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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAYMOND DAVIS MILLER,
Petitioner,
v.
MARCUS POLLARD, Warden,
Respondent.

Case No. 2:20-cv-06690-KES
MEMORANDUM OPINION AND
ORDER

I.
INTRODUCTION

Raymond Davis Miller (“Petitioner”) filed a Petition for Writ of Habeas Corpus by a person in state custody pursuant to 28 U.S.C. § 2254 (“Pet.”), challenging his 2016 conviction for multiple crimes arising out of two violent confrontations with an acquaintance, David Simington, including assault with a deadly weapon, criminal threats, dissuading a witness, and attempted kidnapping. (Dkt. 1 at 2.¹) After Respondent moved to dismiss the Petition as partially

¹ Except for citations to the Reporter’s Transcript (“RT”) and Clerk’s Transcript (“CT”), page citations refer to pagination imposed by the Court’s electronic filing system.

1 unexhausted (Dkt. 16), Petitioner voluntarily dismissed his two unexhausted
2 grounds (Dkt. 26). Respondent then answered the Petition (Dkt. 35) and lodged
3 relevant documents (Dkt. 18, 36). Petitioner replied. (Dkt. 38.) For the reasons
4 discussed below, Petitioner’s two remaining claims fail on the merits, and the
5 Petition should be denied.

6 **II.**
7 **FACTUAL BACKGROUND**

8 The underlying italicized facts are taken from the unpublished California Court
9 of Appeal decision on Petitioner’s first direct appeal. (Lodged Document [“LD”] 3);
10 People v. Miller, No. B282284, 2019 WL 1856420, 2019 Cal. App. Unpub. LEXIS
11 2930 (Cal. Ct. App. Apr. 25, 2019). Unless rebutted by clear and convincing
12 evidence, these facts may be presumed correct. Tilcock v. Budge, 538 F.3d 1138,
13 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1).

14 ***A. August 21, 2015: [Petitioner] Attacked Simington With A Wooden Pole,***
15 ***Causing A Head Injury And Broken Arm***

16 *[Petitioner] and Simington first met in prison. Thereafter, on August 21,*
17 *2015, Simington was fixing his car at the lot where John Schumann kept his motor*
18 *home. Simington served as Schumann’s “kind of” caretaker, because Schumann*
19 *had a heart condition.*

20 *At some point while Simington was fixing his car, [Petitioner], accompanied*
21 *by an unidentified man, arrived at the lot and got into an argument with Simington*
22 *possibly over drugs. Schumann heard the commotion from inside his motor home,*
23 *went outside, and hollered that [Petitioner] was not supposed to be on the lot.*
24 *[Petitioner] struck Simington with a four-foot wooden pole on the back of his head*
25 *and right arm. Simington saw [Petitioner] strike his arm but not the back of his*
26 *head. The blows caused Simington’s head to bleed and broke his right arm.*
27 *Simington then attempted to move behind Schumann, at which point [Petitioner]*
28 *struck Schumann’s stomach with the pole and fled.*

1 *The paramedics and police arrived. Simington told Officer James Clark*
2 *about the argument and attack. Simington received treatment for his injuries at a*
3 *hospital.*

4 *[Petitioner] was arrested and charged with assault and battery.*

5 *After being released from the hospital, Simington testified about the*
6 *aforementioned events at the preliminary hearing on the assault and battery*
7 *charges. We observe that at the preliminary hearing, Simington testified he did not*
8 *see who hit his arm, but at trial, he testified he saw [Petitioner] hit his arm with a*
9 *wooden pole. [FN2: At trial, on redirect examination, Simington testified he was*
10 *mistaken when he testified at the preliminary hearing that he did not see who hit his*
11 *arm.]*

12 *About two weeks after the attack and sometime after the preliminary hearing,*
13 *[Petitioner]’s girlfriend, Toni, approached Simington at the gas station where he*
14 *was working. She asked him out for a drink and how he was feeling. Simington put*
15 *her off and said he would call her later, although he never did. About a week later,*
16 *Toni approached Simington at work again and asked him if he planned to testify*
17 *against [Petitioner]; Simington said no. Simington thought “something was up”*
18 *and observed Toni “had a certain look on her face.” Simington had no further*
19 *contact with Toni.*

20 ***B. November 1, 2015: [Petitioner] Threatened To Take Simington To The***
21 ***Desert To Kill Him And Schumann, But Lawson Intervened And Helped***
22 ***Simington Regain Possession Of His Car Keys***

