UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN SOLIS, Petitioner, v. R.T.C. GROUNDS, Warden, Respondent.	NO. SA CV 15-796-PSG(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on March 30, 2015, in the United States District Court for the North District of California. On May 19, 2015, the United States District Court for the Northern District of

California transferred the action to this Court. On July 2, 2015, Respondent filed an Answer and a supporting memorandum ("Answer Mem."). Petitioner failed to file a Reply within the allotted time.

BACKGROUND

A jury found Petitioner guilty of kidnapping (count 1), domestic violence battery (count 3), aggravated assault with a deadly weapon (count 5), child abuse and endangerment (count 6), and making, possessing, and uttering fictitious instruments (count 4) (Reporter's Transcript ["R.T."] 658-61; Clerk's Transcript ["C.T."] 255-62; see also C.T. 198-201 (Amended Information)). The jury found Petitioner not guilty of making criminal threats or attempted criminal threats (count 2), and not guilty of domestic battery with corporal injury (count 3) (R.T. 659; C.T. 256-58). In a bifurcated proceeding, the trial court found that Petitioner had suffered a prior conviction qualifying as both a strike within the meaning of California's Three Strikes Law, California Penal Code sections 667(b) - (i) and 1170.12(a) - (d),[1] and a "prior serious felony" conviction within the meaning of California Penal Code section 667(a)(1) (R.T. 72-75, 670-74). The trial court also found that Petitioner had suffered a prior conviction for which he had served a prison term within the meaning of

[1] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code section 667(b) - (i) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code section 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). The State charged Petitioner under both versions (C.T. 200).

California Penal Code section 667.5(b) (R.T. 674). The trial court sentenced Petitioner to 18 years and four months in state prison (R.T. 678-83; C.T. 323-24).

The California Court of Appeal affirmed in a reasoned decision (Respondent's Lodgment 7; see People v. Solis, 2013 WL 5827668 (Cal. App. Oct. 30, 2013)). The California Supreme Court denied Petitioner's petition for review summarily (Respondent's Lodgment 9). The California Court of Appeal and the California Supreme Court summarily denied Petitioner's habeas corpus petitions (Respondent's Lodgments 11, 13).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Solis, 2013 WL 5827668, at *1-3. See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state appellate decision).

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Counts 3 and 5: Domestic Violence Battery and Aggravated Assault

Around August 7, 2011, defendant lived at his mother's home with his girlfriend, Neary Eng,[2] and his seven-year-old son, Marc. Eng accused defendant of "kicking it with some girls." Defendant, angered by Eng's nagging, chased her as she ran away. He swung a 15-inch wooden Angel's souvenir bat at her. Marc saw defendant hit Eng twice with the bat and heard her scream.

Defendant's sister stopped him from chasing Eng and drove her away. Eng's friend, Marilen Calma, took Eng to Calma's house. Eng told Calma's boyfriend, Paul Khap, that "she had been in a domestic violence incident where she was hit with a bat by [defendant]." Khap saw a bruise on Eng's right shoulder.

Count 1: Kidnapping

Two days later, defendant texted Calma that he was coming over to pick up Eng (who had stayed at Calma's house). Calma told defendant to wait before coming over.

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[2] Eng did not testify at trial. Instead, her preliminary hearing testimony was read to the jury under California Evidence Code sections 1290 and 1291, after the court found she was absent from the trial despite the prosecutor's reasonable diligence to procure her attendance by the court's process. See Cal. Evid. Code § 240(a)(5).

Instead of waiting, defendant went to Calma's house with Marc.

Eng went in a bedroom and stayed there. She told Calma she did not want to talk to defendant, so Calma relayed the message to defendant.

Defendant, who was angry, went in the house and said to Eng, "Let's go home." Eng replied, "I don't want to go home yet." "I don't have a home." Defendant and Eng argued and yelled at each other. Defendant grabbed one or both of Eng's hands or wrists. Eng tried to break free by pushing defendant away. Defendant told Eng that "she knew what would happen to her if she didn't go home with him."

Defendant picked up Eng, threw her over his shoulder, and carried her out to his truck. On the way, Eng struggled with defendant, hit him in the back and called him an "ass," and angrily told him several times to put her down, but he did not. Eng did not want to leave Calma's house, where she felt safe. Eng feared for her safety, not knowing what defendant would do.

