "didn't know yet and that [she would] call him to let him know." (Doc. #18, Exh.
26 A at 74.) After speaking to Petitioner, Kim called her mother, ex-husband, and Aaron. (Doc.
27 #18, Exh. A at 73.) Aaron drove Kim, and the children, to the Chandler Police Department.
28 (Doc. #18, Exh. A at 73.)

1 At about 9:00 p.m. that evening, after speaking to Kim and Aaron, Detective Gary
2 Minor conducted a videotaped interview of K. (Doc. #18, Exh. B at 38; Exh. C at 12.) K
3 said she was in the bathtub with Petitioner and M, and that M had pulled up a leg hole on
4 Petitioner's shorts and Petitioner's "penis came out of his shorts." (Doc. #18, Exh. C at 12-
5 13.) K said that Petitioner's "wiener" was "big, long and stuck straight up." (Doc. #18, Exh.
6 C at 13.) K said that M then "started to suck on [Petitioner's] privates." (Doc. #18, Exh. D
7 at 84.) K said that it happened two times, the previous Saturday (February 6) and,
8 previously, on a Sunday. (Doc. #18, Exh. C at 13-14.)

9 Detective Minor arranged for both K and M to be interviewed by forensic interviewer
10 Cherie Leffler, who specialized in interviewing children under the age of eight. (Doc. #18,
11 Exh. A at 92, 104; Exh. B at 39-40.) Ms. Leffler first interviewed K. (Doc. #18, Exh. A at
12 105; Exh. B at 11.) K said that she and M took a bath with Petitioner. (Doc. #18, Exh. A at
13 107.) K and M were naked; Petitioner wore blue "swimming trunks or underwear." (Doc.
14 #18, Exh. A at 107-08.) Petitioner sat "closest to the water spout," K was "in the center,"
15 and M "at the end of the tub." (Doc. #18, Exh. A at 108.) Petitioner "reach[ed] over" K and
16 picked up and lifted M over K. (Doc. #18, Exh. A at 108.) K said that Petitioner's "wiener
17 was out of his pants." (Doc. #18, Exh. A at 109.) When asked how his wiener got out, K
18 "lifted up the leg of her shorts and indicated that his wiener came out the leg of his pants."
19 (Doc. #18, Exh. A at 109.) K said that "[M] touched his winer [sic]," making "a circle with
20 her index finger and her thumb in an up and down motion." (Doc. #18, Exh. A at 109.) K
21 said that "after [M] touched [Petitioner's] wiener that it was sticking straight up." (Doc. #18,
22 Exh. A at 109.) "Then M put his mouth on [Petitioner's] wiener." (Doc. #18, Exh. A at
23 109.) K said "this happened on two separate occasions." (Doc. #18, Exh. A at 109.)
24 Initially, K said it happened on "Sunday and Monday," but later said "Saturday and Sunday."
25 (Doc. #18, Exh. A at 110-11.)

26 Ms. Leffler then attempted to interview 3-year-old M, but he was "unwilling or unable
27 in the end to give [her] any information." (Doc. #18, Exh. B at 11-12, 16, 30.)
28

1 Before speaking to Petitioner, Detective Minor checked the Internet and found “about
2 roughly five sites that [Petitioner] had listed on for his baby-sitter services.” (Doc. #18, Exh.
3 B at 45.) On February 13, 2005, Detective Minor spoke to Petitioner at the Chandler Police
4 Department, after advising him of his Miranda rights. (Doc. #18, Exh. B at 44-46.)
5 Detective Minor told Petitioner “there had been an accusation made against him of molesting
6 a child.” (Doc. #18, Exh. B at 47.) Petitioner, “laughed,” and said, “that’s ridiculous.”
7 (Doc. #18, Exh. B at 47.) Detective Minor then discussed “the accusations of being in the
8 bathtub with the children.” (Doc. #18, Exh. B at 47.) Petitioner admitted that he “was in the
9 bathtub with the kids,” “equat[ing] it to swimming,” but “denied anything sexual happening
10 with the children.” (Doc. #18, Exh. B at 47.) Petitioner said he “was wearing a green pair
11 of shorts.” (Doc. #18, Exh. B at 47.) Petitioner said he “had been in the tub twice with the
12 children, two separate occasions.” (Doc. #18, Exh. B at 48.) Petitioner “denied his penis
13 coming out of his shorts,” or having “any sexual contact with the children.” (Doc. #18, Exh.
14 B at 49.)

15 Detective Minor asked Petitioner if the children could have seen his penis “by
16 accident”: Petitioner answered “no.” (Doc. #18, Exh. B at 49.) Detective Minor asked
17 Petitioner “if his penis was out and he had an erection,” Petitioner said he “did not.” (Doc.
18 #18, Exh. B at 49.) Detective Minor asked Petitioner if the children might haven seen him
19 “urinating.” (Doc. #18, Exh. B at 49.) Initially, Petitioner said, “I don’t know,” or, “I don’t
20 think so,” then later said they “did not see him urinating at any time.” (Doc. #18, Exh. B at
21 49.)

22 Regarding the incident where Aaron got home early, Petitioner said he “heard Aaron
23 come in, he got out of the tub,” then “wrang out his shorts while still wearing them and then
24 pulled his pants up over his wet shorts.” (Doc. #18, Exh. B at 54.) Petitioner said that he
25 was in the tub with the children on the night Aaron came home early (Friday, February 11),
26 and “within two weeks prior to that.” (Doc. #18, Exh. C at 15.)

27 On February 22, 2005, the State of Arizona filed an indictment in Maricopa County
28 Superior Court charging Appellant with two counts of sexual conduct with a minor, class 2

1 felonies and dangerous crimes against children (Counts 1 and 3), and two counts of public
2 sexual indecency to a minor, class 5 felonies (Counts 2 and 4.) (Doc. #18, Exh. N.)

3 At the close of the State's case, Petitioner moved for directed verdict on all counts.
4 (Doc. #18, Exh. C at 16.) The trial court granted Petitioner's motion for judgment of
5 acquittal on Counts 1 and 2. (Doc. #18, Exh. C at 26-27). The jurors convicted Petitioner
6 on Counts 3 and 4. (Doc. #18, Exh. E at 3.) The trial court imposed presumptive,
7 consecutive sentences of life imprisonment on Count 3, and 1 ½ years' imprisonment on
8 Count 4. (Doc. #18, Exh. M at 11-12.)

9 Petitioner filed a direct appeal, raising a single claim: that the trial court committed
10 fundamental error when it sentenced him to life imprisonment. (Doc. #18, Exh. F.) The
11 Arizona Court of Appeals affirmed Petitioner's conviction and sentence. (Doc. #18, Exh.
12 F.) Petitioner did not file a petition for review in the Arizona Supreme Court.

13 On December 14, 2006, Petitioner filed a Notice of Post-Conviction Relief. (Doc.
14 #18, Exh. G.) Petitioner subsequently filed a Petition for Post-Conviction Relief, and raised
15 six claims: (1) the State presented insufficient evidence of his guilt; (2) the prosecutor
16 committed misconduct during closing argument by vouching for witnesses and
17 mischaracterizing trial testimony; (3) juror bias; (4) the prosecutor tainted jury selection by
18 discriminatory use of peremptory challenges; (5) Petitioner was improperly denied a
19 preliminary hearing; and (6) trial counsel rendered ineffective assistance. (Doc. #18, Exh.
20 H.)

21 On August 30, 2007, the trial court found that the Petition for Post-Conviction Relief
22 "fail[ed] to present a material issue of fact or law which would entitle [Petitioner] to relief"
23 and thus dismissed Appellant's claim. (Doc. #18, Exh. I.)

24 Petitioner subsequently filed a "Notice of Appeal" in the Arizona Court of Appeals
25 which provided, in totality, as follows:

26 Notice is hereby given that Petitioner David Ruderman, in propria persona, in
27 the above case, appeals to the Court of Appeals of the State of Arizona from
28 the final judgment entered in this action on the 31st day of October, 2007.

1 (Doc. #18, Exh. J.) Petitioner also filed a Petition for Review arguing: (1) his convictions
2 were based upon insufficient evidence; (2) the state committed misconduct through improper
3 vouching and by misrepresentations of the evidence during closing argument; (3) juror bias;
4 (4) the prosecutor tainted the jury by discriminatory use of peremptory challenges; (5) he was
5 denied his right to a preliminary hearing; and (6) ineffective assistance of counsel. (Doc.
6 #18, Exh. O.)

7 The Arizona Court of Appeals denied review, and, on February 5, 2009, the Arizona
8 Supreme Court denied review. (Doc. #18, Exhs. J, K, L.)