23 *In the early morning of November 1, 2015, at about 2:00 a.m., Simington*
24 *arrived home from work to his apartment building and parked his car in the back*
25 *alley carport. Someone came to Simington’s passenger-side window, looked into*
26 *the car, and walked off. Upon exiting his car, Simington saw [Petitioner] [FN3:*
27 *Simington believed [Petitioner] had been released on bail.] and another man,*
28 *different from the one who had peered into his car, moving quickly toward him.*

1 *Simington ran. [Petitioner] kicked Simington's legs and tackled him, causing them*
2 *both to fall to the ground. Simington believed he lost his car keys when he fell and*
3 *that [Petitioner] or the other man² then picked them up.³*

4 *[Petitioner] then picked up a 15-inch knife that had fallen on the ground.*
5 *[Petitioner] and the other man grabbed Simington. Simington attempted to run*
6 *away, but could not escape [Petitioner]'s and now the other man's grasp.*
7 *[Petitioner] told Simington he was going to kill him, raised the knife, and pointed*
8 *the blade toward Simington while the other man continued to hold Simington. For*
9 *Simington, "[f]ear took over." The other man grabbed [Petitioner]'s arm and*
10 *said, "not here."*

11 *Simington attempted to flee again, and the other man said, "He's not going*
12 *to go quietly. We've got to do something to him," and "[l]et's just knock him out*
13 *and take him." [Petitioner] said no, became angry, walked away, and got on his*
14 *phone. [Petitioner] and the other man then walked Simington southward down the*
15 *alley while holding on to him. [Petitioner] told the other man to get the truck. The*
16 *other man walked down the alley southward, in the direction of where the truck*
17 *would eventually arrive.*

18 *[Petitioner] told Simington, "you messed up" and "[y]ou never should have*
19 *testified against me." [Petitioner] also told Simington that (1) he was going to take*
20 *him to the desert; (2) they were going to talk Schumann into the car and take him to*
21 *the desert too; (3) Simington was going to dig a hole in which to bury Schumann;*
22 *and (4) Simington would be "going in right behind" Schumann.*

23
24 ² Like the California Court of Appeal, the Court refers to this individual as
25 "the other man."

26 ³ Simington testified, "They had the keys to my car." (2 RT 691.) When
27 asked how he knew that, he responded, "I guess I fell a couple times When I
28 went back to the . . . after all that happened at the end I couldn't find my keys."
(Id.)

1 *Simington convinced [Petitioner] to allow him to go to his apartment*
2 *ostensibly to say goodbye to his son. Actually, although Simington had two sons,*
3 *they were not then at his apartment, and he created this ploy to attempt to seek*
4 *refuge in his apartment where his two roommates, Lawson and Eddie Peterson,*
5 *would be. Eventually, [Petitioner] and Simington went to Simington’s apartment*
6 *as [Petitioner] continued to hold Simington “under the arm with his hand.”*
7 *Simington believed [Petitioner] still had the knife. Simington knocked on the*
8 *apartment door and Lawson opened it.*

9 *Simington told Lawson to “wake up” and, referring to himself, also told*
10 *Lawson he was in “bad trouble,” “you gotta help me,” [Petitioner] and the other*
11 *man were going to take him to the desert to kill him, and he had lost his car keys.⁴*
12 *Lawson intervened, causing [Petitioner] to release Simington from his grip.*

13 *Lawson asked [Petitioner] where Simington’s car keys were. [Petitioner]*
14 *whistled, and the other man arrived and pulled a set of keys from his pocket. The*
15 *keys did not belong to Simington. Lawson grabbed the other man and told him to*
16 *“[g]o get [Simington’s car] keys.”⁵*

17 *Lawson then went to the alley with [Petitioner] and the other man to retrieve*
18 *Simington’s keys. [FN4: In subsection B below, we set forth additional facts about*
19 *this event in our discussion of [Petitioner’s] sufficiency-of-evidence challenge to*

20 ⁴ Simington testified (in essence) that he assumed that Petitioner and the
21 other man had the keys to his car, because Simington did not have them after the
22 scuffle. (2 RT 691.) He also testified that he told Lawson that he “lost [his] keys”
23 and that his keys were “missing.” (2 RT 701.) Lawson’s preliminary hearing
24 testimony, which the jury heard, reflected that Simington told Lawson, “They even
got my car keys.” (3 RT 946.)