Defendant threatened Calma by saying that "if anybody got in his way, . . . he would slash them." Calma was in fear because defendant was "a big man" and "capable of following through with the threat." Once defendant had left her house with Eng and Marc, Calma phoned 911 to report the

incident.

Defendant put Eng in the back seat of his truck next to Marc, and drove toward a gas station. While defendant was driving, Eng asked him to stop and let her out, but defendant did not stop. Defendant and Eng argued. Even though the truck was moving, Eng tried to open the door several times. Defendant tried to pull Eng to keep her from getting out. Defendant pulled the truck over, got out, opened Eng's door, grabbed her by her shirt, and ripped her shirt and bra in the process. Eng screamed as defendant twice grabbed and ripped her shirt apart. Eng covered her chest with her arms so Marc would not see her exposed body.

Defendant got back in the driver's seat and drove to the gas station. Before they arrived at the station, Eng promised defendant she would not leave. Defendant and Eng made up at the gas station.

Defendant drove them back to his mother's house. Eng put on a new shirt and then she and Marc got back in the truck to run an errand with defendant. The police stopped the truck. An officer saw half a pink bra and a shredded green lace blouse in the vehicle. When an officer spoke to Marc, defendant told Marc not to say anything. At the police station, a female employee examined Eng and observed no visible marks on her body.

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Count 4: Possession of Fictitious Instruments

In defendant's wallet, an officer found a $100 bill that appeared to be counterfeit. When officers searched defendant's bedroom, they found three $100 bills in a safe. All four $100 bills were counterfeit.

Count 6: Child Abuse and Endangerment

During trial, defense counsel conceded that defendant committed misdemeanor child abuse against Marc by exposing him to these experiences.

Uncharged Acts

Maria Gomez is Marc's mother and defendant's former girlfriend of six or seven years. Gomez testified at trial about three prior acts of domestic violence defendant committed against her.

On July 4, 2003, defendant and Gomez argued while they were at Gomez's ex-sister-in-law's home. When Gomez and defendant returned to Gomez's home, defendant searched Gomez's purse and found an old phone number. Defendant questioned Gomez, who told him it was an old friend's phone number. Defendant accused Gomez of lying, insulted her, and told her to get her stuff and get out. When Gomez tried to leave, defendant grabbed her arm and dragged her by her hair

to the front yard. Gomez's sister-in-law tried to calm defendant down, but he said, "No, 'F' this." Gomez and her sister-in-law got into a car. Defendant pulled out a knife and slashed a tire. He tried to "get at" Gomez while she was in the car. As a result of this incident, defendant pleaded guilty to criminal charges.

On June 9, 2005, defendant, Gomez, and Marc were living in defendant's mother's home. Marc, who was a baby at the time, woke up crying. Defendant, who had just woken up, was cranky and said, "[S]hut that kid up." Defendant asked Gomez to make him lunch, but Gomez refused. Defendant said, "You [fucking bitch], you better make me my lunch." After Gomez again refused, defendant grabbed the back of her neck and said, "[W]hat's your problem [bitch?]" Gomez tried to get away, but defendant threw her and she hit her head on Marc's crib. Defendant grabbed her by the throat and squeezed, making it difficult for her to breathe. Gomez sustained bruising on the neck and forehead. As a result of this incident, defendant pleaded guilty to criminal charges.

On September 15, 2005, Gomez and Marc, not defendant, were living at defendant's mother's house. Defendant went there to see Marc who was a baby. Defendant and Gomez argued in the bedroom. Marc started to cry. Defendant's sister took Marc out of the bedroom. Defendant threw Gomez on the ground and on the bed, and kicked, punched, insulted, and spit on her, as well as getting on top of her on the

bed. Afterwards, defendant apologized to Gomez. Gomez sustained some bruises, and reported the incident to the police.

(Respondent's Lodgment 7, pp. 1-6; People v. Solis, 2013 WL 5827668, at *1-3.