9 On April 27, 2009, Petitioner filed the instant Petition for Writ of Habeas Corpus
10 (Doc. #1) and “Brief in Support of Petition” (Doc. #3). Petitioner raises six grounds for
11 relief. In Ground One, he alleges that he was denied his Fifth and Fourteenth Amendment
12 rights to due process because the evidence was insufficient to prove guilt beyond a
13 reasonable doubt. (Docs. #1 at 6; #3 at 3.) In Ground Two, he alleges that he was denied an
14 impartial jury in violation of his Fifth, Sixth, and Fourteenth Amendment rights. (Docs. #1
15 at 7; #3 at 5.) In Ground Three, he alleges that the prosecutor vouched for witnesses and
16 misstated or mischaracterized testimony in violation of Plaintiff’s Fifth and Fourteenth
17 Amendment right to due process and a fair trial. (Docs. #1 at 8; #3 at 7.) In Ground Four,
18 Petitioner alleges that prospective jurors were impermissibly stricken by the prosecutor based
19 on gender in violation of equal protection under the Fourteenth Amendment. (Docs. #1 at
20 9; #3 at 10.) In Ground Five, Petitioner alleges his Fifth and Fourteenth Amendment right
21 to due process was violated when he was denied a state-created right applicable to criminal
22 defendants. (Docs. #1 at 12; #3 at 11.) In Ground Six, he alleges that he received the
23 ineffective assistance of counsel at trial in violation of his Sixth Amendment rights based on
24 the failure to make appropriate motions and objections and to preserve constitutional issues.
25 (Docs. #1 at 13; #3 at 12.)

26 Respondents filed an Amended Answer on November 12, 2009 (Doc. #18), and
27 Petitioner filed a Reply to Respondents’ Amended Answer on December 9, 2009 (Doc. #19).

28 DISCUSSION

1 In their Answer, Respondents contend that Ground Five fails to state a basis for
2 federal habeas relief, and the remaining claims fail on the merits. As such, Respondents
3 request that the Court deny and dismiss Petitioner’s Petition for Writ of Habeas Corpus with
4 prejudice.

5 **A. Ground Five**

6 In Ground Five, Petitioner alleges his Fifth and Fourteenth Amendment right to due
7 process was violated when he was denied a state-created right applicable to criminal
8 defendants. Despite Petitioner’s reference to alleged due process violations, the Court’s
9 review of Petitioner’s claim in Ground Five reveals that Petitioner is merely asserting a
10 violation of Arizona state law claiming a violation of state statutory requirements for holding
11 preliminary hearings. (Doc. #1 at 12.) Petitioner bases his claim upon Rule 5.1(a)-(b) of the
12 Arizona Rules of Criminal Procedure. (Doc. #1 at 12.) Ground Five fails to constitute a
13 basis for federal habeas relief.

14 The Court can grant habeas relief “only on the ground that [a petitioner] is in custody
15 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
16 “[I]t is not the province of a federal habeas court to reexamine state-court determinations on
17 state-law questions.” Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see Lewis v. Jeffers,
18 497 U.S. 764, 780 (1990) (“[F]ederal habeas corpus relief does not lie for errors of state
19 law.”). This includes a trial court’s evidentiary rulings based upon state law matters unless
20 admission of the evidence was so prejudicial that it offends due process. See id.; Walters v.
21 Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th
22 Cir. 1991). Additionally, a petitioner cannot “transform a state-law issue into a federal one
23 merely by asserting a violation of due process.” Langford v. Day, 110 F.3d 1380, 1389 (9th
24 Cir. 1996), cert. denied, 522 U.S. 881 (1997); see Engle v. Isaac, 456 U.S. 107, 119-21
25 (1982) (“While they attempt to cast their first claim in constitutional terms, we believe that
26 this claim does no more than suggest that the instructions at respondents’ trials may have
27 violated state law.”). Accordingly, the Court will recommend that Petitioner’s claim as
28 asserted in Ground Five be denied.

1 **B. Grounds One through Four and Six – Merits Analysis**

2 Pursuant to the AEDPA¹, a federal court “shall not” grant habeas relief with respect
3 to “any claim that was adjudicated on the merits in State court proceedings” unless the state
4 court decision was (1) contrary to, or an unreasonable application of, clearly established
5 federal law as determined by the United States Supreme Court; or (2) based on an
6 unreasonable determination of the facts in light of the evidence presented in the state court
7 proceeding. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000)
8 (O’Connor, J., concurring and delivering the opinion of the Court as to the AEDPA standard
9 of review). “When applying these standards, the federal court should review the ‘last
10 reasoned decision’ by a state court” Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir.
11 2004).

12 A state court’s decision is “contrary to” clearly established precedent if (1) “the state
13 court applies a rule that contradicts the governing law set forth in [Supreme Court] cases,”
14 or (2) “if the state court confronts a set of facts that are materially indistinguishable from a
15 decision of [the Supreme Court] and nevertheless arrives at a result different from [its]
16 precedent.” Williams, 529 U.S. at 404-05. “A state court’s decision can involve an
17 ‘unreasonable application’ of Federal law if it either 1) correctly identifies the governing rule
18 but then applies it to a new set of facts in a way that is objectively unreasonable, or 2)
19 extends or fails to extend a clearly established legal principle to a new context in a way that
20 is objectively unreasonable.” Hernandez v. Small, 282 F.3d 1132, 1142 (9th Cir. 2002).

21 **1. Ground One**

22 In Ground One, Petitioner alleges that he was denied his Fifth and Fourteenth
23 Amendment rights to due process because the evidence was insufficient to prove guilt
24 beyond a reasonable doubt. Specifically, Petitioner claims that because the “testimony of [K]
25 [was] the only evidence that any kind of sexual conduct had taken place,” there was
26 insufficient evidence support his guilt because her testimony was “objectively unbelievable.”
27

28 ¹ Antiterrorism and Effective Death Penalty Act of 1996.

1 The Due Process Clause of the Fourteenth Amendment “protects the accused against
2 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute
3 the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). The relevant
4 United States Supreme Court precedent applicable to claims of insufficient evidence is set
5 forth in Jackson v. Virginia, 443 U.S. 307 (1979): there is sufficient evidence to support a
6 conviction if, “after viewing the evidence in the light most favorable to the prosecution, *any*
7 rational trier of fact could have found the essential elements of the crime beyond a reasonable
8 doubt.” Id. at 319 (emphasis original). Thus, “the dispositive question under *Jackson* is
9 ‘whether the record evidence could reasonably support a finding of guilt beyond a reasonable
10 doubt.’” Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson, 443 U.S.
11 at 318.) A petitioner in a federal habeas corpus proceeding “faces a heavy burden when
12 challenging the sufficiency of the evidence used to obtain a state conviction on federal due
13 process grounds.” Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant
14 the writ, the habeas court must find that the decision of the state court reflected an objectively
15 unreasonable application of Jackson and Winship to the facts of the case. See id. at 1275.

16 When the sufficiency of the evidence is challenged by a state prisoner in federal
17 habeas corpus proceedings, a federal court must review the entire record. See Adamson v.
18 Ricketts, 758 F.2d 441, 448 n.11 (9th Cir. 1985), vacated on other grounds, 789 F.2d 722 (9th
19 Cir. 1986) (en banc), reversed, 483 U.S. 1 (1987); see also Jackson, 443 U.S. at 318
20 (implying that in federal habeas corpus proceedings, federal courts have a duty to review the
21 underlying facts for an insufficiency of the evidence claim as they do for claims relating to
22 an alleged involuntary confession). It is the province of the jury to “resolve conflicts in the
23 testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to
24 ultimate facts.” Jackson, 443 U.S. at 319. If the trier of fact could draw conflicting
25 inferences from the evidence, the reviewing court will assign the inference that favors
26 conviction. See McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994). “The relevant inquiry
27 is not whether the evidence excludes every hypothesis except guilt, but whether the jury
28

1 could reasonably arrive at its verdict.” United States v. Dinkane, 17 F.3d 1192, 1196 (9th Cir.
2 1994) (quoting United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991)).

3 Petitioner was convicted and sentenced on one count of sexual conduct with a minor,
4 a class 2 felony² and dangerous crime against children, and one count of public sexual
5 indecency to a minor, a class 5 felony.³ (Doc. #18, Exh. F.)

6 Initially, Petitioner asserts that there was insufficient evidence of his guilt because the
7 testimony reflecting his sexual conduct with M was “objectively unbelievable” because “the
8 act ... would have taken place under water given [K’s] testimony ... that the water level in the
9 tub ‘kind of overflowed’ when Petitioner got in.” (Doc. #1 at 6.) The record, however,
10 refutes Petitioner’s claim. At trial, K testified as follows:

11 Q. Okay. Do you remember what happened in the bathtub?

12 A. Yeah.

13 Q. Could you tell me, please?

14 A. What happened is [Petitioner] got in the bathtub, and me and [M] played
15 together. And we painted on each other.

16 * * *

17 Q. Do you remember anything about the water in the bathtub?

18 A. It kind of overflowed.

19 Q. What do you mean by that? Did it go over the edge of the tub?

20 A. No.

21 Q. Okay. When did it overflow?

22 A. When [Petitioner] got in the tub.

23 ² The crime of sexual conduct with a minor required proof that Petitioner: (1)
24 intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another
25 person; and (2) the other person had not reached his/her fifteenth birthday. See A.R.S. § 13-
26 1405 (A).