25 ⁵ Lawson’s preliminary hearing testimony was that Petitioner whistled to
26 summon the other man and that Petitioner then asked the other man for Simington’s
27 keys. (3 RT 958.) Simington testified that Lawson demanded Simington’s keys
28 from the other man when the other man responded to Petitioner’s whistle. (2 RT
701.)

1 *the theft verdict.⁶] Simington stayed in the apartment. After returning Simington’s*
2 *keys, [Petitioner] and the other man left the scene.*

3 *About five or 10 minutes later, Simington went to the carport to inspect his*
4 *car and found it had been ransacked. Simington also noticed a pickup truck idling*
5 *at, and then departing from the alley’s southern end—the same end toward which*
6 *the other man had forcibly walked Simington after he and [Petitioner] had initially*
7 *apprehended Simington in the alley.*

8 *The police arrived, and Simington gave a statement to Deputy Benjamin*
9 *Casebolt. [Petitioner] was arrested. (LD 3 at 4-8.)*

10 **III.**

11 **PROCEDURAL HISTORY**

12 Based on the August 21, 2015 attack, the District Attorney charged Petitioner
13 with two counts of assault with a deadly weapon: one count concerning Simington
14 (count 1) and the other concerning Schumann (count 14) (Cal. Pen. Code (“PC”)
15 § 245(a)(1)). (1 CT 151, 158.)

16 Based on the November 1, 2015 events, the District Attorney charged
17 Petitioner with the attempted willful, deliberate, and premeditated murder of
18 Simington (count 3) (PC §§ 664, 187(a)); assault on Simington with a deadly
19 weapon (a knife) (count 4) (PC § 245(a)(1)); dissuading Simington from testifying
20 by force or threat (count 5) (PC § 136.1(c)(1)); making criminal threats against
21 Simington (count 6) (PC § 422(a)); kidnapping Simington (count 7) (PC § 207(a));
22 two counts of conspiracy to commit murder (counts 8 and 9) (PC §§ 182(a)(1),
23 187(a)); conspiracy to kidnap Simington (count 10) (PC §§ 182(a)(1), 207(a));
24 second degree robbery of Simington’s personal property (count 11) (PC § 211); and
25

26
27 ⁶ The Court sets out these additional facts in its analysis of Petitioner’s
28 insufficiency of evidence claim.

1 first degree burglary (count 13) (PC § 459).⁷ (1 CT 148-159.)

2 The jury found Petitioner guilty of three counts of assault with a deadly
3 weapon (counts 1, 4, and 14), dissuading a witness from testifying (count 5),
4 criminal threats (count 6), attempted kidnapping⁸ (count 7), conspiracy to kidnap
5 (count 10), petty theft⁹ (count 11), and burglary (count 13). (1 CT 197-203, 206-
6 10.) The jury found Petitioner not guilty of conspiracy to commit murder (counts 8
7 and 9). (1 CT 204-05.) The trial court declared a mistrial on attempted murder
8 (count 3) because the jury could not reach a unanimous verdict on that charge. (4
9 RT 2414.)

10 Petitioner appealed. (LD 5, 6, 7.) The Court of Appeal affirmed his
11 convictions but reversed three 1-year sentence enhancements and remanded the
12 case for re-sentencing. (LD 3.)

13 On remand, the trial court vacated the sentence, struck the three
14 enhancements, and resentenced Petitioner to 17 years in state prison rather than 20.
15 (LD 4.) Petitioner again appealed. Petitioner's appellate counsel filed a brief
16 pursuant to People v. Wende, 25 Cal.3d 436 (1979), and requested that the Court of
17 Appeal independently review the record. (LD 8.) The Court of Appeal found no
18 error and affirmed the judgment. (LD 9.)

19 Petitioner never filed a petition for review at the California Supreme Court in
20 either of his direct appeals. Instead, Petitioner accomplished exhaustion by filing a
21

22 ⁷ The District Attorney's Office charged Petitioner with two other crimes that
23 it ultimately did not bring to trial: battery with serious bodily injury (PC § 243(d)
24 (count 2) and conspiracy to dissuade a witness from testifying by force or threat
(PC §§ 136.1(c)(1), 182(a)(1)) (count 12). (See 1 CT 81, 87.)

25 ⁸ The jury found Petitioner not guilty of the greater crime of actual
26 kidnapping. (1 CT 202.)

