IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER JOHNSON,

Petitioner, No. CIV S-05-1223 JAM DAD P

vs.

M.L. EVANS,

Respondent. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2002 Sacramento County Superior Court conviction following a jury trial for premeditated attempted murder (Cal. Penal Code §§ 664/187),[1] home burglary (Cal. Penal Code § 459) and assault with a deadly weapon, a police night stick, with the force likely to produce great bodily injury (Cal. Penal Code § 245 (a)(1)). The jury also found the enhancement allegations that petitioner was personally armed with a deadly weapon during the commission of the crime (Cal. Penal Code § 12022(b)(1)) and personally inflicted great bodily injury under the circumstances of domestic violence (Cal. Penal Code § 12022.7(e)) to be true. As a result, petitioner was sentenced to life in prison with the

[1] Petitioner was acquitted at trial of premeditated attempted murder of a second victim.

possibility of parole and 15 years in state prison. (Answer at 1-2.) In his petition pending before this court petitioner collaterally attacks his conviction, raising the following grounds for relief: 1) ineffective assistance of trial counsel for failing to seek suppression of evidence and for failing to prevent the destruction of evidence;[2] 2) jury instruction error; 3) the trial court erred by forcing petitioner to testify before other defense witnesses and 4) insufficient evidence to support attempted murder. (Petition (Pet.), filed on June 20, 2006, at 6.)[3]

After carefully considering the record, the court recommends that the petition be denied.

PROCEDURAL AND FACTUAL BACKGROUND[4]

Prosecution Case

> [Petitioner] and Robyn R. (Robyn) were married for four years and lived in Robyn's house in Sacramento. [Petitioner] often yelled at her and held her by the throat. In 1997, [petitioner] had been convicted of a federal offense; after serving his term, he violated his parole several times. During his most recent incarceration in a federal detention facility in October 2000, Robyn decided to leave him.
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> [Petitioner] called Robyn from prison in January 2001. Robyn told [petitioner] she was ending the relationship; she was sending his clothes to his aunt and changing the locks on her doors, as well as her telephone number. [Petitioner] threatened to stalk her, and hurt or kill her. After the telephone call, Robyn attempted to get a restraining order against [petitioner]. On February 5, Robyn wrote to [petitioner] restating her intentions to leave him and change her

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[2] These claims were presented separately by petitioner but the court will discuss them together.

[3] The court has referred to all page numbers as they appear on the court's electronic filing system, as the petition is not numbered consecutively.

[4] The following summary is drawn from the February 8, 2005 opinion by the California Court of Appeal for the Third Appellate District (hereinafter Opinion), designated in this action as respondent's lodged document 6, at pgs 1-21. See also People v. Johnson, CO42532, 2005 WL 289962 at *1-2 (Feb. 8, 2005). This court presumes that the state court's findings of fact are correct unless petitioner rebuts that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004). Petitioner has not attempted to rebut that presumption and this court will therefore rely on the state court's recitation of the facts.

locks and telephone number. She told [petitioner] if he contacted her she would call the police.

[Petitioner] was released from prison on March 1, 2001. On the evening of March 12, 2001, Robyn and her new friend Patrick Watson fell asleep on a mattress in her living room while watching television. Some time after midnight, Robyn awoke and saw [petitioner] standing in the living room, holding a night stick. Watson recognized the night stick as a "PR-24" because he had used one during his former employment as a correctional officer. [Petitioner] began to hit Watson in the head and face with the night stick. When Robyn screamed, [petitioner] told her to "shut up, bitch," and began to hit her in the face. Robyn ran toward the door, but [petitioner] grabbed her and began hitting her in the head again. Thinking Robyn had escaped, Watson fled out the bedroom sliding door. Robyn passed out. When she awoke, she found she was alone in the house. Robyn spent six days in the hospital and had ongoing trauma.

When arrested on March 20, [petitioner] had a one-way ticket to Texas purchased on March 13 in his pocket. While being transported to the police station, he said to the deputy sheriff, among other things, "I'm going to be going away for a long time. I almost got away. I really fucked up. I ran because I was scared[ ]" and "What do you think is going to happen to me now?"

Watson saw [petitioner's] face and identified him as the assailant at trial. Robyn did not initially identify [petitioner] as the assailant. Neither she nor Watson recalled the original descriptions given to the police.

[Petitioner's] Case

[Petitioner] testified he was incarcerated in the Metropolitan Detention Center in February when he received the letter from Robyn. He had expected the letter, and was not upset. On March 8, one week after his parole, he informed his parole officer that he wanted to move to Texas to help his mother, who had cancer.

On March 12 and 13, the night of the attack, [petitioner] had been staying with friends, Miguel Elicia (Buck) and Gwen DuPatty.[5] After DuPatty left the house, a friend dropped [petitioner] off at Darcell Snowton's home about 8:00 p.m. [Petitioner] took a cab back to Elicia and DuPatty's house about 2:30 a.m. Between 9:00 and 10:00 a.m. on March 13, his sister Denise Galvan picked him up. On March 19, he received a bus ticket that had been purchased

[5] DuPatty indicated during her testimony that her boyfriend's last name was "Sansaya"; defendant refers to him as "Miguel Elicia."