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court allegedly erred by admitting evidence of Petitioner's prior acts of domestic violence (Ground One); and

2. The evidence allegedly was insufficient to support the conviction for assault with a deadly weapon (Ground Two).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was

based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

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"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 190 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 562 U.S. 86, 101 (2011). This is "the only question that matters under § 2254(d)(1)." Id. at 102 (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

In applying these standards, the Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). Where no reasoned decision exists, as where the state court summarily denies a claim, "[a] habeas court must determine

what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (citation, quotations and brackets omitted).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

I. The Introduction of Evidence of Petitioner's Prior Bad Acts Does Not Merit Federal Habeas Relief.

Petitioner asserts that the introduction of evidence of his prior bad acts violated due process (Petition, pp. 5-22 through 5-25). The trial court admitted testimony from Petitioner's ex-girlfriend concerning three prior acts of domestic violence. See R.T. 17-31, 75-80 (trial court rulings), 333-45 (relevant testimony); see also C.T. 186-94 (People's motion to admit priors). The trial court did so pursuant to California Evidence Code section 1109, which authorizes

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the admission of propensity evidence in domestic violence cases.[3] Petitioner argues that the admission of propensity evidence violates due process (Petition, pp. 5-24 - 5-25).

The Court of Appeal rejected this argument, agreeing with the "uniform appellate holdings" that section 1109 does not violate due process (Respondent's Lodgment 7, pp. 6-9 (citing, inter alia, People v. Falsetta, 21 Cal. 4th 903, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (1999), cert. denied, 529 U.S. 1089 (2000) (finding constitutional a "parallel" California statute permitting propensity evidence in sex offense cases); People v. Hoover, 77 Cal. App. 4th 1020, 92 Cal. Rptr. 2d 208 (2000) (finding that section 1109 does not violate due process)).

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[3] California Evidence Code Section 1109 provides that in cases where a defendant is accused of domestic violence, evidence of a defendant's commission of other acts of domestic violence is not inadmissible unless the probative value of the evidence is substantially outweighed by the danger of undue prejudice. See Cal. Evid. Code § 1109 (citing Cal. Evid. Code §§ 352, 1101). Here, the trial court found that: (1) the prior offenses were "very similar" to the facts of Petitioner's case; (2) the prior offenses were relevant propensity evidence that were "relatively close in time"; (3) the natures of the prior offenses were such that they would not inflame the jury; (4) there was nothing about the prior incidents that would prevent a jury from being fair in Petitioner's case; (5) Petitioner's pleas of guilt in the prior cases would take away any speculation about whether the incidents happened; and (6) with the court's limitations to only testimonial evidence from the witness concerning three specific events, the evidence was more probative than prejudicial. See R.T. 76-80. The trial court instructed the jury that the evidence of Petitioner's alleged prior acts of domestic violence was not sufficient by itself to prove that Petitioner was guilty of the charged offenses. See C.T. 240. The jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. 225, 226 (2000).

Under the AEDPA standard of review, Petitioner is not entitled to federal habeas relief on his due process claim. The United States Supreme Court has never held clearly that the introduction of propensity evidence or other allegedly prejudicial evidence violates due process. See Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) ("we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"); Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (the United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ"); Mejia v. Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008), cert. denied, 555 U.S. 1117 (2009) (rejecting habeas petitioner's challenge to introduction of propensity evidence, where petitioner could point to no Supreme Court precedent establishing that admission of otherwise relevant propensity evidence violated the Constitution); Alberni v. McDaniel, 458 F.3d 860, 864 (9th Cir. 2006), cert. denied, 549 U.S. 1287 (2007) (rejecting challenge to admission of propensity evidence in light of Supreme Court's express refusal to consider the issue in Estelle v. McGuire); see also Foy v. Gipson, 2015 WL 1516051, at *3 (9th Cir. Apr. 6, 2015) (unpublished decision reaffirming same); Chavarria v. Hamlet, 472 Fed. Appx. 749, 750 (9th Cir. 2012), cert. denied, 133 S. Ct. 931 (2013) (unpublished decision denying habeas relief on due process challenge to California Evidence Code section 1109). Accordingly, Petitioner cannot obtain federal habeas relief on this claim. See id.; see also Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("it is not an unreasonable application of clearly established Federal law for a state court to decline to apply

a specific legal rule that has not been squarely established by this Court") (citations and internal quotations omitted); Wright v. Van Patten, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonably applied clearly established Federal law") (citation, internal brackets and quotations omitted); Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009) (habeas relief unavailable where the Supreme Court had articulated no "controlling legal standard" on the issue); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir.), cert. denied, 555 U.S. 871 (2008) (where Supreme Court "expressly left [the] issue an 'open question,'" habeas relief unavailable).