27 ⁹ The jury found Petitioner not guilty of the greater crime of second degree
28 robbery. (1 CT 207.)

1 habeas petition with the California Supreme Court (LD 10) that was summarily
2 denied in February 2020 (LD 11).

3 **IV.**

4 **CLAIMS**

5 Ground Two: Appellate counsel provided ineffective assistance of counsel
6 (“IAC”) by failing to file a petition in the California Supreme Court for review
7 raising the claims raised unsuccessfully on initial direct appeal. (Pet. at 5, 12-13.)

8 Ground Three: There is insufficient evidence to support Plaintiff’s
9 conviction on count 11 for petty theft. (Id. at 5, 13-14.)

10 **V.**

11 **STANDARD OF REVIEW**

12 Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”),
13 Petitioner is entitled to habeas relief only if the state court’s decision on the merits
14 “(1) resulted in a decision that was contrary to, or involved an unreasonable
15 application of, clearly established Federal law, as determined by the Supreme
16 Court” or “(2) resulted in a decision that was based on an unreasonable
17 determination of the facts in light of the evidence presented in the State court
18 proceeding.” 28 U.S.C. § 2254(d)(1)-(2); Cullen v. Pinholster, 563 U.S. 170, 181
19 (2011).

20 The relevant “clearly established Federal law” consists of only Supreme
21 Court holdings (not dicta), applied in the same context to which the petitioner seeks
22 to apply it, existing at the time of the relevant state court decision. Premo v.
23 Moore, 562 U.S. 115, 127 (2011). A state court acts “contrary to” clearly
24 established Federal law if it applies a rule contradicting the relevant holdings or
25 reaches a different conclusion on materially indistinguishable facts. Price v.
26 Vincent, 538 U.S. 634, 640 (2003). A state court “unreasonably appli[es]” clearly
27 established federal law if it engages in an “objectively unreasonable” application to
28 the facts of the correct governing legal rule. White v. Woodall, 572 U.S. 415, 425

1 (2014) (rejecting previous construction of section 2254(d) that a state court decision
2 involves an unreasonable application of clearly established Supreme Court law if
3 the state court “unreasonably refuses to extend a legal principle to a new context
4 where it should apply”). Habeas relief may not issue unless “there is no possibility
5 fair-minded jurists could disagree that the state court’s decision conflicts with [the
6 United States Supreme Court’s] precedents.” Harrington v. Richter, 562 U.S. 86,
7 103 (2011). “[T]his standard is ‘difficult to meet,’” Metrish v. Lancaster, 569 U.S.
8 351, 358 (2013), as even a “strong case for relief does not mean the state court’s
9 contrary conclusion was unreasonable,” Richter, 562 U.S. at 102.

10 VI.

11 DISCUSSION

12 A. CLAIM TWO: IAC.

13 1. **The Relevant State Court Decision.**

14 For purposes of applying AEDPA deference, the relevant state court decision
15 is the last reasoned decision, if any. Ylst v. Nunnemaker, 501 U.S. 797, 806
16 (1991).

17 Here, Petitioner first presented an IAC claim to the California Supreme Court
18 in his habeas petition. (LD 10 at 7, 46 [letter from counsel confirming he did not
19 file a petition for review].) Specifically, Petitioner argued that his counsel on direct
20 appeal failed to “raise the enclosed claims.” (Id. at 7.) The two “enclosed” claims
21 in his state habeas petition were (1) that the trial court erred in overruling defense
22 counsel’s objections to hear any portions of Lawson’s preliminary hearing
23 testimony (id. at 4-5), and (2) insufficient evidence to support petty theft (id. at 6)—
24 i.e., the two claims raised unsuccessfully on direct appeal. (See LD 3 at 11-20.)

25 The California Supreme Court denied the claim without explaining its
26 reasoning. (LD 11.) When faced with an unexplained denial, federal courts
27 applying AEDPA must independently consider whether any reasonably grounds
28 exist on which the state court could have denied the claim. Richter, 562 U.S. at 98,

1 102; Murray v. Schriro, 882 F.3d 778, 802 (9th Cir. 2018).

2 **2. The California Supreme Court’s Denial Had A Reasonable Ground.**

3 There is no right to counsel on discretionary appeals. Pennsylvania v. Finley,
4 481 U.S. 551, 555 (1987). In California, after the first appeal, direct review occurs
5 only at the California Supreme Court’s discretion. See Douglas v. California, 372
6 U.S. 353, 356 (1963); People v. Scott, 64 Cal. App. 4th 550, 558 n.6 (1998).