> on March 13 and a money order from his mother. [Petitioner] denied ever threatening Robyn.
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> Snowton testified she was with defendant until about 2:00 a.m. on the night of the murder. [Petitioner]'s sister Denise confirmed [petitioner] was staying at Elicia's house. She also claimed [petitioner] was not upset by the impending divorce.
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> In rebuttal, Gwen DuPatty testified that [petitioner] came in between 10:00 and 12:00 p.m., but he may have been gone when she arose at 6:00 or 6:30 a.m. on March 13.

(Opinion at 2-5.)

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> (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.

See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court's decision does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review of a habeas petitioner's claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See also Frantz v. Hazey, 513 F.3d 1002, 1013 (9th Cir. 2008) (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

The court looks to the last reasoned state court decision as the basis for the state court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002). When it is clear that a state court has not reached the merits of a petitioner's claim, or has denied the claim on procedural grounds, the AEDPA's deferential standard does not apply and a federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

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II. Petitioner's Claims

Claim 1 - Ineffective assistance of counsel

Petitioner contends that his trial counsel provided ineffective assistance by failing to seek suppression of a statement and physical evidence and for failing to preserve potentially exculpatory information in the form of a taped phone conversation. (Pet. at 12, 14.)

Legal Standard

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003). Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

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In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman, 477 U.S. at 381 (quoting Strickland, 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689).

Suppression

Approximately a week after the attack that eventually resulted in petitioner's conviction, police units went to the apartment complex of Carol Olivas looking for petitioner.[6] (Reporter's Transcript (RT) at 380.) The police obtained a key and approached Olivas' apartment. (Id. at 382.) The police knocked to announce their presence but no one answered.[7] (Id. at 382.) They then entered the apartment without a warrant. (Id. at 383; Pet. at 12.) Olivas and her son were removed by police officers and she stated that petitioner was in the apartment. (RT at 401.) At trial, petitioner testified that on the day in question he was in bed with Olivas when he heard a loud noise. (Id. at 490.) Petitioner, fearing it was the father of Olivas' children, hastily put on his pants and went out the window, jumped over a gate and ran before being seized by a police dog. (Id. at 490-91.)

Police recovered a one-way bus ticket to Texas in petitioner's pocket and a letter from petitioner's mother acknowledging her purchase of the ticket. (RT at 372-75.) The ticket was purchased on March 13, 2001, the same day as the attack. (Id.) While in the back of a police car headed to the station, petitioner volunteered to police officers, "I'm going to be going away for a long time. I almost got away. I really fucked up. I ran because I was scared. What do you think is going to happen to me now?" (Id. at 418.) Petitioner contends that his trial counsel was ineffective for failing to move to suppress the train ticket and his statements to

[6] Petitioner was romantically involved with Olivas.

[7] Petitioner and Olivas both testified at trial that the police did not announce their presence prior to entering the apartment. (RT at 490, 560-61.)

police. The California Court of Appeal for the Third Appellate District, rejected petitioner's argument in this regard on direct appeal, stating:

> [Petitioner] argues trial counsel erred by failing to seek suppression of the items in his pockets and his postarrest statements because the warrantless entry into the apartment was not excused by consent or exigent circumstances, and his arrest was the fruit of this poisonous tree. [Petitioner] contends he had standing as an "overnight guest" to challenge the entry.
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> Failure to preserve a Fourth Amendment claim for appeal will not necessarily preclude appellate review of the merits of the argument if [petitioner] asserts on appeal that his trial counsel was constitutionally ineffective for failing to preserve the argument for appeal. (People v. Terrell (1999) 69 Cal.App.4th 1246, 1252-1254, 82 Cal.Rptr.2d 231.) There can be no prejudice from a failure to make a futile suppression motion. (Kimmelman v. Morrison (1986) 477 U.S. 365, 382 [91 L.Ed.2d 305] [defendant must show motion to suppress would have been meritorious in order to satisfy the prejudice prong of ineffective assistance of counsel standard].)
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> We are not persuaded by [petitioner's] basic premise. He does not claim the officers lacked probable cause to arrest him. Rather, he contends the arrest was the product of an illegal entry, even though he was arrested outside the house.
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> [Petitioner's] arrest was not the product of the entry. [Petitioner] testified he went out the apartment's bedroom window after hearing a noise because he thought a vengeful man would find him. He ran from his lover's ex-husband, not from the police.
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> Therefore, even assuming the entry into Carol Olivas's apartment could have violated someone's Fourth Amendment rights (although probably not [petitioner's]), his detention and arrest while running through an apartment complex were separate from the entry. The items seized from him and his volunteered statements in the police car were not the product of an illegal entry.
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> Moreover, """[t]o the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation....'"""" (People v. Hart (1999) 20 Cal.4th 546, 623-624, 85 Cal.Rptr.2d 132, 976 P.2d 683, quoting People v. Pope (1979) 23 Cal.3d 412, 426, 152 Cal.Rptr. 732, 590 P.2d 859, fn. omitted.) In this case, trial counsel answered the question at the Marsden motion. Trial counsel explained that, after researching the issue, he concluded a motion to suppress would be futile because defendant was arrested outside the apartment. The statement was given 45 minutes after the officers had entered the

> house. We agree. "It is not incumbent upon trial counsel to advance meritless arguments or to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel." (People v. Constancio (1974) 42 Cal.App.3d 533, 546, 116 Cal.Rptr. 910.)

(Opinion at 7-8.)