To the extent Petitioner argues that the admission of the challenged evidence violated state law because the evidence assertedly was more prejudicial than probative, such argument fails to raise an issue cognizable on federal habeas corpus. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010) ("it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts") (original emphasis); Estelle v. McGuire, 502 U.S. at 67-68 (mere errors in the application of state law are not cognizable on federal habeas review). The California Court of Appeal found that the trial court did not abuse its discretion under California law in admitting the propensity evidence. See Respondent's Lodgment 7, pp. 9-10. This Court cannot redetermine an issue of state law. See Waddington v. Sarausad, 555 U.S. at 192 n.5 ("we have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions") (citation and internal quotations omitted); Mullaney v. Wilbur, 421

U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law") (citations omitted).[4]

In sum, because the Court of Appeal's rejection of Ground One was not contrary to, or an unreasonable application of, any "clearly established Federal law as determined by the Supreme Court of the United States," Petitioner is not entitled to federal habeas relief. See 28 U.S.C. § 2254(d).

II. Petitioner's Challenge to the Sufficiency of the Evidence Does Not Merit Federal Habeas Relief.

Petitioner argues that there was insufficient evidence to support his conviction for assault with a deadly weapon. Petitioner claims there was no evidence the 15-inch wooden "souvenir" baseball bat was: (a) inherently dangerous; (b) used in a way capable of causing great bodily injury; or (c) productive of any injuries to Eng (Petition, pp. 5-33 - 5-38).

The Court of Appeal ruled the evidence sufficient to support the jury's conclusion that the bat was a "deadly weapon" (Respondent's Lodgment 7, pp. 11-13). According to the Court of Appeal, the jury reasonably could have so inferred from the way Petitioner wielded the

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[4] Petitioner does not contend, and the record does not show, that this is the "highly unusual case" in which a state court's interpretation of state law was "clearly untenable and a subterfuge to avoid federal review of a constitutional violation." See Butler v. Curry, 528 F.3d 624, 642 (9th Cir.), cert. denied, 555 U.S. 1089 (2008) (citations and internal quotations omitted).

bat, evidence that the bat did not break on contact with Eng and evidence that the bat's contact with Eng had caused Eng to scream in pain (id.). The Court of Appeal further observed that whether Eng actually suffered injury was immaterial, because one may commit assault without making actual physical contact with the victim (Id., p. 12, citing People v. Aguilar, 16 Cal. 4th 1023, 1028, 68 Cal. Rptr. 2d 655, 945 P.2d 1204 (1997)).

A. Governing Legal Principles

On habeas corpus, the Court's inquiry into the sufficiency of evidence is limited. Evidence is sufficient unless the charge was "so totally devoid of evidentiary support as to render [Petitioner's] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir. 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations omitted). A conviction cannot be disturbed unless the Court determines that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 317 (1979). A verdict must stand unless it was "so unsupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 132 S. Ct. 2060, 2065 (2012).

Jackson v. Virginia establishes a two-step analysis for a challenge to the sufficiency of the evidence. United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc). "First, a reviewing court must consider the evidence in the light most favorable to the prosecution." Id. (citation omitted); see also McDaniel v.

Brown, 558 U.S. 120, 133 (2010).[5] At this step, a court "may not usurp the role of the trier of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." United States v. Nevils, 598 F.3d at 1164 (citation omitted). "Rather, when faced with a record of historical facts that supports conflicting inferences a reviewing court must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Id. (citations and internal quotations omitted); see also Coleman v. Johnson, 132 S. Ct. at 2064 ("Jackson leaves [the trier of fact] broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that [the trier of fact] draw reasonable inferences from basic facts to ultimate facts") (citation and internal quotations omitted); Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) ("it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial"). The State need not rebut all reasonable interpretations of the evidence or "rule out every hypothesis except that of guilt beyond a reasonable doubt at the first step of Jackson [v. Virginia]." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted). Circumstantial evidence and the inferences drawn therefrom can be sufficient to sustain a conviction. Ngo v. Giurbino, 651 F.3d 1112, 1114-15 (9th Cir. 2011).