7 Where no constitutional right to counsel exists, there can be no claim of ineffective
8 assistance. Wainwright v. Torna, 455 U.S. 586, 587-88 (1982). Petitioner,
9 therefore, cannot pursue an ineffective assistance claim based on his appellate
10 counsel’s failure to file a petition for review. See Lennan v. Janda, No. CV 12-
11 4510-JLS (JEM), 2015 U.S. Dist. LEXIS 167086, at *45 (C.D. Cal. Aug. 4, 2015);
12 Hollins v. Jaime, No. SACV 19-2487-FMO (KS), 2020 WL 2066141, at *6 (C.D.
13 Cal. Apr. 8, 2020) (“Because Petitioner had no constitutional right to appellate
14 counsel for discretionary review by the California Supreme Court, he could not
15 have been deprived of effective assistance by his appellate counsel’s failure to file a
16 timely request for review in that court.”). The California Supreme Court’s denial of
17 Petitioner’s IAC claim was therefore reasonable, and Petitioner does not warrant
18 habeas relief on this claim.

19 **B. CLAIM THREE: Insufficiency of the Evidence.**

20 **1. The Relevant State Court Decision.**

21 Petitioner first presented this claim on direct appeal. (LD 5.) He then
22 presented it to the California Supreme Court in his habeas petition (LD 10 at 29,
23 40) and received an unexplained denial (LD 11).

24 When the California Supreme Court issues an unexplained decision after a
25 lower court has issued a reasoned decision, the reviewing federal court “looks
26 through” the unexplained decision, presuming that the California Supreme Court
27 denied relief on the same factual and legal grounds as the lower court. Ylst, 501
28 U.S. at 804. Thus, for purposes of applying AEDPA deference, the relevant state

1 court decision is the reasoned decision of the Court of Appeal. (LD 3.)

2 **2. Clearly Established Federal Law.**

3 Under Jackson v. Virginia, in determining a due process claim based on the
4 sufficiency of the evidence, “the critical inquiry ... is whether, after viewing the
5 evidence in the light most favorable to the prosecution, any rational trier of fact
6 could have found the essential elements of the crime beyond a reasonable doubt.”
7 443 U.S. 307, 318 (1979). In undertaking collateral review of a state court decision
8 rejecting a claim of insufficiency of the evidence pursuant to 28 U.S.C.
9 § 2254(d)(1), the inquiry is “even more limited”; federal courts “ask only whether
10 the state court’s decision was contrary to or reflected an unreasonable application of
11 Jackson to the facts of a particular case.” Emery v. Clark, 643 F.3d 1210, 1213-14
12 (9th Cir. 2011) (citing Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005)).
13 The relevant inquiry is made in light of the applicable state law. Jackson, 443 U.S.
14 at 324 n.16; see also Emery, 643 F.3d at 1214 (“Insufficient evidence claims are
15 reviewed by looking at the elements of the offense under state law.”).

16 **3. The California Court of Appeal’s Decision.**

17 The Court of Appeal began by summarizing Petitioner’s briefing as arguing
18 that “the evidence supporting the jury’s guilty verdict on the petty theft charge
19 (count 11) was insufficient because there was no evidence that [Petitioner] intended
20 to steal Simington’s car keys, [Petitioner] knew or reasonably expected that the
21 other man who accompanied him would steal the keys, or anyone took the keys
22 from Simington.” (LD 3 at 17; see also LD 5 at 29-31.)

23 Next, the court summarized the elements of petty theft, relying on
24 CALCRIM 1800, the pattern jury instruction given to Petitioner’s jury (2 CT 228),
25 as follows:

26 The elements of theft are: The defendant (1) took possession of
27 property owned by someone else; (2) took the property without the
28 owner’s consent; (3) when taking the property, intended to deprive the

1 owner of it permanently or to remove it from the owner’s possession
2 for so extended a period that the owner would be deprived of a major
3 portion of the value or enjoyment of the property; and (4) moved the
4 property, even a small distance, and kept it for any period of time,
5 however brief. (CALCRIM No. 1800.)

6 (LD 3 at 18.)