27 ³ The crime of public sexual indecency to a minor required proof that Petitioner:
28 intentionally or knowingly engaged in an act of oral sexual conduct; and engaged in such act
with reckless disregard as to whether a person under age 15 was present. See A.R.S. § 13-
1403(A)(2).

1 Q. So it got higher when [Petitioner] got in the tub?

2 A. Yeah.

3 Q. Okay. How was it before [Petitioner] got in the tub? How high was it?

4 A. Kind of low.

5 Q. Could you see your knees?

6 A. No.

7 Q. Could you see your toes?

8 A. Yeah.

9 (Doc. #18, Exh. D at 77-78.) K then went on to testify that she saw Petitioner’s “privates”
10 after M pulled up the bottom of Petitioner’s shorts and that M “started to suck on
11 [Petitioner’s] privates.” (Doc. #18, Exh. D at 80-87.) Thus, contrary to Petitioner’s claim
12 even though K testified that the water “kind of overflowed” at some point, her testimony
13 does not establish that the event must have taken place underwater, particularly considering
14 her testimony that she “[c]ould see her toes” and that she witnessed M pull up Petitioner’s
15 shorts and perform oral sex. It is within the exclusive province of the jury to determine the
16 facts by weighing the evidence presented and the credibility of the witnesses presenting it
17 and to resolve conflicts in testimony. See Jackson, 443 U.S. at 319 (“This familiar standard
18 gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the
19 testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to
20 ultimate facts.”); Briceno v. Scribner, 555 F.3d 1069, 1078 (9th Cir. 2009) (“To prevail on
21 an insufficiency of evidence claim, a habeas petitioner must show that ‘upon the record
22 evidence adduced at the trial[,] no rational trier of fact could have found proof of guilt
23 beyond a reasonable doubt.’”). Thus, Petitioner’s claim that K’s testimony was “objectively
24 unbelievable” is meritless.

25 Equally spurious is Petitioner’s claim that there was insufficient evidence supporting
26 his convictions because “[K’s testimony was] the only evidence that any kind of sexual
27 conduct had taken place.” (Doc. #1 at 6.) The Supreme Court has never held that the
28 uncorroborated testimony of a single witness cannot sufficiently support a criminal

1 conviction. To the contrary, it is well established that the testimony of a single
2 uncorroborated witness can be sufficient to support a conviction. See Edwards v. Jones, 720
3 F.2d 751, 755 (2d Cir. 1983); see also United States v. Larios, 640 F.2d 938, 940 (9th Cir.
4 1981) (holding that “[t]he testimony of one witness” is sufficient to uphold a conviction).

5 Accordingly, Petitioner has failed to establish that the state court’s rejection of this
6 claim was contrary to, or involved an unreasonable application of, clearly established Federal
7 law. The Court will recommend that Petitioner’s claim as asserted in Ground One be denied.

8 **2. Ground Two**

9 Petitioner claims in Ground Two that he was denied an impartial jury in violation of
10 his Fifth, Sixth, and Fourteenth Amendment rights.

11 In Smith v. Phillips, 455 U.S. 209 (1982) the Supreme Court stated:

12 [D]ue process does not require a new trial every time a juror has been placed
13 in a potentially compromising situation. Were that the rule, few trials would
14 be constitutionally acceptable. The safeguards of juror impartiality, such as
15 *voir dire* and protective instructions from the trial judge, are not infallible; it
16 is virtually impossible to shield jurors from every contact or influence that
might theoretically affect their vote. Due process means a jury capable and
willing to decide the case solely on the evidence before it, and a trial judge
ever watchful to prevent prejudicial occurrences and to determine the effect of
such occurrences when they happen.

17 455 U.S. at 217; see Greene v. Georgia, 519 U.S. 145, 146, (1996) (per curiam) (“[F]ederal
18 courts must accord a presumption of correctness to state courts’ findings of juror bias.”). The
19 determination of whether a particular juror was biased so as to deny a defendant a fair trial
20 “is plainly one of historical fact.” Patton v. Yount, 467 U.S. 1025, 1036 (1984). And, the
21 state trial judge’s findings of impartiality is “presumptively correct under 28 U.S.C. §
22 2254[(e)(1)].” Phillips, 455 U.S. at 218. Under the AEDPA, a habeas petitioner bears the
23 heavy burden of “rebutting the presumption of correctness by clear and convincing
24 evidence.” 28 U.S.C. § 2254(e)(1).

25 Here, the record supports the trial judge’s determination that the challenged jurors
26 could be fair and impartial, and Petitioner fails to rebut that presumption. At the start of *voir*
27 *dire*, the trial judge instructed the jurors as follows:
28

1 The life experiences that help make you how you are today shape you. They
2 shape you. And those life experiences may have left you with some, as they
3 do all of us, with preconceived notions, biases, perhaps some prejudices, based
4 on your life experiences.

5 Now the fact that you have a preconceived notion or bias or prejudice or some
6 life experience that may have some indirect bearing on the facts of this case
7 does not necessarily preclude you from serving on this jury. What we ask of
8 you as jurors is to recognize your life experiences, the facts of your life for
9 what they are. They relate to your life and they have no application really to
10 the facts in this case. The facts of this case have to be decided based on their
11 own merits and the law that I give you.

12 The purpose of the questions that I'm going to ask is ... so you can determine
13 in your own mind whether or not you can be a fair and impartial juror in this
14 case.

15 (Doc. #18, Exh. Q at 23-24.) In response to the trial court's subsequent inquiries, several
16 jurors that were ultimately seated indicated that they had been victims of crime and some
17 indicated that they had previously been victims of molestation. The record reflects that: (1)
18 Juror #1 (panel #4) had a daughter who was 4, had previously volunteered in a rape advocacy
19 program, and had a childhood friend that she later learned had been molested as a child; (2)
20 Jurors #3 (panel #7), #4 (panel #9), #6 (panel #21), and #11 (panel #35) had been molested
21 as children; and (3) Juror #10 (panel #33) had been raped when she was 16. (Doc. #18, Exh.
22 D at 39; Exh. Q at 39-41, 63-65, 70.) After these revelations, each juror indicated that they
23 could put their experiences, emotional responses, and mental images aside, and that they
24 could render a fair and impartial verdict based upon the facts and law of the case. (Doc. #18,
25 Exh. Q at 73-83.) Upon individual questioning, Jurors #4, #10, #11 specifically stated that,
26 despite their experiences, they could listen to the facts and evidence and render a fair and
27 impartial verdict. (Doc. #18, Exh. D at 31-32, 38-40.)

28 Although Petitioner asserts that "[t]hese jurors are presumed biased as a matter of law
because of the negative relationship between their experiences and the nature of the
allegations at the issue in trial," (Doc. #3 at 6), it is Petitioner's burden to overcome the
presumption of correctness to the court's finding of impartiality. Here, Petitioner has failed
to present any persuasive evidence, let alone "clear and convincing evidence" to rebut the
presumption of correctness afforded to the state court's determination that a fair and impartial

1 jury was empaneled. See United States v. Miguel, 111 F.3d 666, 673 (9th Cir. 1997) (holding
2 that, in a trial for abusive sexual contact, the trial court did not err in failing to excuse jurors
3 for cause based upon statements that they had been the victims of child molestation or that
4 they had relatives that had been victims of child molestation because the juror's indicated
5 that they could render a fair and impartial verdict). Petitioner's claim is nothing more than
6 unsubstantiated speculation that, despite the jurors' avowals that they could render a fair and
7 impartial verdict, and the state court's finding of the same, he was denied a fair trial. Such
8 speculation is insufficient to carry Petitioner's burden.

9 Accordingly, Petitioner has failed to establish that the state court's rejection of this
10 claim was contrary to, or involved an unreasonable application of, clearly established Federal
11 law. The Court will recommend that Petitioner's claim as alleged in Ground Two be denied.

12 **3. Ground Three**

13 In Ground Three, Plaintiff alleges that the prosecutor vouched for witnesses and
14 misstated or mischaracterized testimony in violation of Plaintiff's Fifth and Fourteenth
15 Amendment right to due process and a fair trial.

16 In cases where the state did not deny the defendant the benefit of a specific provision
17 of the Bill of Rights, such as the right to counsel or the defendant's privilege against self-
18 incrimination, the appropriate standard of federal habeas review for a claim of prosecutorial
19 misconduct is "the narrow one of due process, and not the broad exercise of supervisory
20 power." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v.
21 DeChristoforo, 416 U.S. 637, 642 (1974)); see Phillips, 455 U.S. at 221 ("Federal courts hold
22 no supervisory authority over state judicial proceedings and may intervene only to correct
23 wrongs of constitutional dimension."). "The relevant question is whether the prosecutors'
24 comments 'so infected the trial with unfairness as to make the resulting conviction a denial
25 of due process.'" Darden, 477 U.S. at 181 (quoting Donnelly, 416 U.S. at 643). This
26 standard reflects the reality that "the touchstone of due process analysis in cases of alleged
27 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."
28 Phillips, 455 U.S. at 219.

1 In determining if a state prisoner's due process rights were violated, the reviewing
2 court "must consider the probable effect the prosecutor's [comments] would have on the
3 jury's ability to judge the evidence fairly." United States v. Young, 470 U.S. 1, 12 (1985).
4 To make such an assessment, it is necessary to place the prosecutor's remarks in context.
5 See Boyde v. California, 494 U.S. 370, 385 (1990); United States v. Robinson, 485 U.S. 25,
6 33-34 (1988); Williams v. Borg, 139 F.3d 737, 745 (9th Cir. 1998). The Supreme Court has
7 expressly identified defense counsel's conduct as an important consideration in determining
8 the effect of a challenged prosecutorial remark on the fairness of the defendant's trial:

9 Inappropriate prosecutorial comments, standing alone, would not justify a
10 reviewing court to reverse a criminal conviction obtained in an otherwise fair
11 proceeding. Instead, as Lawn [v. United States], 355 U.S. 339 (1958) teaches,
12 the remarks must be examined within the context of the trial to determine
13 whether the prosecutor's behavior amounted to prejudicial error. In other
14 words, the Court must consider the probable effect the prosecutor's response
15 would have on the jury's ability to judge the evidence fairly. In this context,
16 defense counsel's conduct, as well as the nature of the prosecutor's response,
17 is relevant. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 242,
18 60 S.Ct. 811, 853, 84 L.Ed. 1129 (1940); Crumpton v. United States, 138 U.S.
19 361, 364, 11 S.Ct. 355, 356, 34 L.Ed. 958 (1891). Indeed, most Courts of
20 Appeals, applying these holdings, have refused to reverse convictions where
21 prosecutors have responded reasonably in closing argument to defense
22 counsel's attacks, thus rendering it unlikely that the jury was led astray.

23 * * *

24 In order to make an appropriate assessment, the reviewing court must not only
25 weigh the impact of the prosecutor's remarks, but must also take into account
26 defense counsel's opening salvo. Thus the import of the evaluation has been
27 that if the prosecutor's remarks were "invited," and did no more than respond
28 substantially in order to "right the scale," such comments would not warrant
reversing a conviction.

21 Young, 470 U.S. at 11-13.

22 Moreover, the Supreme Court has indicated that state courts have substantial latitude
23 when considering prosecutorial misconduct claims because "constitutional line drawing [in
24 prosecutorial misconduct cases] is necessarily imprecise." Donnelly, 416 U.S. at 645; see
25 Slagle v. Bagley, 457 F.3d at 501, 516 (6th Cir. 2006).

26 The controlling standard for determining whether alleged misconduct constitutes
27 harmless error on habeas review is far more lenient than on direct appeal, as the inquiry is
28 merely "whether the error 'had substantial and injurious effect or influence,'" and whether

1 the error resulted in “actual prejudice.” Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)
2 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

3 Petitioner first challenges as improper vouching the following unobjected-to remarks
4 during closing and rebuttal argument regarding K’s testimony:

5 Not me, mommy, but [M] sucked on [Petitioner’s] wiener. First thing I said
6 to you about a week ago. First thing that [K] told Kimberly [K], has
7 [Petitioner] ever touched your privates? No, mommy. ... Not me, but [M]
8 sucked on his wiener. What we’re about in this trial, ladies and gentleman, is
9 whether you believe [K]. ... [I]n an interview with Detective Minor, once again
10 one on one, [K] says to Detective Minor, [M] sucked on [Petitioner’s] penis –
11 [Petitioner’s] wiener. Three days later, talking to Cherie Leffler, one on one,
12 [K] says, [M] sucked on [Petitioner’s] wiener. Six months later [K] comes in
13 to court, 14 of you, 5 of us, the court staff, 20 people or more people, what
14 happened? [K] said [M] played with his wiener, but he didn’t suck on his
15 wiener. That’s why you heard from Detective Minor ... [and] Cherie Leffler.
16 What inconsistencies were there? Each one of them described from their
17 interview what [K] said to each of them. The size of the penis. How it was
18 after [M] played with it. Remember [K] even used a motion. Cherie Leffler
19 described the finger and thumb put together and the motion that [M] did on
20 [Petitioner’s] penis. What happened then? It stuck straight up. She was
21 scared to come in front of 25, 20 people, and say something that she had only
22 told one person individually three different times. And today, ladies and
23 gentleman, I am asking you to believe her from those first three times.

15 * * *

16 Now Ms. Wakefield when she was talking to you, she wants you to think, I
17 guess, that somehow somebody has had some kind of influence on K, to put
18 in [K]’s mind these words, this image I guess that’s in her mind. ... The
19 statement that [K] made to Kim was as spontaneous a statement as we’re likely
20 to hear. Because if she was trying to please mom, or if she was trying to say
21 what mom wants to hear, she would say, yes, he touched me. I forgot, mom.
22 He touched me. Right? She didn’t say that.

20 * * *

21 Her descriptions, [K]’s descriptions about what happened in the bathtub, the
22 masturbatory technique, the length of the penis, were plausible. In fact, they
23 were accurate to what probably happened. There’s been no evidence about the
24 actual size of [Petitioner’s] penis, so we don’t know what that size was. But
25 the actions [K] described – she used her hands. ... She was very clear about
26 what it was in her head that she saw and what she was able to describe.

25 * * *

26 [Defense counsel during his closing argument] ask[ed] you to think of the fate
27 of [Petitioner]. I ask you, ladies and gentlemen, what about the fate of these
28 children? Luckily we caught this. Luckily Aaron [] came back. If her
answers were suggested, as [defense counsel] suggests, why were they
different? Why when I asked her on the stand what happened, did she not say
what she had said to interviewers? Because they weren’t suggested. That’s

1 the answer. I'm going to answer that rhetorical question. They were not
2 suggested by the interviewers. They were not suggested by her mother. This
3 isn't her story. This is what she saw. This is her observation of what
4 happened to her younger brother. ... And maybe it is very true that we didn't
5 get the whole story of what happened in that bathtub, but we got something
6 that happened with details that she would not otherwise know. ...

(Doc. #18, Exh. S at 22-23, 26, 29-30, 32, 45, 46.)

7 Contrary to Petitioner's claim, the prosecutor's arguments did not constitute vouching,
8 nor were they improper. Vouching occurs either when the prosecutor places the prestige of
9 the government behind its witness, or when the prosecutor suggests that information not
10 presented to the jury supports the witness's testimony. See United States v. Younger, 398
11 F.3d 1179, 1190 (9th Cir. 2005) (internal quotation marks omitted); State v. Dumaine, 783
12 P.2d 1184, 1193 (Ariz. 1989). "The first type of vouching consists of personal assurances
13 of a witness' truthfulness." State v. Dunlap, 930 P.2d 518, 539 (Ariz. Ct. App. 1996). "The
14 second type involves prosecutorial remarks that bolster a witness' credibility by reference
15 to material outside the record." Id. Courts examine the context of challenged prosecutorial
16 remarks to determine whether they constitute impermissible vouching. See State v. Lee, 917
17 P.2d 692, 697 (Ariz. 1996); State v. Corona, 932 P.2d 1356, 1362 (Ariz. Ct. App. 1997);
18 State v. Hernandez, 823 P.2d 1309, 1316 (Ariz. Ct. App. 1991).

19 Here, the Court finds that the prosecutor's comments did not fall within the scope of
20 improper vouching. Rather, it is clear that the prosecutor was attempting to respond to
21 Petitioner's proffered defense and argument, which questioned K's credibility and attacked
22 the inconsistency of her statements and testimony, by arguing that her testimony was
23 believable, supported by the evidence, and that the government's case based upon her
24 testimony was the more plausible scenario according to the evidence and testimony presented
25 in the case. See United States v. Necochea, 986 F.2d 1273, 1276 (9th Cir. 1993) (holding
26 that the prosecutor must have reasonable latitude in fashioning closing arguments, and can
27 argue reasonable inferences based on the evidence). As such, the prosecutor's comments
28 were not personal assurances of K's truthfulness, nor did they bolster her credibility with
reference to material outside the record, and thus, did not constitute vouching.

1 Petitioner next attacks as a mischaracterization of the evidence that Aaron caught and
2 saw Petitioner getting out of the tub.

3 At trial, Aaron testified as follows:

4 A. [I] got home and walked in. I was talking to my brother at the time [on the
5 phone], ... And I walked in and finished talking to him. About 45 seconds later
6 walked towards the bathroom. The door was closed. I opened it up, and that's
7 when I saw [Petitioner] pulling up his pants.

8 Q. Okay. Which bathroom was it?

9 A. It was the kids' bathroom.

10 Q. You said - - describe the door again. You said it was open?

11 A. I cannot recall if the door was completely latched, but it was closed.

12 Q. Okay. Can you hear anything going on inside?

13 A. I heard the kids playing in the bathtub.

 * * *

14 Q. Okay. You said that you saw [Petitioner] inside, correct?

15 A. Correct.

16 Q. What was he doing?

17 A. He was standing up against the wall, pulling up his pants.

18 Q. Was he wearing any other clothing?

19 A. He had navy blue underwear on. ... Briefs.

20 Q. Could you tell or not that the clothing was wet?

21 A. I couldn't tell. I was navy blue. I couldn't tell. I had one glance at it and
22 turned my head away.

 * * *

23 Q. How did you react to this?

24 A. I was in shock. I didn't know what to think at first. My heart stopped and
25 I saw my reflection in the mirror. Then I turned and saw him actually pull
26 them up. Then that's when I turned away and walked out towards the couch
27 in the living room.

 * * *

28 Q. Did you notice – what kind of pants was he pulling up?

1 A. It was denim. I can't recall if they were shorts or pants, but they were
2 denim.

3 Q. Did you notice them on him once he had pulled them up and put them on?

4 A. Yes, he put them on.

5 Q. Did you notice whether or not the denim pants were wet or not?

6 A. They were dry with patches of wet.

7 (Doc. #18, Exh. A at 18-22.)

8 During closing argument, the prosecutor made the following statements:

9 February 11, 2005, Aaron [] comes home early. He's supposed to go out with
10 the guys that night, have a couple of drinks, have a good time. Stay out till
11 1:00 or so. Instead he comes home early, 9:00 o'clock. What does he do? He
12 catches [Petitioner] getting out of the tub. Even Ms. Wakefield – we will talk
13 about her in a minute – she said three people with Petitioner in the tub was
14 implausible. But that's what Aaron [] saw. He saw it just two seconds later.
15 His shorts were wet. He's pulling up the pants. And the pants were wet.
16 After they already had been pulled up over the wet shorts. ... Aaron [] did not
17 know what to do. What do you do in a situation like that? You walk home to
18 what should be a houseful of playing children, and they're nowhere to be
19 found until you hear their voices. Oh, they're in the bathroom. You go down
20 that hallway to the door where the bathroom is – on your phone. ... He looks
21 over. ... The door is closed. There are three people in the apartment. They're
22 all in the bathtub, and the door is closed. Why? He doesn't know what to do.
23 He's flabbergasted. ... Absolutely beside himself. Called his brother again.
24 What should I do? What should I do? [Petitioner], unlike any other time in
25 Aaron's [] experience with him, gets out of the tub, puts his clothes on, gathers
26 up the stuff, puts it into his bag, keeps his head down, and walks out the door.
27 Zero conversation. Zero eye contact.

28 (Doc. #18, Exh. S at 23-25.)

Contrary to Petitioner's claims, the prosecutor's argument neither mischaracterized
the evidence, nor did it refer to "largely irrelevant" testimony. (Doc. #3 at 8.) First, the
prosecutor's statements were a reasonable statement of the evidence presented at trial. This
is particularly so when considering Petitioner's admission to Detective Minor that he had
been in the tub with the children on two separate occasions, including the night Aaron came
home, and Aaron's testimony that he: (1) discovered Petitioner in the bathroom, with the
door closed; (2) witnessed Petitioner in his underwear, pulling his pants up; (3) noted that
Petitioner's pants were wet; and (4) was shocked at what he had seen. Thus, the prosecutor's
statements were not improper. See Ceja v. Stewart, 97 F.3d 1246, 1253 (9th Cir. 1996)

1 (holding that “[c]ounsel are given latitude in the presentation of their closing arguments, and
2 courts must allow the prosecution to strike hard blows based on the evidence presented and
3 all reasonable inferences therefrom”); Bible v. Schriro, 497 F.Supp.2d 991, 1025 n.25 (D.
4 Ariz. 2007) (“Unlike opening statements, during closing arguments counsel may summarize
5 the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from
6 the evidence, and suggest ultimate conclusions.”); State v. Dumaine, 783 P.2d 1184, 1193
7 (Ariz. 1989) (counsel may comment on evidence and argue all reasonable inferences
8 therefrom); State v. Jaramillo, 520 P.2d 1105, 1107 (Ariz. 1974) (recognizing that if a
9 prosecutor’s remarks are invited by opposing counsel, the remarks are not grounds for
10 reversal unless they “go beyond a pertinent reply or are necessarily prejudicial”).

11 Equally unavailing is Petitioner’s claim that the prosecutor’s arguments referred to
12 “largely irrelevant” testimony because Aaron “did not witness any criminal activity, did not
13 speak to the witnesses and testified as to a date on which the witnesses did not allege
14 anything happening and on which no crime was charged.” (Doc. #3 at 8.) “‘Relevant
15 evidence’ means evidence having any tendency to make the existence of any fact that is of
16 consequence to the determination of the action more probable or less probable than it would
17 be without the evidence.” Fed.R.Evid. 401. Here, Aaron’s testimony that he caught
18 Petitioner in the bathroom with the children, with the door closed, in his wet underwear was
19 clearly relevant as it tended to corroborate both K’s testimony that Petitioner had taken baths
20 with the children, and Petitioner’s own admission that he had taken baths with the children.
21 As such, the testimony was relevant and the prosecutor’s reference to said testimony in his
22 argument was not improper.

23 Petitioner further claims that the prosecutor mischaracterized the testimony of Kim
24 because he stated that Petitioner “was accepting half the money that the other weekend
25 babysitters would accept.” (Doc. #3 at 9.) The record, however, refutes this claim. At trial,
26 Kim testified that when she looked for babysitters, she interviewed four daycare facilities
27 before speaking to Petitioner. (Doc. #18, Exh. A at 58.) She stated that the facilities quoted
28

1 her a price of \$200. (Doc. #18, Exh. A at 58.) Petitioner, however, agreed to provide the
2 same service for “100, \$120.” (Doc. #18, Exh. A at 64.)

3 During closing argument, the prosecutor stated the following:

4 Back to February 3rd, the weekend, you recall that Kimberley [] said it was
5 really the weekend that I was hiring this guy who was accepting half the
6 amount of money than any other weekend baby-sitter would accept. ... He was
7 taking advantage of people who cannot otherwise [afford] a baby-sitter. ... He
told them that he liked to help struggling parents, help them out when they
needed help. He accepted half the pay to get himself alone in a bathtub with
boys, with children.

8 (Doc. #18, Exh. S at 36-39.) Contrary to Petitioner’s claim, this argument was again a
9 reasonable inference given Kim’s testimony. See Ceja, 97 F.3d at 1253; Bible, 497
10 F.Supp.2d at 1025 n.25; Dumaine, 783 P.2d at 1193.

11 Finally, Petitioner’s claims of prosecutorial misconduct fail because any potential
12 prejudice caused by the prosecutor’s closing comments was sufficiently minimized by the
13 trial court’s final jury instructions. Before closing arguments, the court instructed the jury
14 that: (1) opening statements by counsel are not evidence; (2) the verdict must be based solely
15 on the evidence, which the court defined as witness testimony, exhibits, and the parties’
16 stipulations; and (3) the jury should decide the case without “sympathy or prejudice.” (Doc.
17 #18, Exh. S at 14-22.) Overwhelming precedent belies any alleged claim of prejudice
18 resulting from the prosecutor’s allegedly improper comments. See Richardson v. Marsh, 481
19 U.S. 208, 211, (1987) (“The rule that juries are presumed to follow their instructions is a
20 pragmatic one, rooted less in the absolute certitude that the presumption is true than in the
21 belief that it represents a reasonable practical accommodation of the interests of the state and
22 the defendant in the criminal justice process.”); Darden, 477 U.S. at 182 (“The trial court
23 instructed the jurors several times that their decision was to be made on the basis of the
24 evidence alone, and that the arguments of counsel were not evidence.”); Drayden v. White,
25 232 F.3d 704, 713 (9th Cir. 2000) (“Additionally, before the lawyers made their closing
26 arguments, the court instructed the jury that ‘[s]tatements made by the attorneys during the
27 trial are not evidence,’ and that the jury ‘must not be influenced by mere sentiment,
28 conjecture, sympathy, passion, prejudice, public opinion or public feeling.’ We presume that

1 the jury followed the instructions.”); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir.
2 1996) (denying habeas relief for allegedly improper prosecutorial remark because “the jury
3 accords less weight to the arguments of counsel than to the court’s instructions”); State v.
4 Nordstrom, 25 P.3d 717, 742 (Ariz. 2001); (“Courts do not presume that jurors betray the
5 court’s trust and ignore their instructions.”).

6 This is particularly so considering the evidence presented by the State. The State’s
7 evidence against Petitioner included testimony reflecting that: (1) Petitioner admitted to
8 taking baths with the children on two separate occasions; (2) when K and M were in the
9 bathtub, K and M were naked and Petitioner wore blue underwear and that M sucked on
10 Petitioner’s “wiener”; (3) K stated that “[M] touched Petitioner’s winer [sic],” making “a
11 circle with her index finger and her thumb in an up and down motion, ... “[t]hen [M] put his
12 mouth on [Petitioner’s] wiener”; (4) the sexual activity happened on two separate occasions;
13 and (5) K described Petitioner’s “wiener” being “big, long and stuck straight up.” (Doc. #18,
14 Exh. A at 18-22, 30-31, 71, 83, 107-111; Exh. B at 47-48, 54; Exh. C at 12-15; Exh. D at 84.)
15 It is well established that substantial evidence of guilt renders any prosecutorial misconduct
16 non-prejudicial. See Darden, 477 U.S. at 182 (“The weight of the evidence against petitioner
17 was heavy; the overwhelming eyewitness and circumstantial evidence to support a finding
18 of guilt on all charges ... reduced the likelihood that the jury’s decision was influenced by
19 argument.”) (citation omitted); Cristini v. McKee, 526 F.3d 888, 900 (6th Cir. 2008)
20 (“Nevertheless, some of the prosecutor’s opening and closing argument went beyond the
21 bounds of the ruling that permitted other acts evidence to establish Defendant’s identity. We
22 find, however, that the Michigan Court of Appeals reasonably found that this character
23 argument was harmless in view of the admissible evidence that established the Defendant’s
24 guilt.”); United States v. Green, 435 F.3d 1265, 1269 (10th Cir. 2006) (“The amount of
25 evidence presented against Defendant satisfies us the alleged misconduct had a minuscule
26 effect, if any, on the jury’s verdict.”); United States v. Washington, 417 F.3d 780, 787 (7th
27 Cir. 2005) (“Finally, like most prosecutorial misconduct claims, Washington’s claim
28 founders in the face of the strong evidence of his guilt.”); Cotton v. Cockrell, 343 F.3d 746,

1 752 (5th Cir. 2003) (“Given the overwhelming evidence of guilt and the court’s cautionary
2 instruction to the jury, we conclude that the prosecution’s statement had no substantial and
3 injurious effect or influence in the determination of Cotton’s guilt.”); Drayden, 232 F.3d at
4 712 (citing Darden to support holding that misconduct was non-prejudicial because “the
5 evidence of Petitioner’s guilt of first-degree murder was very strong”).

6 Accordingly, the state court’s rejection of Petitioner’s claim was neither contrary to,
7 nor did it involve an unreasonable application of, clearly established Federal law. The Court
8 will recommend that Petitioner claim as set forth in Ground Three be denied.

9 **4. Ground Four**

10 In Ground Four, Petitioner alleges that prospective jurors were impermissibly stricken
11 by the prosecutor based on gender in violation of equal protection under the Fourteenth
12 Amendment. Specifically, Petitioner claims that the State violated his right to equal
13 protection as set forth by Batson v. Kentucky, 476 U.S. 79 (1984) when it utilized 5 of its 6
14 peremptory challenges against male prospective jurors. Petitioner’s failure to file a
15 contemporaneous objection at trial, however, bars any consideration of this claim on habeas
16 review. Assuming, however, that Petitioner’s failure to object is not fatal to his claim,
17 Petitioner cannot make even a *prima facie* showing of purposeful discrimination sufficient
18 to establish a Batson violation.

19 The United States Supreme Court set forth the clearly established federal law
20 governing this claim in Batson. There, the Court held that the Fourteenth Amendment’s
21 Equal Protection clause limits the state’s ability to use its peremptory challenges to exclude
22 potential jurors solely because of their race. See id. at 86. The Supreme Court set forth a
23 three-step process for reviewing claims that the state’s use of a peremptory challenge violated
24 equal protection:

25 First, the defendant must make a *prima facie* showing that the prosecutor has
26 exercised peremptory challenges on the basis of race. Second, if the requisite
27 showing has been made, the burden shifts to the prosecutor to articulate a race-
28 neutral explanation for striking the jurors in question. Finally, the trial court
must determine whether the defendant has carried his burden of proving
purposeful discrimination.

1 Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citations omitted).

2 During *voir dire*, Petitioner’s jury panel included 32 female and 18 male prospective
3 jurors. (Doc. #18, Exh. T.) The trial court excused 15 prospective jurors for cause – 8
4 female and 7 male. (Doc. #18, Exh. T.) The State used its peremptory strikes to remove one
5 female and five male jurors. Petitioner did not object. (Doc. #18, Exh. T; Exh. D at 40-42.)
6 Petitioner subsequently used his peremptory strikes to remove four female and two male
7 jurors from the panel. (Doc. #18, Exh. T; Exh. D at 40-42.)

8 Initially, the Court notes that Petitioner has forfeited his Batson claim by failing to
9 raise a contemporaneous objection alleging an equal protection violation or otherwise object
10 to the gender composition of the jury at trial. See United States v. Contreras-Contreras, 83
11 F.3d 1103, 1104-05 (9th Cir. 1996) (holding that a defendant forfeits a Batson claim if the
12 defendant fails to make a timely objection to the prosecution’s assertedly discriminatory use
13 of peremptory challenges); see also Allen v. Lee, 366 F.3d 319, 327-28 (4th Cir. 2004) (en
14 banc) (concluding the defendant “did not adequately preserve his *Batson* objection ... [by
15 remaining silent] after the trial judge’s repeated calls for objections after the actual jury
16 selection” and emphasizing the defendant’s claim had not been procedurally defaulted);
17 McCrorry v. Henderson, 82 F.3d 1243 1249 (2nd Cir. 1996) (“[W]e hold that the failure to
18 object to the discriminatory use of peremptory challenges prior to the conclusion of jury
19 selection waives the objection.”); Sledd v. McKune, 71 F.3d 797, 799 (10th Cir. 1995)
20 (concluding there was no basis to review a peremptory challenge when an objection had not
21 been made in the state trial court).

22 Petitioner’s failure to raise the Batson issue during trial resulted in a trial record that
23 is not sufficiently developed to support an evaluation of the jury selection practice under
24 Batson. See Sledd, 71 F.3d at 799 (where no Batson objection was made at trial, “there is
25 no basis for us to review the peremptory challenge”); Thomas v. Moore, 866 F.2d 803, 805
26 (5th Cir. 1989) (“A timely [Batson] objection and the corresponding opportunity to evaluate
27 the circumstances of the jury selection process are essential to a trial court’s reasoned
28 application of the limitations placed on peremptory challenges by the Batson holding.”).

1 Here, because Petitioner did not object, no analysis of the prosecutor's reasons for the strikes
2 is possible, for the prosecutor had no reason to believe any such explanations were necessary,
3 and so never provided any. Accordingly, because Petitioner failed to make a timely
4 objection, he has forfeited his Batson claim.

5 Assuming Petitioner's failure to object is not fatal to his claim, he has failed to meet
6 his burden in establishing a *prima facie* case of purposeful discrimination. To successfully
7 challenge a peremptory strike, a party must set forth a "*prima facie* case of purposeful
8 discrimination by showing that the totality of the relevant facts give rise to an inference of
9 discriminatory purpose." Batson, 476 U.S. at 93-94. Petitioner has failed to establish that
10 the totality of the relevant facts gave rise to an inference of gender-based discrimination. The
11 State did not employ all of its peremptory strikes to remove males from the jury panel; a
12 female prospective juror was also excluded. Moreover, three males remained and Petitioner
13 used his peremptory strikes to remove two of the remaining male prospective jurors. (Doc.
14 #18, Exh. T.) A *prima facie* case generally cannot be established where only some, but not
15 all, members of a cognizable group are struck. See United States v. Vasquez-Lopez, 22 F.3d
16 900, 902 (9th Cir. 1994) ("Using peremptory challenges to strike Blacks does not end the
17 inquiry; it is not per se unconstitutional, without more, to strike one or more Blacks from the
18 jury"); State v. Eagle, 992 P.2d 1122 (Ariz. Ct. App. 1998) (holding that a *prima facie* case
19 generally cannot be established where only some, but not all, members of a cognizable group
20 are struck); State v. Thompson, 950 P.2d 1176, 1178 (Ariz. Ct. App. 1997) (holding that
21 where the defendant failed to offer a single reason, other than the strike of a minority juror,
22 to support his Batson claim, and another minority juror went unchallenged and served on the
23 jury, the trial court did not abuse its discretion in finding that the defendant failed to make
24 a *prima facie* showing of purposeful discrimination).

25 Here, Petitioner has failed to offer a single other reason, statistical or otherwise, to
26 justify his claim of discriminatory strikes other than the fact that the State used a majority of
27 its strikes to exclude male jurors. Thus, because there is a complete absence of support for
28 Petitioner's Batson claim, male jurors remained on the panel, and because Petitioner himself

1 struck several male jurors, Petitioner has failed to establish a *prima facie* showing of
2 purposeful discrimination.

3 As such, Petitioner has neither established that the state court's rejection of
4 Petitioner's claim was contrary to, nor involved an unreasonable application of, clearly
5 established Federal law. The Court will recommend that Petitioner's claim as asserted in
6 Ground Four be denied.

7 **5. Ground Six**

8 Petitioner contends in Ground Six that he received ineffective assistance of counsel
9 at trial in violation of his Sixth Amendment rights based on the failure to make appropriate
10 motions and objections and to preserve constitutional issues. Specifically, Petitioner claims
11 that he received ineffective assistance because his trial counsel: (a) failed to move for
12 directed verdict based upon K's alleged lack of credibility; (b) did not file a motion for a new
13 trial on the ground that the verdict was contrary to the weight of the evidence based upon K's
14 alleged "improbable testimony" and that "the prosecutor's arguments and statements denied
15 Petitioner a fair trial"; (c) did not object to the prosecutor's closing argument; (d) failed to
16 challenge juror numbers 1, 3, 4, 6, 10, and 11 for cause; (e) did not object to the prosecutor's
17 use of peremptory challenges; (f) did not object when the trial court vacated his preliminary
18 hearing.

19 The two-prong test for establishing ineffective assistance of counsel was established
20 by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail
21 on an ineffective assistance claim, a convicted defendant must show (1) that counsel's
22 representation fell below an objective standard of reasonableness, and (2) that there is a
23 reasonable probability that, but for counsel's unprofessional errors, the result of the
24 proceeding would have been different. See id. at 687-88.

25 Regarding the performance prong, a reviewing court engages a strong presumption
26 that counsel rendered adequate assistance, and exercised reasonable professional judgment
27 in making decisions. See id. at 690. "[A] fair assessment of attorney performance requires
28 that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

1 circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s
2 perspective at the time.” Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995) (quoting
3 Strickland, 466 U.S. at 689). Moreover, review of counsel’s performance under Strickland
4 is “extremely limited”: “The test has nothing to do with what the best lawyers would have
5 done. Nor is the test even what most good lawyers would have done. We ask only whether
6 some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel
7 acted at trial.” Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.), judgment rev’d on other
8 grounds, 525 U.S. 141 (1998). Thus, a court “must judge the reasonableness of counsel’s
9 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
10 conduct.” Strickland, 466 U.S. at 690.

11 If the prisoner is able to satisfy the performance prong, he must also establish
12 prejudice. See id. at 691-92; see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (burden
13 is on defendant to show prejudice). To establish prejudice, a prisoner must demonstrate a
14 “reasonable probability that, but for counsel’s unprofessional errors, the result of the
15 proceeding would have been different.” Strickland, 466 U.S. at 694. A “reasonable
16 probability” is “a probability sufficient to undermine confidence in the outcome.” Id. A
17 court need not determine whether counsel’s performance was deficient before examining
18 whether prejudice resulted from the alleged deficiencies. See Robbins, 528 U.S. at 286 n.14.
19 “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient
20 prejudice, which we expect will often be so, that course should be followed.” Id. (quoting
21 Strickland, 466 U.S. at 697).

22 In reviewing a state court’s resolution of an ineffective assistance of counsel claim,
23 the Court considers whether the state court applied Strickland unreasonably:

24 For [a petitioner] to succeed [on an ineffective assistance of counsel claim], ...
25 he must do more than show that he would have satisfied Strickland’s test if his
26 claim were being analyzed in the first instance, because under § 2254(d)(1),
27 it is not enough to convince a federal habeas court that, in its independent
28 judgment, the state-court decision applied Strickland incorrectly. Rather, he
must show that the [state court] applied Strickland to the facts of his case in an
objectively unreasonable manner.

1 Bell v. Cone, 535 U.S. 685, 698-99 (2002) (citations omitted); see also Woodford v.
2 Visciotti, 537 U.S. 19, 24-25 (2002) (“Under § 2254(d)’s ‘unreasonable application’ clause,
3 a federal habeas court may not issue the writ simply because that court concludes in its
4 independent judgment that the state-court decision applied Strickland incorrectly. Rather,
5 it is the habeas applicant’s burden to show that the state court applied Strickland to the facts
6 of his case in an objectively unreasonable manner.”) (citations omitted).

7 Having reviewed the record, the Court finds that the state court did not unreasonably
8 apply Strickland. The Court will recommend that Petitioner’s claim as asserted in Ground
9 Six be denied.

10 **a. Failing to move for a directed verdict based upon K’s alleged lack of**
11 **credibility.**

12 Petitioner asserts that his trial counsel rendered ineffective assistance by failing to
13 renew a motion for a directed verdict based upon K’s alleged lack of credibility and conflicts
14 within the evidence.

15 The record reflects that at the close of the State’s evidence, defense counsel moved
16 for a directed verdict on all counts pursuant to Rule 20 of the Arizona Rules of Criminal
17 Procedure, and succeeded in garnering the dismissal of Counts 1 and 2 of the indictment.
18 (Doc. #18, Exh. C at 16-27.) Petitioner, however, contends that his counsel was ineffective
19 because he failed to renew the motion based upon alleged conflicts with K’s testimony. As
20 the Court has indicated, while K’s testimony was arguably inconsistent, it is the province of
21 the jury to “resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable
22 inferences from basic facts to ultimate facts.” Jackson, 443 U.S. at 319. If the trier of fact
23 could draw conflicting inferences from the evidence, the reviewing court will assign the
24 inference that favors conviction. See McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994).
25 Thus, defense counsel’s choice not to renew the motion for directed verdict was a reasonable
26 tactical choice that is insufficient to constitute ineffective assistance. See Wildman v.
27 Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (tactical decision by counsel with which a
28 defendant disagrees cannot form a basis for an ineffective assistance claim); Gerlaugh v.

1 Stewart, 129 F.3d 1027, 1033 (9th Cir. 1997) (a reasonable tactical choice based on an
2 adequate inquiry is immune from attack under Strickland); see also United States v. Mejia-
3 Mesa, 153 F.3d 925, 931 (9th Cir. 1998) (failure to make certain objections as a matter of
4 overall litigation strategy does not constitute ineffective assistance).

5 Moreover, Petitioner has failed to establish prejudice. The record reflects that defense
6 counsel moved for a directed verdict on all four counts and was successful in getting Counts
7 1 and 2 dismissed. Petitioner has failed to carry his burden of establishing that, had defense
8 counsel argued that K's testimony was inconsistent and incredible, it would have persuaded
9 the court to dismiss the remaining two counts. This is particularly so, when considering that
10 it is within the exclusive province of the jury to determine the facts by weighing the evidence
11 presented and the credibility of the witnesses presenting it. See Jackson, 443 U.S. at 319
12 ("This familiar standard gives full play to the responsibility of the trier of fact fairly to
13 resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences
14 from basic facts to ultimate facts.").

15 Thus, Petitioner has not shown deficient performance or prejudice.

16 **b. Failing to file a motion for new trial on the ground that the verdict was**
17 **contrary to the weight of the evidence.**

18 Petitioner alleges that defense counsel rendered ineffective assistance when he failed
19 to file a motion for new trial based upon "[K]'s improbable testimony, the victim's denial of
20 the charged conduct, [and] the witness's inconsistent court testimony"

21 To set aside a jury verdict for insufficient evidence, it must clearly appear that upon
22 no hypothesis whatsoever is there sufficient evidence to support the conclusion reached by
23 the jury. See State v. Arredondo, 746 P.2d 484, 486 (Ariz. 1987). Petitioner's mere
24 allegation that there was conflicting evidence and inconsistent testimony is insufficient to
25 constitute a verdict which goes against the weight of the evidence presented here. Thus,
26 because the offense was clearly proven by the evidence presented, counsel could not have
27 been ineffective by failing to file a motion for a new trial based upon insufficient evidence.

1 Moreover, Petitioner’s claim must be rejected because he has failed to make any
2 showing that, had such a motion been filed, there is a reasonable likelihood that the motion
3 would have succeeded. This is particularly so, where trial counsel moved for a directed
4 verdict on all counts and was successful in garnering a dismissal of Counts 1 and 2.
5 Petitioner has presented no evidence that supports a finding that, had the motion been filed,
6 the trial court would have reconsidered its previous ruling denying the motion for directed
7 verdict as to counts 3 and 4. Thus, Petitioner has failed to establish that, had a motion for
8 new trial been filed, the trial court would have reconsidered and overturned its previous
9 ruling denying a directed verdict as to Counts 3 and 4. Accordingly, no prejudice has been
10 shown.

11 **c. Failing to object to alleged prosecutorial misconduct during closing**
12 **argument and failing to move for a new trial on the same grounds.**

13 Petitioner argues that trial defense counsel rendered ineffective assistance when he
14 failed to object to the prosecutor’s closing argument which Petitioner claims included
15 vouching and mischaracterization of the evidence and failed to move for a new trial on the
16 same grounds. Specifically, Petitioner claims that, had the objection been made, “the judge
17 probably would have sustained the objections or granted a new trial had defense counsel
18 raised the issue.”

19 As the Court discussed previously, the prosecutor’s closing remarks did not constitute
20 vouching, nor did he mischaracterize the evidence presented at trial. Thus, because these
21 statements were not improper, any objection or request for a new trial would have been
22 denied, and therefore, Petitioner has failed to overcome the presumption that, under the
23 circumstances, defense counsel’s actions constituted sound trial strategy, let alone establish
24 that, even had defense counsel objected, there is a “a reasonable probability that absent the
25 errors the fact finder would have had a reasonable doubt respecting guilt.” Strickland, 466
26 U.S. at 687-94 (citations omitted); see United States v. Molina, 934 F.2d 1440, 1448 (9th Cir.
27 1991) (recognizing that counsel’s failure to object may be reasonable because of fear that
28 jury might construe objections as “a sign of desperation and hyper-technicality”).

1 Petitioner has failed to establish deficient performance or prejudice.

2 **d. Failing to challenge for cause Jurors #1, #3, #4, #6, #10, and #11.**

3 Petitioner asserts that his trial counsel rendered ineffective assistance by failing to
4 challenge several jurors for cause because: (1) Juror #1 (panel #4) had a daughter who was
5 4, had previously volunteered in a rape advocacy program, and had a childhood friend that
6 she later found out had been molested as a child; (2) Jurors #3 (panel #7), #4 (panel #9), #6
7 (panel #21), and #11 (panel #35) had been molested as children; and (3) Juror #10 (panel
8 #33) had been raped when she was 16.

9 At trial, Jurors #1, #3, #4, #6, #10, and #11 all indicated that, despite their past
10 experiences, they would be able to render a fair and impartial verdict and decide Petitioner's
11 guilt based upon the facts and law of the case. (Doc. #18, Exh. Q at 73-83.) Upon individual
12 questioning by defense counsel, Jurors #4 and #11, indicated that they could listen to the
13 evidence and render an impartial verdict. (Doc. #18, Exh. Q at 73-83; Exh. D at 38-40.)
14 Similarly, Juror #10, specifically stated that, despite her past experiences, she could be "fair,
15 logical, and objective" and would be able to render an impartial verdict. (Doc. #18, Exh. D
16 at 31-33.)

17 Based upon this record, Petitioner has failed to overcome the presumption that defense
18 counsel's decision to not challenge these jurors for cause constituted a reasonable
19 professional judgment. The standard for qualification as a juror is fairness and impartiality:
20 whether the person could set aside any personal feelings that they might harbor, keep an open
21 mind throughout the presentation of the evidence, and base their verdict solely on the
22 evidence that has been presented at trial. See Bible, 858 P.2d at 1176. In this respect, even
23 a preconceived notion of guilt is not sufficient to justify a strike for cause, so long as the
24 juror indicates that he can set aside that opinion and render a verdict on the facts. See State
25 v. Atwood, 832 P.2d 593, 647-48 (Ariz. 1992), cert. denied, 506 U.S. 1084 (1993), overruled
26 on other grounds by State v. Nordstrom, 25 P.3d 171 (2001). The juror's promise to "try"
27 to set aside the preconception is sufficient to overcome a motion to strike, see State v. Oliver,
28 821 P.2d 250, 253 (Ariz. Ct. App. 1991), as is the juror's promise to "try" and follow the trial

1 court's instructions. See State v. Comer, 799 P.2d 333, 346 (Ariz. 1990). A juror's "strong
2 feelings" is not sufficient cause to strike a juror, see State v. Cocio, 709 P.2d 1336, 1339
3 (Ariz. 1985), nor is a juror's serious misgiving about his ability to be fair if that potential
4 juror ultimately assures the judge that she can be fair. See State v. Sexton, 787 P.2d 1097,
5 1098-99 (Ariz. Ct. App. 1989). In the instant case, because the juror's indicated that they
6 would be able to set aside personal feelings and experiences and decide this case on the facts
7 presented in the court room, any challenge for cause would have been futile.

8 Moreover, Petitioner's reliance upon United States v. Gonzalez, 214 F.3d 1109 (9th
9 Cir. 2000), for the proposition that there was imputed bias is misplaced. In Gonzalez, a juror
10 indicated that he had personal experiences similar to the fact pattern at issue at the trial and
11 never indicated that she would be able to serve impartially and fairly. See id. at 1113-1114.
12 Here, in contrast, Jurors #1, #3, and #6 indicated that their personal experiences would not
13 prevent them from rendering an impartial verdict, and Jurors #4, #10, and #11, upon
14 individual questioning, affirmatively stated that they could be fair and impartial despite their
15 personal history and would not be adversely affected by their past experiences. As such,
16 there was no actual or imputed bias. Thus, there was no basis for counsel to challenge these
17 jurors for cause, and thus, counsel could not have been ineffective for failing to do so. See
18 United States v. Quintero-Barraza, 78 F.3d 1344, 1349-50 (9th Cir. 1996); Lowry v. Lewis,
19 21 F.3d 344, 346 (9th Cir. 1994) (holding that counsel is not required to argue frivolous or
20 groundless matters).

21 Finally, Petitioner cannot establish the prejudice. Petitioner has failed to support his
22 claim with any evidence of actual or implied juror bias. An ineffective assistance of counsel
23 claim based on counsel's failure to strike an allegedly biased juror requires a petitioner show
24 a juror's actual bias. See Miller v. Francis, 269 F.3d 609, 616 (6th Cir. 2001) (holding that
25 when a defendant claims that counsel was ineffective for failing to strike a juror, it is the
26 defendant's burden to establish that the juror was biased). Petitioner's claim that the jurors
27 must have been biased because of their past experiences is pure speculation, particularly
28

1 when considering that each of the jurors indicated that, despite their personal experiences,
2 they could render a fair and impartial verdict.

3 Accordingly, Petitioner has shown neither deficient performance nor prejudice.

4 **e. Failing to object to the prosecutor's peremptory strikes.**

5 Petitioner contends that his trial counsel was ineffective for failing to object to and
6 argue that the prosecutor violated Batson by using peremptory strikes to remove male
7 prospective jurors. Petitioner's claim, however, fails because, as has been discussed he failed
8 to make a *prima facie* showing that the prosecutor's peremptory strikes raised an inference
9 of gender discrimination. Thus, the burden never shifted to the State to give reasons for its
10 strikes, and the trial court did not err by not requiring the State to explain the reasons for the
11 strikes. As a result, he cannot establish that defense counsel acted incompetently. See
12 Batson, 476 U.S. at 96 (defendant has burden of establishing *prima facie* case of
13 discrimination by showing that the prosecutor excluded from venire members of defendant's
14 race, under circumstances raising an inference of racial discrimination).

15 Assuming, however, that defense counsel somehow erred, Petitioner is not entitled to
16 relief because he has not established prejudice. He has failed to demonstrate that counsel's
17 decision not to pursue the claim resulted in an unfair trial or that the jury that heard his case
18 was not fair and impartial.

19 Thus, Petitioner has not established that counsel acted incompetently or that prejudice
20 resulted from counsel's actions.

21 **f. Failing to object when the trial court vacated his preliminary hearing.**

22 Petitioner asserts that his counsel rendered ineffective assistance in failing to object
23 when the trial court vacated his preliminary hearing.

24 The record reflects that Petitioner was initially charged by way of direct complaint,
25 but the State subsequently filed a supervening indictment. Accordingly, Petitioner was not
26 entitled to a preliminary hearing. See Ariz.R.Crim.P. 5.1 cmt. ("Rule 5 implements Ariz.
27 Const. Art. 2, § 30 which guarantees a preliminary hearing to persons accused of a felony *by*
28 *means other than a grand jury indictment.*) (emphasis added.) Thus, because Petitioner was

1 not unfairly denied a preliminary hearing, Petitioner has established neither that his counsel
2 was ineffective by failing to object when the trial court vacated the hearing, nor resulting
3 prejudice.

4 CONCLUSION

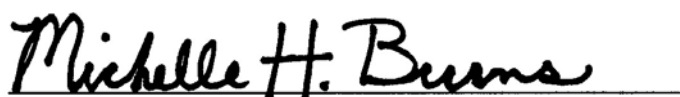
5 Having determined that Ground Five fails to state a basis for federal habeas relief, and
6 Grounds One through Four and Six fail on the merits, the Court will recommend that
7 Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

8 **IT IS THEREFORE RECOMMENDED** that Petitioner's Petition for Writ of
9 Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. #1) be **DENIED** and **DISMISSED**
10 **WITH PREJUDICE**;

11 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
12 to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a
13 substantial showing of the denial of a constitutional right.

14 This recommendation is not an order that is immediately appealable to the Ninth
15 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
16 Appellate Procedure, should not be filed until entry of the district court's judgment. The
17 parties shall have fourteen days from the date of service of a copy of this recommendation
18 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);
19 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
20 days within which to file a response to the objections. Failure timely to file objections to the
21 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report
22 and Recommendation by the district court without further review. See United States v.
23 Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any
24 factual determinations of the Magistrate Judge will be considered a waiver of a party's right
25 to appellate review of the findings of fact in an order or judgment entered pursuant to the
26 Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

27 **DATED** this 30th day of April, 2010.

28 

Michelle H. Burns
United States Magistrate Judge