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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN W. NEFF,)	Case No. CV 13-8460-AB (JPR)
)	
Petitioner,)	
)	ORDER ACCEPTING FINDINGS AND
vs.)	RECOMMENDATIONS OF U.S.
)	MAGISTRATE JUDGE
WARDEN WOFFORD,)	
)	
Respondent.)	
_____)	

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. See 28 U.S.C. § 636. The R&R was prepared by a previously assigned Magistrate Judge. On August 3, 2015, Petitioner filed objections to the R&R, in which he mostly repeats arguments from the Petition and Reply.

Petitioner asserts that the Magistrate Judge "misconstrues [his] principal claim of Double Jeopardy" (Objections at 4) and that the R&R is "non-responsive" to his actual claim (id. at 7-8). He seems to argue that because the jury in his first trial could not reach a verdict on rape, which, the jury was instructed, involved penetration by a penis, and separately

1 considered and convicted him of attempted sexual penetration by a
2 foreign (not an unknown) object, which necessarily excluded a
3 penis, double jeopardy prevented him from being tried in his
4 second trial for attempted sexual penetration by an unknown
5 object. (See id. at 1-3, 6-10.)

6 But as the state court of appeal (Lodged Doc. 4 at 8) and
7 Magistrate Judge (R&R at 14) both noted, attempted sexual
8 penetration by a foreign object and attempted sexual penetration
9 by an unknown object are not two different offenses; the
10 penetration may be attempted by either "any foreign object . . .
11 or by any unknown object," Cal. Penal Code § 289(k)(1). And even
12 assuming the "foreign object" jury instructions at the first
13 trial defined a different offense, that offense would not qualify
14 as a lesser-included offense of rape by penis because rape would
15 not include all the statutory elements of attempted sexual
16 penetration; the latter would encompass only attempted
17 penetration by objects other than a penis, according to
18 Petitioner's theory. See People v. Bailey, 54 Cal. 4th 740, 748
19 (2012) (offense is necessarily included within another offense
20 under "elements test" if "the statutory elements of the greater
21 offense include all of the statutory elements of the lesser
22 offense, such that all legal elements of the lesser offense are
23 also elements of the greater"). Thus, Petitioner's argument that
24 his implied acquittal of rape barred retrial of attempted sexual
25 penetration because the latter was a lesser-included offense is
26 unavailing.

27 Moreover, as the court of appeal (Lodged Doc. 4 at 6) and
28 Magistrate Judge (R&R at 13) noted, the Double Jeopardy Clause

1 does not bar retrial of a defendant whose conviction was set
2 aside because of an error in the proceedings, see Lockhart v.
3 Nelson, 488 U.S. 33, 38 (1988), which was the case here:
4 Petitioner was retried after he successfully moved for a new
5 trial based on instructional error. Thus, Petitioner's reliance
6 on Yeager v. United States, 557 U.S. 110 (2009) (Objections at 4-
7 5, 9-10), does not help him.

8 Having reviewed de novo those portions of the R&R to which
9 objections were filed, the Court accepts the findings and
10 recommendations of the Magistrate Judge. IT IS ORDERED that the
11 Petition is denied and Judgment be entered dismissing this action
12 with prejudice.

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16 DATED: October 19, 2015



ANDRÉ BIROTTE JR.
U.S. DISTRICT JUDGE