7 The court then summarized the evidence that would support a finding on
8 each disputed element, as follows:

9 Lawson testified at the preliminary hearing about the events
10 surrounding Simington’s car keys, which testimony was read back at
11 trial, as follows.¹⁰ When Simington first arrived at the apartment with
12 [Petitioner] and saw Lawson, Simington “said that they even got my
13 car keys.” [3 RT 946.] At some point after Simington went into the
14 apartment, [Lawson] and Simington were asking [Petitioner] about the
15 whereabouts of Simington’s car keys. [Petitioner] then whistled, the
16 other man came, and [Petitioner] asked the other man for Simington’s
17 keys. [3 RT 949.] The other man produced keys but not Simington’s.
18 [3 RT 958.] Lawson, [Petitioner], and the other man went outside to
19 the carport area in the alley behind Simington’s apartment building,
20 where the other man went into one of the carport stalls [about five or
21 six stalls away] and returned about a minute later with Simington’s
22 keys. [3 RT 958-59.]

23 At trial, Simington testified about the events concerning the
24 keys as follows. Simington arrived home from work in his car, which
25

26 ¹⁰ Lawson died after the preliminary hearing but before trial. Because he was
27 “unavailable,” his preliminary hearing testimony was read to the jury. (3 RT 937-
28 38, 1589.)

1 he parked in the alley behind his apartment building. [3 RT 918.]
2 After [Petitioner] initially tackled Simington in the alley, brandished a
3 knife, and with the other man, grabbed Simington and walked him
4 down the alley, Simington could not find his keys.¹¹ [2 RT 689-91.]
5 Simington then persuaded [Petitioner] to let him go to his apartment,
6 and Lawson appeared. [2 RT 695-98.] When the other man came to
7 the apartment, Lawson grabbed him and said “come here” and “[g]o
8 get his keys.” [2 RT 701.] Simington stayed in the apartment while
9 Lawson, [Petitioner], and the other man retrieved his keys from the
10 carport. [2 RT 702.]

11 Lawson’s and Simington’s chronological accounts of the events
12 support a reasonable inference that Simington dropped his keys when
13 [Petitioner] initially chased him down the alley, and that [Petitioner]
14 himself or through the other man then took physical possession of
15 Simington’s keys from the alley floor. [Petitioner] and Simington’s
16 earlier physical altercation, the threats to kill Simington that
17 [Petitioner] made in the alley, [Petitioner]’s attempt to give Simington
18 the wrong keys at Simington’s apartment, and the presence of the
19

20 ¹¹ At the preliminary hearing, Simington testified that he had placed the keys
21 on the passenger seat after removing them from the ignition. (2 CT 310-11.) It is
22 unclear what he did with them afterward, if anything. He also testified at the
23 preliminary hearing that “the black guy” accompanying Petitioner “ransack[ing]”
24 the car after “g[e]t[ting]” Simington’s “keys,” but then said, “You know, I don’t
25 know what he did. I wasn’t there.” (2 CT 323.) Neither the prosecution nor
26 Petitioner’s counsel sought to introduce this portion of Simington’s preliminary
27 hearing testimony as evidence in the trial. In evaluating a sufficiency of the
28 evidence claim, courts consider only the “record evidence” considered by the jury.
See Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (“[T]he dispositive
question under Jackson is ‘whether the record evidence could reasonably support a
finding of guilt beyond a reasonable doubt.’”).

1 knife all support an inference that Simington never consented to
2 [Petitioner]’s taking his keys.

3 That evidence also supports a reasonable inference that
4 [Petitioner] intended to deprive Simington of his keys permanently or
5 for an extended period so as to deprive Simington of a major portion
6 of the value or enjoyment of his keys. This inference is especially
7 true because by taking the keys, [Petitioner] impeded Simington’s
8 ability to escape. Finally, the facts that (1) the other man retrieved
9 Simington’s keys from a place different from where Simington
10 dropped them, and (2) Simington’s car was ransacked between the
11 time he “lost” his keys and [Petitioner] and the other man returned
12 them at Lawson’s insistence [2 RT 702] support a reasonable
13 inference that [Petitioner] moved the keys and maintained possession
14 of them for some time. Therefore, the evidence adduced at trial was
15 sufficient to support each element of theft.

16 [Petitioner] also argues that the evidence of his intent to deprive
17 Simington of his car keys was insufficient because (1) Simington
18 testified that he told Lawson he had “lost” his keys, negating an
19 inference that [Petitioner] wanted to take Simington’s keys, (2) the
20 other man shortly thereafter returned the keys to Simington, and
21 (3) [Petitioner] and the other man had their own cars and were without
22 a third accomplice who could have simultaneously operated
23 Simington’s car. By these contentions, [Petitioner] asks us to draw
24 inferences contradicting those the jury drew. The substantial evidence
25 standard of review does not permit us to do so.

