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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Michael Ray Weeks,)	
)	CV-14-2283-TUC-DCB
Petitioner,)	
v.)	
)	
Charles L. Ryan, et al.,)	ORDER
)	
Respondents.)	
)	
_____)	

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b) and the local rules of practice of this Court (Doc. 2) for a Report and Recommendation (R&R) on the Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Before the Court is the Magistrate Judge’s Report and Recommendation (Doc. 20), which recommends that the Amended Petition be denied and dismissed. Petitioner filed Objections to the Report and Recommendation (Doc. 24) and a Court-Ordered Response to Objections (Doc. 34) was filed. The Court now rules.

STANDARD OF REVIEW

When objection is made to the findings and recommendation of a magistrate judge, the district court must conduct a de novo review. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

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1 **-Claims 1 & 2: Procedural Default**

2 Petitioner objects to the R&R's conclusions and recommendations on
3 Claims 1 and 2 based on exhaustion and procedural default. The Magistrate
4 Judge found that Petitioner failed to exhaust Claims 1 and 2, which
5 alleged that Petitioner was not competent to stand trial and that the
6 trial court erred by failing to *sua sponte* order a competency evaluation.
7 (R&R at 6-8.) As the Magistrate Judge explained, although the post-
8 conviction court rejected the claims on their merits, the Arizona Court
9 of Appeals found the claims precluded under Arizona Rule of Criminal
10 Procedure 32.2(a)(3) because they could have been raised on direct
11 appeal. (*Id.* at 6.) The Magistrate Judge, therefore, found the claims
12 unexhausted and defaulted because the court of appeals "was the last
13 state court to render a judgment on these claims and found them
14 procedurally defaulted." (*Id.* at 7.) *See Coleman v. Thompson*, 501 U.S.
15 722, 731-32 (1991). Petitioner agrees that he failed to present these
16 claims on direct appeal as Arizona law requires, but claims exhaustion
17 occurred by presenting them to the Arizona Court of Appeals on review
18 from the denial of post-conviction relief, despite the fact that the
19 appellate court found the claims precluded under Rule 32.2(a)(3). (Obj.
20 at 4.) ("There is no dispute that [Petitioner] brought the claims to the
21 Arizona Court of Appeals, the only dispute seems to be whether he was
22 required to do so on direct appeal or be forever barred from relief [and]
23 review by this Court."). Petitioner's objection to the Magistrate Judge's
24 conclusion that he brought these claims "in an 'improper forum' or ... in
25 an 'improper vehicle'" is rejected. (Obj. at 4.) Petitioner's failure to
26 raise Claims 1 and 2 on direct appeal resulted in their preclusion in
27 post-conviction proceedings; he is therefore left with no remedy in state

1 court. See Ariz. R. Crim. P. 32.2(a)(3). Thus, the Magistrate Judge had
2 no choice but to find the claims defaulted by Petitioner's failure to
3 properly present them in state court. The Magistrate Judge properly
4 relied on *LaFlamme v. Hubbard*, 225 F.3d 663 (9th Cir. 2000), to support
5 her conclusion that a competency claim may be procedurally defaulted.¹
6 (Obj. at 9.) Petitioner's ongoing objections based on waiver are
7 misplaced. Here, the Magistrate Judge properly found that Petitioner's
8 claims were procedurally defaulted because he failed to properly present
9 them in the state courts. Contrary to Petitioner's arguments, the state
10 procedural bar, Rule 32.2(a)(3), is adequate to bar review of this claim.
11 *Murray v. Schriro*, 745 F.3d 984, 1016 (9th Cir. 2014) ("Arizona Rule of
12 Criminal Procedure 32.2(a)(3) has been firmly established and
13 consistently followed."). Petitioner confuses the application of a
14 procedural bar with waiver. Hence, this Objection is overruled.

15 **-Claim 5, Confrontation Clause**

16 Petitioner objects to the R&R's finding that Claim 5 was not
17 exhausted. Petitioner asserted in Claim 5 that the trial court's
18 admission of his out-of-court statements, in which he denied assaulting
19 the victim, violated his Sixth Amendment Confrontation Clause rights.
20 (Amended Petition, Claim 5: "The trial court admitted hearsay testimony
21 over Petitioner's objections in violation of the Sixth Amendment
22 Confrontation Clause." (Doc. 2 at 60.)).

24
25 ¹Federal circuit courts have disagreed over whether a substantive
26 mental competency claim can be procedurally defaulted at all. § 9B:48,
27 *Mental Competency Claims, Federal Habeas Manual* (May 2017). The majority
28 of circuits, however, have concluded that substantive mental competency
claims can be defaulted. *Id.*

1 The Magistrate' R&R states, as follows:

2 Thus, with respect to the Sixth Amendment Confrontation Clause
3 claim asserted in Ground Five of Weeks's habeas petition, the
4 Arizona Court of Appeals finding of waiver and abandonment in
5 violation of Arizona Rule of Criminal Procedure
6 31.13(c)(1)(vi) is independent and adequate, and the claim is
7 not subject to review. *See Coleman v. Thompson*, 501 U.S. 722,
8 728, (1991) (federal courts "will not review a question of
9 federal law decided by a state court if the decision of that
10 court rests on a state law ground that is
11 independent of the federal question and adequate to support
12 the judgment.").

13 (Doc. 20 at 10-11.)The Magistrate Judge found the Sixth Amendment claim
14 precluded. The Magistrate Judge properly found Petitioner's Sixth
15 Amendment claim procedurally defaulted based on the state court's finding
16 that the claim was waived under state law. Objections going to the Sixth
17 Amendment are overruled as the claim is precluded.

18 **-Claim 5, Fourteenth Amendment Due Process of Law**

19 The trial court admitted testimony from a police officer regarding
20 Petitioner's out-of-court statements denying that he had assaulted his
21 girlfriend. (Amended Petition at 60-66.) The objection during trial was
22 solely based on hearsay (not the Confrontation Clause or Fourteenth
23 Amendment)². The Arizona Court of Appeals reviewed Petitioner's Fourteenth
24 Amendment claim for fundamental, prejudicial error because he failed to
25 preserve the claim by raising it in the trial court. (Obj. at
26 32.)Petitioner properly exhausted this claim (as to fundamental error
27 only) by presenting it to the Arizona Court of Appeals.

28 Respondents stipulated that Petitioner's Fourteenth Amendment claim,
as to fundamental error only, was not procedurally defaulted. Respondents
argue that the claim may be denied as lacking merit. Respondents argue

²Here, it was Petitioner's own statements that were admitted.

1 that there is no problem with the admission of a statement by a party-
2 opponent as non-hearsay. *United States v. Matlock*, 415 U.S. 164, 172
3 (1974). Although Petitioner's argument is not entirely clear, he appears
4 to assert that because he could not have elicited his own out-of-court
5 statements from witnesses, Rule 801(d)(2) was unfairly applied here. Rule
6 801(d)(2)(A) provides that a statement is not hearsay if it is offered
7 against a party and is his own statement, made in his individual
8 capacity. Petitioner's statements to the police satisfy the facial
9 requirements of the rule. The cases disagree that statements are not
10 admissions because they are neither exculpatory or inculpatory. For a
11 Petitioner's statement to be an admission, "it is not necessary to show
12 that the statement was against the interest of the party at the time it
13 was made." M. Udall, J. Livermore, P. Escher, & G. McIlvain, *Arizona*
14 *Practice: Law of Evidence* § 125, at 255 (3d ed. 1991). Rather, "[t]he
15 only limitation, in short, to the use of an opposing party's words is the
16 rule of relevance." *Id.* at 257. A criminal suspect's statements about his
17 activities on the day of an alleged crime are relevant. The only
18 remaining limitation on the admissibility of Petitioner's statements was
19 the possibility that the probative value of the statements was
20 substantially outweighed by the danger of unfair prejudice. Fed.R.Evid.
21 403. The statement was allowed in by the trial court, with no objection
22 based on the Fourteenth Amendment. The Arizona Court of Appeals would
23 then have only reviewed this claim for fundamental, prejudicial error.
24 Petitioner does not dispute that he failed to argue on appeal that any
25 error in the admission of his out of court statements resulted in
26 fundamental, prejudicial error, rendering this claim waived. Here, this
27 claim lacks merit.

1 **-Claim 3: Ineffective Assistance of Counsel**

2 Here, the Magistrate Judge properly found that *Strickland v.*
3 *Washington* was not unreasonably applied. (R&R at 17.) This vague,
4 unspecific Objection is overruled.

5 **-Claim 4: Double Jeopardy**

6 Here, the Magistrate Judge properly concluded that the state court
7 decision was not contrary to, nor an unreasonable application of, clearly
8 established federal law. *United States v. Lopez-Avila*, 678 F.3d 955, 962
9 (9th Cir. 2012) (R&R at 23.) This Objection is overruled.

10 **-Claim 6: Right to Remain Silent**

11 The Magistrate Judge properly concluded that *Harrison v. United*
12 *States*, 392 U.S. 219 (1968), does not offer Petitioner relief on this
13 claim. (Obj. at 45; R&R at 25.) Clearly established law provides that
14 only the introduction of wrongfully obtained evidence can result in a
15 finding that the Petitioner's subsequent testimony was compelled in
16 violation of the Fifth Amendment. See *United States v. Mortensen*, 860
17 F.2d 948, 951 (9th Cir. 1988). Because Petitioner did not assert that his
18 earlier out-of-court statements were illegally obtained, the Magistrate
19 Judge properly denied relief. Further, Petitioner's out-of-court
20 statements were not improperly admitted. Petitioner agrees that "[t]he
21 resolution of this Claim rests on the determination that the evidence
22 discussed in Claim 5 was wrongly admitted, thereby compelling [him] to
23 testify." (Obj. at 46.) The state court found the statements were
24 properly admitted under state law and that Petitioner defaulted his claim
25 that the admission of his statements violated the Confrontation Clause.
26 Therefore, the Magistrate Judge properly rejected Petitioner's claim that

1 he was compelled to testify by the admission of his earlier out of court
2 statements. Objection overruled.

3 **-Claim 7: Right to a jury trial**

4 The Magistrate properly found that this claim lacks merit. Under
5 the current applicable law, a jury is not required to find the absence
6 of mitigating factors. The state's determination was not contrary to any
7 clearly established federal law. Consequently, this objection is
8 overruled.

9 **-Claim 8: Sufficiency of the Evidence**

10 In considering a claim of insufficiency of the evidence, a court
11 does not "ask itself whether *it* believes that the evidence at the trial
12 established guilt beyond a reasonable doubt. Instead, the relevant
13 question is whether, after viewing the evidence in the light most
14 favorable to the prosecution, any rational trier of fact could have found
15 the essential elements of the crime beyond a reasonable doubt." *Jackson*
16 *v. Virginia*, 443 U.S. 307, 318-19 (1979) (internal citation omitted).
17 While Petitioner asserts that the victim's account lacked credibility and
18 that "[s]he had a powerful motive to perjure herself" (Obj. at 50), the
19 jury concluded otherwise after considering "the testimony of Weeks, that
20 of his victim, and the physical evidence that corroborated her story."
21 (R&R at 31.) The Magistrate Judge properly found that the Arizona Court
22 of Appeals' conclusion that Petitioner's convictions are supported by
23 sufficient evidence is not an unreasonable application of *Jackson*. (*Id.*)
24 This claim is likewise overruled.

25 **-Claim 9: Aggravating factor**

26 Because the jury's unanimous verdict finding the aggravating
27 circumstance of "physical, emotional, or financial harm" to the victim,

1 A.R.S. §13-701(D)(9)(current), is supported by evidence in the record
2 establishing each type of harm, the Magistrate Judge properly held that
3 the Arizona Court of Appeals' resolution of this claim was a "reasonable
4 application of federal law." (R&R at 35.) The Magistrate Judge further
5 held that any claimed constitutional error in the state court's
6 resolution of this claim was harmless under *Brecht v. Abrahamson*, 507
7 U.S. 619 (1993). This Objection is overruled.

8 **CONCLUSION**

9 Accordingly, after conducting a de novo review of the record,

10 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation
11 (Doc. 20) in its entirety. The Objections (Doc. 24) raised by the
12 Petitioner are **OVERRULED**.

13 **IT IS FURTHER ORDERED** that the Amended Petition for Writ of Habeas
14 Corpus (Doc. 2) is **DENIED** and this action is **DISMISSED** with prejudice.
15 The Clerk's Office should enter a Final Judgment separately.

16 **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave
17 to proceed in forma pauperis on appeal are **DENIED** on all claims but for
18 Claims 1 and 2 as these claims involve whether a substantive mental
19 competency claim can ever be procedurally defaulted, because reasonable
20 jurists could find the ruling debatable.

21 DATED this 16th day of October, 2017.

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25 David C. Bury
26 United States District Judge
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