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[5] The Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). The Court has conducted such an independent review.

At the second step, the court "must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d at 1164 (citation and internal quotations omitted; original emphasis). A reviewing court "may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (citations and internal quotations omitted; original emphasis).

In applying these principles, a court looks to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Constitution requires to prove the offense "is purely a matter of federal law." Coleman v. Johnson, 132 S. Ct. at 2064.

B. Analysis

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." See Cal. Penal Code § 240. "One may commit an assault without making actual physical contact with the person of the victim. . . ." People v. Aguilar, 16 Cal. 4th at 1028 (citation omitted). "[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." People v. Williams, 26 Cal. 4th 779, 790, 111 Cal. Rptr. 2d 114, 29 P.3d 197

(2001). "Holding up a fist in a menacing manner, [or] drawing a sword or bayonet . . . have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time . . . of using actual violence against the person of another, will be considered an assault." People v. McMakin, 8 Cal. 547, 548 (1857).

There was sufficient evidence to establish that Petitioner assaulted Eng by intentionally swinging the bat at Eng. Eng testified that Petitioner swung the bat at her twice (R.T. 124-25). According to Eng's testimony, Petitioner "almost" hit Eng with the bat, but did not actually touch her with it (R.T. 124-25, 140-41; see also R.T. 182-83, 191-92, 245-46 (Marilen Calma testifying that Eng was not physically hurt and claiming that Eng never told Calma that Petitioner hit her with a bat); R.T. 400-01 (responding police officer testifying that Eng told him Petitioner was holding a wooden baseball bat that was about 15 inches long, but Petitioner supposedly did not swing it at her); but see C.T. 327, 332-33 (transcript of Calma's 911 call during which Calma reported that Eng came to Calma afraid of Petitioner because Petitioner "already hit her with a bat" at their home, and that Eng arrived at Calma's place "hurt")). Eng claimed she did not develop any bruises (R.T. 125). Eng also claimed she never told her sister-in-law's boyfriend Paul that Petitioner had hit her with the bat (R.T. 138; see also R.T. 252, 260, 269-70 (Paul claiming that he did not see any bruises on Eng and did not recall telling police that he saw bruises on Eng's shoulder); R.T. 401, 426-28 (responding police officer testifying that he saw no bruises on Eng); but see R.T. 370-71, 380-81 (another responding police officer

testifying that Paul told her Paul had seen a bruise on Eng's shoulder and that Eng had told Paul Petitioner had hit Eng with a bat)). Petitioner's son, who was seven years old at the time of trial, testified that he heard Eng screaming and saw Petitioner hit Eng twice "a little bit soft" and "a little bit hard" in the back with the bat (R.T. 274, 276, 310-13, 324-26, 328-29). Reportedly, Eng was running away and, when hit, yelled like she was hurt (R.T. 313-14, 329).[6]

While appearing to concede the sufficiency of the evidence to prove an assault, Petitioner argues there was no evidence that the bat was a "deadly weapon," or that Petitioner assaulted Eng "in such a way" that the bat was "capable of causing . . . great bodily injury." See Petition, pp. 5-33 - 5-38; see also Cal. Penal Code § 245(a). "All that is required to sustain a conviction of assault with a deadly weapon is proof that there was an assault, that it was with a deadly weapon, and that the defendant intended to commit violent injury on another." People v. Tran, 47 Cal. App. 4th 253, 261, 54 Cal. Rptr. 2d 650 (1996) (quoting People v. Lee, 28 Cal. App. 4th 1724, 1734, 34 Cal. Rptr. 2d 723 (1994)). As with simple assault, there is no requirement of physical contact to prove assault with a deadly weapon. See People v. Brown, 210 Cal. App. 4th 1, 7, 147 Cal. Rptr. 3d 848 (2012) ("Because [section 245] speaks to the capability of inflicting significant injury, neither physical contact nor actual injury is required to support a conviction.") (citation omitted).

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[6] Eng was "skinny," standing 5'3" tall and weighing 120 pounds (R.T. 201). Calma, who was also 5'3" tall, described Petitioner as "a big man" who was "much bigger" than Calma (R.T. 197, 441).

"[A] 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' Some few objects . . . have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury." People v. Aguilar, 16 Cal. 4th at 1028-29 (internal citations omitted). "Great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate." People v. Armstrong, 8 Cal. App. 4th, 1060, 1067, 10 Cal. Rptr. 2d 839, 841 (1992). "In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." People v. Aguilar, 16 Cal. 4th at 1028-29 (internal citations omitted).

Objects which are not deadly per se, but which have been found to be "deadly weapons" under particular circumstances, have included a screwdriver (People v. Simons, 42 Cal. App. 4th 1100, 1107, 50 Cal. Rptr. 2d 351 (1996)), a straight pin (In re Jose R., 137 Cal. App. 3d 269, 276, 186 Cal. Rptr. 898 (1982)), a pillow (People v. Helms, 242 Cal. App. 2d 476, 486-87, 51 Cal. Rptr. 484 (1966)), a rock (People v. White, 212 Cal. App. 2d 464, 465, 28 Cal. Rptr. 67 (1963)), and a fingernail file (People v. Russell, 59 Cal. App. 2d 660, 665, 139 P.2d 661 (1943)).

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Considering the evidence in the light most favorable to the prosecution, a rational jury could have found beyond a reasonable doubt that the bat, as used by Petitioner in his assault on Eng, was a "deadly weapon." As summarized above, there existed evidence that Petitioner chased Eng, swinging the bat at her and hitting her twice in the back as she ran, causing her to scream. A jury reasonably could have inferred from this evidence that if Petitioner (who was much bigger than Eng) had made solid contact with Eng as Petitioner swung the bat, the likely result would have been a "not insignificant" bodily injury. See, e.g., People v. Copeland, 157 Cal. App. 2d 185, 187, 320 P.2d 531, 532-33 (1958) (upholding assault with a deadly weapon conviction; issue of whether an approximately foot long "policeman's club" was a "deadly weapon" was "at most a mixed question of law and fact, to be determined by the jury" where evidence showed that defendant struck his victim's head with enough force to cause a cut); People v. Petters, 29 Cal. App. 2d 48, 49, 52, 84 P.2d 54 (1938) (evidence was sufficient to support conviction for assault with a deadly weapon where defendant "picked up a wooden club and hit the complaining witness on the head with such force as to almost sever his ear from his head"; "evidence as to the manner of use of the wooden club and the injury inflicted thereby" was such that the only rational conclusion was that the club was a "deadly weapon"); see also State v. Pope, 1990 WL 157268, at *4 (Ohio App. 1990) (wooden handle of a toilet plunger was a "deadly weapon"); compare In re Brandon T., 191 Cal. App. 4th 1491, 1497, 120 Cal. Rptr. 3d 637 (2011) (butter knife that caused only a small scratch before breaking was not "capable" of producing death or great bodily injury); People v. Beasley, 105 Cal. App. 4th 1078, 1087-88, 130 Cal. Rptr. 2d 717 (2003) (broomstick

which, from the evidence, may have been hollow, fiberglass or plastic was not a "deadly weapon," although "[i]t is certainly conceivable that a sufficiently strong and/or heavy broomstick might be wielded in a manner capable of producing, and likely to produce, great bodily injury, e.g., forcefully striking a small child or a frail adult or any person's face or head.").

Although there was conflicting evidence regarding whether Petitioner actually hit Eng with the bat, as discussed above, the jury was not required to find that Petitioner actually hit Eng with the bat or inflicted any injury on Eng. Moreover, it was the jury's province to resolve the conflicts in the evidence, and this Court must presume the jury resolved the conflicts in favor of the prosecution. The Court will not disturb the jury's determination. See Jackson v. Virginia, 443 U.S. 307, 326 (1979); United States v. Nevils, 598 F.3d at 1104. The jury's verdict was not so unsupportable as to fall below the threshold of bare rationality. Coleman v. Johnson, 132 S. Ct. at 2065. For the same reason, at a minimum, the Court of Appeal's rejection of Petitioner's claim of insufficiency of the evidence was not contrary to, or an unreasonable application of, any "clearly established Federal law as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d). Petitioner is not entitled to federal habeas relief on Ground Two of the Petition.

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RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: August 10, 2015.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.