26 (LD 3 at 18-20.)

27 **4. The California Court of Appeal Reasonably Denied this Claim.**

28 The Court is skeptical of some of the California Court of Appeal’s factual

1 conclusions. For example, it found that the man retrieved Simington’s keys “from
2 a place different from where Simington dropped them.” (LD 3 at 20.) Yet
3 Simington did not know exactly when or where the keys left his possession, and the
4 carport area (where the keys were found) was along the alley where the initial
5 scuffle occurred. The California Court of Appeal also attributes some actions to
6 Petitioner that the evidence does not support. The court found that Petitioner
7 attempted to give Simington the wrong set of keys (*id.* at 19), but there is no
8 indication that Petitioner intended the other man to give Simington the wrong
9 keys—especially given that, according to Lawson, Petitioner then instructed the
10 other man to go retrieve the correct keys.

11 Nonetheless, even if the Court found that the state court based its decision on
12 an unreasonable determination of the facts—warranting de novo review (see Hurles
13 v. Ryan, 752 F.3d 768, 778 (9th Cir. 2014))—the Court would still deny
14 Petitioner’s claim. The evidence could have supported multiple versions of events.
15 It is possible, maybe even likely, that Simington dropped the keys; his car was
16 unlocked, permitting Petitioner or the other man to “ransack” it; and the other man
17 found Simington’s keys fortuitously in the carport area. Still, one of the versions of
18 events supported by the evidence is the version that the jury accepted.¹² Viewing
19 the evidence in the light most favorable to the prosecution, a rational trier of fact
20 could have found that Petitioner took possession of Simington’s car keys (the
21 primary element in dispute, as in these circumstances the other elements follow
22 from this one¹³). Petitioner had a motive to take the keys—i.e., preventing

23
24 ¹² Notably, the jury rejected the second degree robbery charge (which
25 required that Petitioner took the keys from Simington’s person, by force or fear or
26 to prevent Simington from resisting) and the lesser-included grand theft charge
(which required that theft was from Simington’s person), opting instead for petty
27 theft. (4 RT 1857-60, 2423.)

28 ¹³ If Petitioner did in fact take the keys, then it would have likely involved
moving the keys, without Simington’s consent, and with the intent to deprive

1 Simington’s escape. Petitioner or the other man had the opportunity to take the
2 keys—i.e., during the scuffle or shortly thereafter. Circumstantial evidence
3 supported the notion that Petitioner—or, at his instruction or with his knowledge
4 and support, the other man¹⁴—took Petitioner’s keys either from Petitioner’s car or
5 from the ground, and later dropped them or placed them in the carport area. When
6 Lawson told Petitioner to return Simington’s keys, Petitioner did not protest—
7 “What keys? We didn’t take his keys!”—but instead whistled for the other man
8 and asked him for the keys, suggesting that Petitioner knew that the other man was
9 responsible. Nor did the other man protest—“What keys?”—but instead reached in
10 his pocket for keys. When Simington disclaimed the produced keys, the other man
11 led Lawson directly to the place where the keys were and produced them a mere
12 minute later, suggesting that he had remembered (or had always known) where the
13 keys had been placed. Further, the car was ransacked (although granted it is
14 unclear whether the car was locked at the time). This is not overwhelming
15 evidence, but nor is it so flimsy that no rational trier of fact could have convicted
16 Petitioner.

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21 Simington of the enjoyment of the keys. Even kicking the keys away so that
22 Simington could not reach them—i.e., so that they were under Petitioner’s control
23 and not Simington’s—might support a petty theft conviction. For example, the jury
24 was instructed, “A person does not have to actually hold or touch something to
25 possess it. It is enough if the person has control over it or the right to control it,
26 either personally or through another person.” (4 RT 1859.)

26 ¹⁴ The trial court instructed the jury on aiding and abetting, because “the
27 other individual involved ended up with the keys.” (3 RT 1558; see also 3 RT 1581
28 [prosecutor telling jury, “it doesn’t matter which of them took the keys because we
have something in the law called aiding and abetting”]; 4 RT 1827-28.)

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V.
CONCLUSION

Based on the foregoing, the Court directs that judgment be entered denying the Petition on the merits.

DATED: July 14, 2021



KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE