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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Lee Schafer,
10 Petitioner,
11 v.
12 Charles L. Ryan, et al.,
13 Respondents.

No. CV-17-0135-TUC-LCK

ORDER

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15 Petitioner Michael Schafer has filed a Petition for Writ of Habeas Corpus pursuant
16 to 28 U.S.C. § 2254. Before the Court are the Petition (Docs. 1, 24), Respondents' Answer
17 (Docs. 17-21), and Petitioner's Reply (Doc. 22). The parties have consented to Magistrate
18 Judge jurisdiction. (Doc. 9.) The Court finds the Petition should be dismissed.

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 Schafer was convicted in the Pima County Superior Court on one count of
21 conspiracy to commit burglary, aggravated robbery, and aggravated assault; one count of
22 burglary; one count of aggravated robbery; and one count of aggravated assault. (Doc. 18,
23 Ex. B.) He was sentenced to concurrent prison terms, the longest of which is 11.25 years.
24 (*Id.*)

25 The Arizona Court of Appeals summarized the facts in support of Schafer's
26 convictions:

27 In June 2013, after dating for eight years, Schafer and J.W. ended their
28 relationship. J.W. tried to arrange a meeting to give Schafer his belongings,
including a basket of unwashed clothes and a box of NASCAR cards, which
he had left at her house. Instead, Schafer approached Shannon Adkins and

1 asked her to “go collect [his belongings].” He also said he wanted J.W.’s cell
2 phone because “she kept calling him and wouldn't stop” and he wanted
3 Adkins to “whip [J.W.’s] ass.” Schafer offered Adkins \$150: \$50 for his
4 belongings, \$50 for the cell phone, and \$50 for the “ass whipping.” After
5 Schafer showed Adkins a photo of J.W., Adkins recognized J.W. from when
6 they used to live in the same housing complex. Adkins agreed to Schafer’s
7 plan and solicited the assistance of Yvonne Lizama.

8 ¶ 3 At approximately 1:00 p.m. on June 15, Adkins and Lizama knocked on
9 J.W.’s door. Recognizing Adkins, J.W. opened the door, and Adkins asked,
10 “Hey, do you want to get high?” After J.W. refused, Adkins punched her in
11 the eye and pushed her into the house. The two struggled, and Adkins pinned
12 J.W. to the ground and continued to hit her in the head. Meanwhile, Lizama
13 searched for Schafer’s belongings. Lizama asked J.W. for “a wicker basket
14 and dirty clothes,” and, after realizing that she wanted Schafer's belongings,
15 J.W. told her where to find the clothes and NASCAR cards. Lizama grabbed
16 the items, as well as J.W.’s purse, which contained her cell phone, car keys,
17 credit cards, and blank checks.

18 ¶ 4 Adkins and Lizama later met up with Schafer and gave him the clothes,
19 NASCAR cards, and cell phone in exchange for \$150, which the two women
20 divided equally. Adkins kept the other items from J.W.’s purse, and, later
21 that day, she used J.W.’s credit cards and forged checks to make purchases.
22 A few days later, an acquaintance of Adkins used J.W.’s car keys to steal her
23 car from her house.

24 ¶ 5 J.W. reported the incident to the Tucson Police Department. During a
25 subsequent interview with investigating officers, Schafer admitted saying
26 “out loud” to a group of people that he would “pay somebody to go down
27 there and ... take care of this.” He said J.W. “had [him] so upset that [he] just
28 ... wan[t]ed to be done with her.” Schafer also acknowledged paying Adkins
and Lizama \$150 when they gave him his clothes and NASCAR cards.

(*Id.*, Ex. H at 2-3.)

Schafer appealed, and the Arizona Court of Appeals affirmed his convictions and
sentences. (*Id.*, Exs. E, H.) Schafer filed a Notice of Post-conviction Relief (PCR). (*Id.*, Ex.
J.) Appointed counsel filed a PCR Petition alleging ineffective assistance of counsel (IAC).
(*Id.*, Ex. J.) The PCR court denied the IAC claims on the merits, finding that counsel’s
performance was not deficient. Schafer’s Petition for Review restated the IAC claims
verbatim from the PCR Petition and argued review should be granted because the PCR
court erred in failing to hold an evidentiary hearing. (*Id.*, Ex. N.)

DISCUSSION

Schafer raises one claim in his Petition, that his Sixth Amendment rights were
violated by counsel’s ineffectiveness in failing to call witness Ann Davis to testify.

1 Respondents contend Schafer failed to fairly present this claim in the Petition for Review
2 and it is, therefore, procedurally defaulted. The Court finds this claim is most expeditiously
3 resolved on the merits. *See* 28 U.S.C. § 2254(b)(2).

4 IAC claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To
5 prevail under *Strickland*, a petitioner must show that counsel’s representation fell below an
6 objective standard of reasonableness and that the deficiency prejudiced the defense. *Id.* at
7 687-88. The inquiry under *Strickland* is highly deferential, and “every effort [must] be
8 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
9 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
10 the time.” *Id.* at 689. Thus, to satisfy *Strickland*’s first prong, deficient performance, a
11 defendant must overcome “the presumption that, under the circumstances, the challenged
12 action might be considered sound trial strategy.” *Id.*

13 A petitioner must affirmatively prove prejudice. *Id.* at 693. To demonstrate
14 prejudice, he “must show that there is a reasonable probability that, but for counsel’s
15 unprofessional errors, the result of the proceeding would have been different. A reasonable
16 probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

17 Schafer alleges counsel was ineffective for failing to call Ann Davis to testify
18 because she could have contradicted testimony by co-conspirator Adkins. (Doc. 1 & Ex.
19 A.) Schafer attached an affidavit from Davis to his PCR Petition. (Doc. 18, Ex. K.) Davis
20 averred that she was friends with Adkins and heard someone ask her to get Schafer’s
21 belongings from J.W.; she never heard a request for J.W.’s cell phone or for Adkins to hurt
22 J.W. (Davis Aff. ¶¶ 2, 3.) Later, Adkins told Davis that, when she went to J.W.’s to get
23 Schafer’s belongings, J.W. hit her and Adkins beat her up in self-defense. (*Id.* ¶¶ 5, 6.)
24 Davis knew Adkins to have been in many altercations with other people. (*Id.* ¶ 7.) Davis
25 provided defense counsel with letters from Adkins indicating an intent to get revenge on
26 Schafer. (*Id.* ¶ 8.) Finally, Davis stated that she was present at the courthouse to testify, had
27 not ingested any illegal substances that day, and was not acting unusually. (*Id.* ¶¶ 9, 10.)
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1 Schafer's trial counsel, Natalie Prince, also provided an affidavit during the PCR
2 proceedings. (Doc. 18, Ex. L at Ex. 1.) She averred that she met with Davis three times in
3 person, talked to her on the phone multiple times, and Davis had been present during the
4 trial. On each of those occasions, Prince had concluded she was clean, sober, and a
5 responsible person. On the day Davis was supposed to testify, Prince stated that Davis
6 arrived with Schafer and her hair was in a rat's nest, her pants were torn, her speech was
7 slurred, and she was acting strange and exhibiting some ticks. Prince stated that Schafer
8 was shaking, extremely pale, sweating profusely, and his speech was slow and shaky.
9 Counsel concluded that Shafer and Davis had spent time drinking or using drugs. (Prince
10 Aff. at 1.) Because she determined that Davis looked like a "homeless drug addict," she
11 told Davis and Shafer that she would not call her to testify. (*Id.* at 1-2.) The purpose of
12 Davis's testimony was to present Adkins's reputation; Prince concluded that testimony
13 from Davis would be damaging to the defense and could prejudice the jury against Schafer.
14 (*Id.* at 1.) After the fact, based on her experience, Prince believed it was the right decision
15 not to call Davis as a witness. (*Id.* at 2.)

16 The PCR court made the following factual findings: trial counsel's decision not to
17 call Davis was a tactical one based on her experience that the testimony would hurt
18 Schafer's interests; Adkins's bias was "well established" at trial through her own testimony
19 that she disliked him because he "snitched on her" and evidence that she received a reduced
20 sentence for assisting the prosecution; and additional evidence of bias was unlikely to
21 discredit Adkins. Under the AEDPA, this Court must presume correct any fact finding by
22 the state court, unless the petitioner rebuts that presumption by clear and convincing
23 evidence. 28 U.S.C. § 2254(e)(1). Schafer has not rebutted any of these findings and the
24 Court accepts them as true.

25 After review of the evidence submitted during the PCR proceeding, the trial
26 testimony of Adkins, and the PCR court findings, the Court concludes that counsel's
27 strategic decision not to call Davis as a witness was not objectively unreasonable. Counsel
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1 believed that Davis's testimony would be helpful, and she had spoken to her many times
2 with the intent of using her as a trial witness. However, based on Davis's appearance and
3 demeanor, it was reasonable for Prince to determine that Davis could hurt Schafer's
4 defense.

5 Additionally, counsel had been able to establish the crux of Schafer's defense
6 through cross-examination of Adkins. Prince cross-examined Adkins using the letters she
7 wrote to Davis, which made evident that she was biased against Schafer and wanted to get
8 back at him for telling the cops of her involvement in the crime. (RT 11/5/14 at 39-40, 44-
9 45, 90-91, 93-95.)¹ The letters also revealed Adkins numerous threats to "get" other people
10 with whom she was angry, which demonstrated her aggressive nature. (*Id.* at 79, 87, 88-
11 90, 92-93, 94, 96.) Counsel's questioning of Adkins raised doubts about whether Schafer
12 asked her to beat up the victim or if Adkins did it because the victim got physical with her.
13 (*Id.* at 17, 57-58, 60-62, 69-70.) Schafer has not demonstrated that he suffered actual
14 prejudice and that there is a reasonable likelihood he would not have been convicted if
15 Davis had testified that day.

16 The Court finds Claim 1 is without merit.²

18 ¹ RT refers to the Reporter's Transcripts of Schafer's trial, which are attached to
19 Respondent's Answer. (Doc. 21, Ex. 1-4.)

20 ² In the Petition, Schafer alleges IAC solely based on counsel's failure to call Davis
21 as a witness. Because it is the only claim clearly stated on the face of the Petition, it is the
22 only one the Court addresses in full. However, under the fact section, Schafer incorporates
23 the legal argument from his Petition for Review to the Arizona Supreme Court as the
24 factual basis to support the claim. (Doc. 1 at 17-19.) That petition contains two other
25 claims: counsel was ineffective for failing to question Schafer's brother Jeremy about an
26 exculpatory conversation he had with Adkins; and counsel was ineffective for failing to
27 request certain jury instructions. For the sake of thoroughness, the Court touches on these
28 claims below.

29 The IAC claim based on jury instructions was not included in Schafer's Petition for
30 Review to the Arizona Court of Appeals. (Doc. 18, Ex. N.) Therefore, it was never fairly
31 presented to the state appellate court. If Schafer were to return to state court now to litigate
32 this claim it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of
33 the Arizona Rules of Criminal Procedure because it does not fall within an exception to
34 preclusion. Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Thus, this claim is technically exhausted
35 but procedurally defaulted.

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CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court must issue or deny a certificate of appealability (COA) at the time it issues a final order adverse to the applicant. A COA may issue only when the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This showing can be established by demonstrating that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner” or that the issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). The Court finds that reasonable jurists would not find this Court’s rulings debatable. Therefore, a COA will not issue.

Accordingly,

IT IS ORDERED that the Petition for Writ of Habeas Corpus is **DISMISSED**.

IT IS FURTHER ORDERED that the Clerk of Court should enter judgment and close this case.

The IAC claim based on counsel’s examination of Jeremy is supported by affidavits from Jeremy and Schafer attached to Schafer’s PCR Petition (Doc. 18, Ex. K). They avow that, during transport to court, Adkins stated that Schafer had not paid her to assault the victim and that she wanted revenge against Schafer. (*Id.*) This claim is without merit. Counsel averred in her affidavit filed during Schafer’s PCR proceeding that neither Schafer nor Jeremy reported an exculpatory conversation with Adkins; if they had, she would have used it to examine Jeremy and Adkins. (Doc. 18, Ex. L, Prince Aff. at 2.) As noted by counsel, Adkins and Jeremy testified on separate days; therefore, Schafer’s allegation that the conversation took place during in-custody transport was not likely true. (*Id.*; RT 11/5/14; RT 11/6/14.) Further, because Jeremy was in custody, he had no contact with his brother on the day of his testimony when he could have reported a conversation. (Prince Aff. at 2.) Even if this claim had been properly presented in this Court and exhausted in state court, Schafer has not demonstrated that counsel’s performance was deficient. Additionally, this evidence would have been mostly cumulative of information already brought out on cross-examination of Adkins (as discussed more thoroughly above).

1 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
2 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
3 certificate of appealability.

4 Dated this 17th day of December, 2018.

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8 Honorable Lynnette C. Kimmins
9 United States Magistrate Judge
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