An attorney's failure to make a meritless objection or motion does not constitute ineffective assistance of counsel. Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (citing Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985)). See also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"). "To show prejudice under Strickland resulting from the failure to file a motion, a defendant must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him." Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (citing Kimmelman, 477 U.S. at 373-74) (so stating with respect to failure to file a motion to suppress on Fourth Amendment grounds)). See also Van Tran v. Lindsey, 212 F.3d 1143, 1156-57 (9th Cir. 2000) (no prejudice suffered as a result of counsel's failure to pursue a motion to suppress a lineup identification), overruled on other grounds by Lockyer v. Andrade, 538 U.S. 63 (2003).

Petitioner has failed to demonstrate that if a motion seeking suppression of the bus ticket and his statements had been brought, it would have been meritorious and would have resulted in a more favorable verdict. Petitioner does not dispute that he was outside the apartment when arrested nor does petitioner dispute that he fled Olivas' apartment believing the intruder was a jealous ex-husband. Given that undisputed fact the warrantless entry of police into Olivas' apartment could not have resulted in the suppression of the evidence seized from petitioner. On this point, the undersigned notes that the trial court denied petitioner's Marsden motion, where petitioner's primary concern was his counsel's failure to file a motion to suppress

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evidence. (Reporter's Transcript (RT) of Sealed Proceedings at 818-37.) In denying the Marsden motion, the trial court stated:

> On the Fourth Amendment action, it's impossible for me to evaluate in detail the propriety of a motion under the Fourth Amendment based on the facts as I understand them as adduced in the more limited way in the context of the trial;
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> I don't see a basis for, but here I'm really not looking as much at the merit of such a claim as to whether or not the attorney properly investigated. In this instance, he did, sought assistance from the professional research unit in the Public Defender's Office and they did not find a basis for it.
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> In my mind I have some other defects running through my mind as [petitioner] articulated his concern in that regard, but defects in a motion that would be brought as he outlined it, but bottom line is that [trial counsel] handled it properly.

(RT of Sealed Proceedings at 836.)

Likewise, the California Court of Appeal found no error in the conduct of petitioner's trial counsel in this regard. (Opinion at 6-8.) Under California law, any motion to suppress petitioner's statement to police or the bus ticket seized from him would have been denied. California courts have examined the principles set forth in Payton v. New York, 445 U.S. 573 (1980) and New York v. Harris, 495 U.S. 14 (1990), and held,

> Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself, nor requires suppression of any post-arrest statement the defendant makes at the police station.

People v. Watkins, 26 Cal. App. 4th 20, 29 (1994) (citing People v. Marquez, 1 Cal. 4th 553, 568-69 (1992) (finding that lack of an arrest warrant did not invalidate defendant's arrest or suppression of statements at the police station, but required only suppression of evidence seized from the home at the time of arrest)). Here, the police had probable cause to make an arrest since the victim had identified petitioner as her assailant. (RT at 368-69.)

Petitioner has failed to show that a motion to suppress would have been successful. Indeed, it appears clear that such a motion would have been denied under the facts of

this case. As noted above, the failure to raise a meritless legal argument does not constitute ineffective assistance of counsel. Kimmelman, 477 U.S. at 373-74; Jones, 231 F.3d at 1239 n.8; James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994).

Moreover, even assuming that a motion to suppress would have been successful, petitioner has not shown that the outcome of his trial would have been more beneficial to him. At trial petitioner presented evidence to the jury explaining the bus ticket and his statements to police. Petitioner testified that he had been planning on moving to Texas to live near his mother for some time. (RT at 480-81.) There was also testimony from petitioner's probation officer that prior to the commission of the crime, petitioner had inquired about the procedure for transferring his probation supervision to Texas. (RT at 648-49.) Petitioner testified at trial that he voluntarily made statements to police but that they were taken out of context in that he was actually expressing only his concern that his probation would be violated due to him fleeing from police, not because he had perpetrated the assault. (RT at 492-93.)[8]

While it is unclear how much weight the jury gave to the evidence that petitioner now claims should have been suppressed pursuant to defense motion, it is clear that the critical issue at petitioner's trial was the identification evidence. In this regard, petitioner was identified by both victims as their attacker and none of petitioner's witnesses could account for his whereabout at the time of the attack. (RT at 708-09.) Petitioner has not shown that suppression of the bus ticket or his statements to police upon his arrest would have affected the jury's verdict or that the state court's decision rejecting his arguments in this regard was contrary to clearly established federal law. Accordingly, petitioner is not entitled to habeas relief on this aspect of his ineffective assistance of counsel.

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[8] Despite this trial testimony by petitioner, he now argues that he made the statements in question while disoriented, in terror and in pain. (Pet. at 13.)

Audio Tape

Petitioner also contends that his trial counsel provided ineffective assistance by failing to preserve potentially exculpatory evidence in the form of a tape-recorded telephone conversation. (Pet. at 14.) This claim involves the January 2001 telephone conversation between petitioner, then incarcerated in a federal detention center where phone calls are recorded, and the victim, Robyn. The tapes were destroyed before either party heard the recording. Robyn testified at trial that during the conversation, she told petitioner she was divorcing him and petitioner then threatened to stalk and hurt her. (RT at 119.) Petitioner denies threatening Robyn and contends that production of the tape-recorded telephone conversation would have confirmed this and proved that Robyn lied. The California Court of Appeal described the background of this claim as follows:

> It is undisputed that trial counsel obtained an order in July 2001 from the trial court authorizing a subpoena duces tecum to the Metropolitan Detention Center in Los Angeles for the tapes of [petitioner's] telephone conversations. Later that month, trial counsel was notified by the Federal Bureau of Prisons that the tapes would not be released to anyone but a law enforcement agency. Thereafter, the deputy district attorney attempted to obtain the tapes by sending his own subpoena. The district attorney ceased his efforts when the federal authorities indicated that an investigator could only copy three hours per day of the 120 hours of tapes.
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> Trial counsel again subpoenaed the tapes on December 19, 2001. He received a telephone message in January that the tapes were no longer available. In February 2002, defense counsel was told the tapes had been destroyed. According to trial counsel, the records had been set aside but were destroyed when the federal authorities did not hear from the prosecutor.

(Opinion at 8-9.)

In his pending application for habeas relief, petitioner argues that his trial counsel was ineffective for failing to preserve the tapes once the prosecution had declined to copy them. Petitioner notes that the trial judge stated that this "raises at least an inference of [ineffective] assistance of counsel[.]" (RT at 670.) In the instant petition and on direct appeal, petitioner

argued that the tapes were exculpatory as they would have revealed that he did not threaten the victim, thus impeaching her testimony. Petitioner concludes that this evidence also would have cast doubt on the victim's identification of him as her attacker and would have undermined the evidence of premeditation. (Pet. at 16.) The state appellate court rejected petitioner's argument, stating:

> Assuming for the sake of argument that trial counsel did not act in a timely manner to obtain the tapes, and that he had the power to obtain the tapes, the record is insufficient to show the failure to do so was prejudicial, thereby establishing ineffective assistance of counsel. The record lacks any evidence that the tapes were exculpatory. Indeed, the affidavit for the subpoena duces tecum expressly states the taped telephone call was inculpatory. [Petitioner's] argument that "[Robyn's] credibility may well have been destroyed by the tapes and [petitioner] may well have been acquitted" is not persuasive. Whether or not [petitioner] threatened Robyn in a January telephone call before his release in March, his own testimony confirms he knew she was divorcing him. The case hinged upon the certainty of the identification of [petitioner] as the assailant of both Robyn and Watson. The absence of a direct threat to kill was not sufficient to undermine the verdict, particularly when the jury could see the victim's warning to defendant that if he contacted her she would call the police. Therefore, the failure to produce the tape was not ineffective assistance of counsel.

(Opinion at 10-11.)

Petitioner has again failed to meet his burden under Strickland with respect to this aspect of his ineffective assistance of counsel claim. Even assuming arguendo that trial counsel was ineffective in failing to obtain the tape-recordings, petitioner has not demonstrated any prejudice resulting from this error. If the tapes revealed what petitioner contends, the evidence would not have been exculpatory in any event. Petitioner has not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The existence or non-existence of a threat by petitioner toward his victim in January of 2001 is collateral to the pertinent facts of the case. Petitioner was identified by both victims as being the perpetrator of the crime.

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Petitioner argues that Robyn's credibility would have been undermined had his attorney acted to preserve the tape-recorded conversation. However, the nature of the victim's relationship with petitioner and her credibility in describing it, was thoroughly explored by petitioner's trial counsel who questioned Robyn about the various letter she sent while petitioner was incarcerated. On direct examination at trial, Robyn recounted the physical and emotional abuse she suffered at the hands of petitioner. (RT at 117.) On cross examination, petitioner's trial counsel questioned Robyn at length about the letters she wrote to petitioner in January 2001, expressing her love and affection for him. (RT at 171-73.) Despite that cross-examination, the jury apparently credited Robyn's testimony.

Furthermore, the evidence presented at petitioner's trial supports the inference that the tape-recorded conversation in question would have inculpated petitioner, as Robyn claimed. In this regard, the exact date of the phone call was not known but it was alleged to have occurred in late January 2001. (RT at 170-71.) In letters sent between January 4 - 28, 2001, Robyn stated how much she loved and respected petitioner and how she would always stand by him and was excited about his upcoming release from detention. (Clerk's Augmented Transcript (CT) at 2-3, 8, 10-14, 16-19, 21.) However, in Robyn's final letter written on February 5, 2001, the tone is markedly different as she told petitioner that she was filing for divorce, changing the phone number and locks and would call the police if petitioner came to her house. (Id. at 24-26.) Even without the transcript of the telephone call in question, it is evident that something occurred in late January of 2001 that changed the nature of the relationship between the two. There was also testimony admitted at trial that during this time Robyn attempted to obtain a restraining order against petitioner. (RT at 188-90.) Despite the inconsistences in her testimony regarding her feelings for petitioner, the jury apparently credited Robyn's testimony. The reviewing court must respect the jury's ability to determine the credibility of witnesses. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995).

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Petitioner's argument that the alleged threat that took place during the telephone conversation was the sole evidence of his premeditation is meritless. The jury at petitioner's trial was properly instructed that,

> Premeditated means considered beforehand. If you find that the attempted murder was preceded and accompanied by a clear deliberate intent to kill which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate and premeditated murder.

(RT at 771.)

In this case, petitioner armed himself with a police baton and went to the victim's house, which petitioner no longer lived at, sometime around 3:00 a.m.[9] Petitioner entered the home and approached the victims while they were sleeping. Even if the tape recorded conversation had been produced and did not reflect any threat by petitioner, there was sufficient evidence admitted at petitioner's trial to support the jury's finding of premeditation.[10]

For these reasons, petitioner has not demonstrated that his trial counsel was ineffective in failing to obtain the tape-recording of his January 2001 conversation with Robyn. Nor has petitioner established that the state appellate court's decision rejecting his argument in this regard is contrary to clearly established federal law.

Claim 2 - Jury instructions

Petitioner next argues that the trial court erred by not instructing the jury with respect to heat of passion or manslaughter. (Pet. at 17.) Respondent counters that this claim is procedurally barred. (Answer at 16-17.)

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[9] Police responded to the scene at 3:45 am, following a neighbors 911 call. (RT at 230, 322.)

[10] Petitioner's argument in his fifth claim for relief that there was insufficient evidence introduced at trial to support a finding of premeditation is equally meritless for the same reason.

Legal Standard

A challenge to jury instructions does not generally state a federal constitutional claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle, 456 U.S. 107, 119 (1982)). Habeas corpus is unavailable for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at 1085; Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986). However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir. 1980)). See also Prantil v. California, 843 F.2d 314, 317 (9th Cir. 1988) (To prevail on such a claim petitioner must demonstrate that an erroneous instruction "so infected the entire trial that the resulting conviction violates due process."). The analysis for determining whether a trial is "so infected with unfairness" as to rise to the level of a due process violation is similar to the analysis used in determining, under Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), whether an error had "a substantial and injurious effect" on the outcome. See McKinney v. Rees, 993 F.2d 1378, 1385 (9th Cir. 1993).

Under the doctrine of procedural default, a petitioner who has defaulted on his claims in state court is barred from raising them in federal court so long as the default is "pursuant to an independent and adequate state procedural rule." Coleman v. Thompson, 501 U.S. 722, 750 (1991). In Bennett v. Mueller, 322 F.3d 573 (9th Cir. 2003), the Ninth Circuit adopted a burden-shifting analysis in determining the adequacy of a state procedural rule. Under this analysis, the state may plead as an affirmative defense, that the petitioner's failure to satisfy a state procedural bar should foreclose federal review. 322 F.3d at 586. Once the state pleads the bar, the burden shifts to the petitioner to challenge the adequacy of that bar by showing that it has been inconsistently applied. Id. However, the state has the ultimate burden of proving the adequacy of the state procedural rule relied upon as an affirmative defense. Id.

It is established under California law that a defendant is estopped from raising any error as a ground for reversal if he or she initially invited the error at trial. People v. Marshall, 50 Cal.3d 907, 931 (1990). In Leavitt v. Arave, 383 F.3d 809, 832-33 (9th Cir. 2004), the Ninth Circuit held that only where the state court expressly invoked the invited error doctrine as the basis for rejection of the claim may it be applied as a state procedural bar to federal habeas relief.

Discussion

Petitioner argues that the trial court should have included an instruction to the jury on heat of passion or manslaughter. (Pet. at 17.) Respondent counters that this claim is procedurally barred from federal review, since the court of appeal rejected petitioner's argument in this regard based on the independent and adequate state law ground of invited error. (Answer at 16-17.) In his traverse, petitioner does not address respondent's argument that this claim is procedurally barred. The California Court of Appeal discussed the pertinent background with respect to this claim as follows:

> During discussions on jury instructions, and referring to an earlier discussion, the trial court stated:
>
> "There are lesser included crimes here as to the attempted murder. There would be the lesser included crime of attempted voluntary manslaughter. It's my understanding, [trial counsel], that you are not requesting that, fair statement?"
>
> [Trial counsel:] "Correct, your Honor."
>
> [The court:] "That's a strategic concern based on your theory of the case that [petitioner] wasn't there at all, fair statement?"
>
> [Trial counsel:] "Fair."
>
> [The court:] "And the Court would note further even if that was not the situation, it is simply not sufficient evidence in this record to support a heat of passion, for example, voluntary manslaughter of [sic] attempt in the context of the case as a whole most notably as it has been presented by the defendant. [¶] ... [¶] It's a whodunit case, not a what type of crime case, fair statement [trial counsel]?"
>
> [Trial counsel:] "Yes."

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[The court:] "Does that reflect your strategic concern?"

[Trial Counsel:] "Yes."

(Opinion at 11-12.)

However, just prior to the jury returning its verdict[11], another public defender who was standing in for petitioner's trial counsel, stated to the court that after a discussion with trial counsel they had agreed that it was a fundamental mistake not to request that the jury be instructed on heat of passion or manslaughter. (RT at 795-96.) Petitioner then requested that the court not take the jury's verdict and instead re-instruct the jury on the issue of voluntary attempted manslaughter. (Id.) The trial court declined to give the belatedly requested jury instruction, ruling that it was not a potential issue of ineffective assistance of counsel as framed by petitioner, rather it involved a sua sponte determination by the court not to give the jury instruction. (RT at 815.) In this regard, the trial court stated that there was simply not enough evidence to warrant the giving of this instruction. (Id.)

Faced with this somewhat confusing record, the California Court of Appeal held that:

> We need not decide whether the trial court's finding that there was insufficient evidence to justify instructions on attempted voluntary manslaughter and heat of passion was error. (CALJIC Nos. 8 .40, 8.42 & 8.43.) We conclude that if there was error, it was invited by trial counsel.
>
> The doctrine of invited error exists to ensure there is no reversal on appeal for an error made by the trial court at the behest of defendant. In order for the doctrine to apply, defendant must object to the instructions and must do so for a strategic purpose rather than by ignorance or mistake. (People v. Wickersham (1982) 32 Cal.3d 307, 330, 185 Cal.Rptr. 436, 650 P.2d 311 (Wickersham), fn. omitted .) "Invited error, however, will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction. [Citations.]" (People v. Valdez (2004) 32 Cal.4th 73, 115, 8 Cal.Rptr.3d 271, 82 P.3d 296.)

[11] Based on questions from the jury, it was by then apparent a guilty verdict was imminent. (RT at 799.)

> In this case, the record demonstrates invited error and estops [petitioner] from making this argument. This was a clear tactical decision. Trial counsel did not gamble for an all-or-nothing verdict concerning the attempted murder of Robyn. The jury was instructed on unpremeditated murder as a lesser included offense of premeditated murder, as well as the lesser charge of assault. Trial counsel elected not to provide the jury with a tempting compromise of attempted voluntary manslaughter that was inconsistent with the defense theory, [petitioner's] own testimony, and defense witness testimony.

(Opinion at 13-14.)

The state appellate court thereby expressly applied the "invited error doctrine" which petitioner has failed to address. Petitioner is therefore procedurally barred from raising this claim in the instant application for federal habeas corpus relief. Coleman, 501 U.S. at 749-50.

Even if this claim where not procedurally barred, petitioner would not be entitled to the requested relief. California law holds that the trial court must instruct on lesser included offenses when the evidence presented at trial raises a question as to whether all the elements of the charged offense were present, but the trial court is not obligated to provide the instruction when there is no evidence that the offense was less than that charged. People v. Breverman, 19 Cal. 4th 142, 154 (1998). Petitioner's claim that the trial court had a duty to sua sponte instruct the jury on the lesser included offense of attempted voluntary manslaughter, despite counsel's timely strategic choice to forgo such an instruction, is fundamentally flawed. A review of the trial record demonstrates that there was no evidence presented to the jury to support the issuing of an instruction on heat of passion or voluntary manslaughter. In this regard, the defense theory at trial was based on the misidentification of petitioner as the perpetrator. Because this was the theory of the defense, there simply was no evidence presented that would have supported a finding that petitioner acted in the heat of passion or committed only voluntary manslaughter. Therefore, the trial court was under no obligation to give the jury instructions that petitioner now

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claims should have been given. See Breverman, 19 Cal. 4th at 154. Habeas relief should be denied with respect to this claim.

Claim 3 - Sequence of Testimony

As noted above, petitioner also contends in the pending petition that the trial court erred by forcing petitioner to testify before other defense witnesses. (Pet. at 19.) Petitioner's arguments in this regard are unpersuasive.

Legal Standard

The right to present relevant evidence may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process. See United States v. Scheffer, 523 U.S. 303, 308 (1998) (defendant's right to present evidence in his defense "not unlimited" but rather is subject to reasonable evidentiary and procedural restrictions); Michigan v. Lucas, 500 U.S. 145, 149 (1991) (right to present relevant testimony may bow to accommodate other legitimate interests).

Moreover, even if a trial court's decision regarding, for instance, the order in which testimony will be presented at trial amounts to constitutional error, a habeas petitioner is not entitled to habeas relief unless such error had a "substantial and injurious effect" upon the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). See also Fry v. Pliler, 551 U.S. 112, 117 (2007) ("[t]he opinion in Brecht clearly assumed that the Kotteakos standard would apply in virtually all § 2254 cases").

Discussion

The specifics of petitioner's argument on this point are difficult to discern. Nonetheless, it appears that petitioner is arguing that he may not have testified at trial, if he had been given the opportunity to first view the testimony of his alibi witnesses, and that the trial court therefore violated his due process rights by forcing him to testify first. (Pet. at 19-20.) After the prosecution rested its case at petitioner's trial, the trial court stated it would conduct a

Fifth Amendment voir dire of petitioner, who would be first witness to testify for the defense, since the other defense witnesses were not available at that time. (RT at 459.) Petitioner's counsel objected on the grounds that it would tactically injure the defense by not allowing the alibi witnesses to appear as the first defense witnesses. (Id.) The trial court overruled the objections on the grounds that the jury should not be required to wait for a half a day with nothing to do before the defense commenced the presentation of its case. (RT at 459-60.) The trial court did allow petitioner additional time to prepare for his testimony. (RT at 459.)

Petitioner's argument that the trial court erred in requiring the defense case to go forward in this order was presented on direct appeal and rejected by the state appellate court, which reasoned as follows:

> Under both Evidence Code section 320[12] and section 1044,[13] the trial court has inherent and statutory discretion to control the proceedings to ensure the efficacious administration of justice.
>
> [Petitioner] objected to the trial court's order, but did not do so on constitutional grounds. Therefore, the issue is forfeited. However, in order to forestall any further ineffective assistance claim, we reach the merits of the issue.
>
> [Petitioner] relies upon the United States Supreme Court's decision in Brooks v. Tennessee (1972) 406 U.S. 605 [32 L.Ed.2d 358], where, because a state statute required a defendant to testify first, the defendant did not testify at all. The Supreme Court in that case invalidated a state statute requiring a defendant to testify before all other defense witnesses or to forfeit the right. (Id. at p. 612.) Brooks is inapposite.
>
> Nothing in this record indicates that [petitioner's] waiver of his Fifth Amendment right not to testify was coerced by the order of witnesses. Trial counsel's objection was a strategic one. (But see People v. Cuccia (2002) 97 Cal.App.4th 785, 791, 118 Cal.Rptr.2d 668 ["Nonetheless, we conclude his waiver was coerced based on

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[12] Evidence Code section 320 provides: "Except as otherwise provided by law, the court in its discretion shall regulate the order of proof."

[13] Penal Code section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

> the trial court's threat to consider his case rested if he did not testify"].)
>
> Further, we see no prejudice under any standard. [Petitioner] testified before his alibi witnesses, and before the woman who explained he jumped out of her window because he was afraid of her husband, not because he was running from the police. [Petitioner's] suggestion that he might have foregone testifying for fear he would appear "unlikable" or "unbelievable" had his alibi witnesses testified first is purely speculative, and does not support a due process argument.

(Opinion at 19-21.)

Petitioner has failed to demonstrate that the state court opinion was contrary to clearly established federal law. Petitioner's reliance on the decision in Brooks v. Tennessee, 406 U.S. 605 (1972), is misplaced. In Brooks, the Supreme Court found unconstitutional a state statute requiring a criminal defendant who wished to testify to do so before any other defense testimony was heard. The Supreme Court noted that a defendant may not know at the conclusion of the prosecution's case whether his testimony would be necessary or helpful to the defense. 406 U.S. at 610. The Court concluded that the state statute before it cast too heavy of a burden on the defendant's unconditional right not to take the stand in his own defense by preventing him from realistically assessing the value of his own testimony in light of the other evidence. Id. at 610-11. Here, the trial court's ruling that the defense should proceed in a timely fashion with the witness that was available at the time put no such burden on petitioner's right not to testify. In the instant case, it was clear before the trial court's ruling that petitioner planned on testifying in his own defense. (RT at 472.) In fact, defense counsel advised the court that petitioner would be testifying, four days prior to the day on which he actually testified.[14] See United States v. Leon, 679 F.2d 534, 538 (5th Cir. 1982) ("Brooks does not control here. The judge was merely trying to keep the trial from stalling in mid-afternoon. The record shows that counsel and Hicks already

[14] Petitioner testified on Monday, September 5, 2002, and counsel had indicated to the court on the previous Thursday that petitioner would be testifying in his own defense. (RT at 459, 471.)

had discussed the matter, and Hicks had decided to testify. Thus the Court's actions did not influence the decision to testify."); Harris v. Barkley, No. CV97-1557 RR., 1999 WL 1273323, *5 (E.D.N.Y. Jan. 25 1999) ("[N]either New York State nor the trial judge presiding over Harris's trial had any absolute rule in place, akin to the Tennessee law, requiring petitioner to testify first in his defense or lose the opportunity to be heard. Instead, the order of petitioner's testimony within the defense case became an issue only when Harris failed to have all his witnesses available to testify on March 2, 1992, as previously instructed by the court.").

Here, petitioner has made no showing that his defense was prejudiced by the fact that he testified before the other defense witnesses were called. Petitioner merely makes general allegations that the order of the defense testimony affected the jury's verdict, but nothing that is supported by the trial record. Other than these conclusory statements, petitioner offers no substantive argument in support of this claim. Petitioner does not describe how his testimony would have changed had he been called after the other defense witnesses nor does he credibly explain the circumstances under which he would have chosen not to testify despite the earlier representations to the trial court that he intended to do so. Even assuming arguendo that the trial court erred, any such error was harmless under these circumstances. There is no evidence before this court that the sequence of the defense testimony had a "substantial and injurious effect" upon the verdict in petitioner's case. See Brecht, 507 U.S. at 637-38.[15] Petitioner is therefore not entitled to habeas relief on this claim.

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[15] In the case of People v. Cuccia, 97 Cal. App. 4th 785 (2002), cited in the state appellate court's decision rejecting petitioner's argument on this issue, the trial court had forced the defendant to testify out of order when another defense witness could not be located and had improperly inquired in front of the jury whether the defendant had changed his mind about testifying. The appellate court did not find this to be per se reversible error and concluded that the defendant had failed to establish any prejudice resulting from the trial court's actions. Cuccia, 97 Cal. App. 4th at 792. Nonetheless, the court did reverse and remand the case because the cumulative effect of multiple errors during trial had resulted in a denial of the defendant's right to a fair trial. Id. at 795. In this respect, the instant case is clearly distinguishable from that confronted by the court in Cuccia.

Claim 4 - Sufficiency of evidence

Petitioner alleges there was insufficient evidence to support a guilty verdict on the charge of attempted premeditated murder. (Pet. at 21.)

Legal Standard

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). "[T]he dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982-83 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 318). "A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant the writ, the federal habeas court must find that the decision of the state court reflected an objectively unreasonable application of Jackson and Winship to the facts of the case. Juan H., 408 F.3d at 1275, n.13.

The court must review the entire record when the sufficiency of the evidence is challenged in habeas proceedings. Adamson v. Ricketts, 758 F.2d 441, 448 n. 11 (9th Cir. 1985), vacated on other grounds, 789 F.2d 722 (9th Cir. 1986) (en banc), rev'd, 483 U.S. 1 (1987). It is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson, 443 U.S. at 319. If the trier of fact could draw conflicting inferences from the evidence, the court in its review will assign the inference that favors conviction. McMillan v. Gomez, 19 F.3d 465, 469 (9th Cir. 1994). The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether

the jury could reasonably arrive at its verdict. United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991). Thus, "[t]he question is not whether we are personally convinced beyond a reasonable doubt" but rather "whether rational jurors could reach the conclusion that these jurors reached." Roehler v. Borg, 945 F.2d 303, 306 (9th Cir. 1991). The federal habeas court determines sufficiency of the evidence in reference to the substantive elements of the criminal offense as defined by state law. Jackson, 443 U.S. at 324 n.16; Chein, 373 F.3d at 983.

Discussion

Petitioner essentially argues that there was insufficient evidence presented at his trial to find him guilty of premeditated attempted murder because the evidence established that the victim was unconscious on the floor and petitioner had the opportunity to kill her, but did not. (Pet. at 21.) The California Court of Appeal quickly disposed of this argument on direct appeal, stating:

> The jury found [petitioner] not only intended to kill Robyn, but committed the crime willfully, deliberately, and with premeditation. [Petitioner's] use of a lethal weapon, striking multiple blows to the head of someone he knew, clearly supports a jury finding of intent to kill. We reject petitioner's argument that the fact he did not succeed in killing Robyn does not mean that he did not intend to kill her.

(Opinion at 18.)

After a review of the record, it is clear that the state appellate court was correct in concluding that there was sufficient evidence presented to the jury for a finding of premeditated attempted murder. The trial court correctly instructed the jury with California Jury Instructions - Criminal (CALJIC) No. 8.66 on the elements of attempted murder. (RT at 770.) Thus, petitioner's jury was instructed as follows:

> In order to prove attempted murder, each of the following elements must be proved. 1. A direct but ineffectual act was done by one person towards killing another human being, And 2. The person committing the act harbored express malice aforethought, namely a specific intent to kill unlawfully another human being.

(RT at 770, CT at 230.)

As the California Court of Appeal stated, evidence that petitioner beat the victim, Robyn, over the head multiple times with a police baton until she was unconscious, undoubtedly supported the jury's finding that petitioner acted with the intent to kill. Petitioner argues that Robyn could not testify to how many times she was struck, simply stating that she was hit more than once. (Pet. at 21.) Regardless of the fact that the exact number of times the victim was hit is not known, she testified that she was hit multiple times, and that when she ran for the door petitioner grabbed her to prevent her from escaping, continuing to hit her about the head with the baton. (RT at 127-28.) A police officer testified that upon arriving at the scene he observed a large quantity of blood on the ground, Robyn's face was almost completely covered in blood, her right eye was almost swollen shut and fresh blood was dripping from the right side of her face. (RT at 322.) The officer also testified that Robyn appeared to be in shock. (RT at 323.) Robyn was hospitalized for six days and had to make return visits to the hospital due to her fractured nose and hearing loss. (RT at 465-67.) That petitioner did not succeed in killing the victim is no basis upon which to disturb the jury verdict finding that petitioner acted willfully, deliberately, with premeditation and with the intent to kill. A review of the evidence demonstrates that rational jurors could find petitioner guilty of the offense of conviction.

While petitioner does not specifically address the identification evidence in his sufficiency of the evidence claim, the court will discuss that evidence since it was a central issue at his trial. When police first arrived to the scene at approximately 3:45 a.m., immediately after the attack, Robyn did not provide the identity of her assailant. (RT at 323.) The officer testified that Robyn appeared in shock, her ability to communicate was sporadic and some of the words she spoke were incomprehensible. (RT at 324.) Another officer who first responded, testified that Robyn was unable to provide her own name upon his arrival. (RT at 314-15.) Robyn herself testified that she did not remember speaking to police officers who arrived at the scene. (RT at 131.)

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At approximately 4:47 am, Robyn was taken to the hospital where different police officers questioned her in the emergency room. (RT at 341-42, 347.) One officer testified that Robyn was nauseous and vomiting at that time but appeared aware while answering the officer's questions. (Id.) When asked about her husband, Robyn provided information about the pending divorce and provided petitioner's name, date of birth and the intersection where he was staying with his aunt. (RT at 344-45.) However, Robyn did not identify petitioner as being the assailant at that time. (RT at 345-46.) At petitioner's trial Robyn testified that she only vaguely remembered this conversation with police and was heavily sedated at the time. (RT at 184-85, 206-07.)

The afternoon following the attack, March 13, 2001, detectives went to the hospital to speak with Robyn again. She was unable to answer questions at that time as she was throwing up, complaining of pain and was generally incoherent. (RT at 353, 368.) It was only on the following day, March 14, 2001, that Robyn first identified petitioner as her attacker. (RT at 369.) At trial, she testified that she was one hundred percent sure that petitioner was the attacker. (RT at 131.)

The other victim, Patrick Watson also identified petitioner as the attacker in his testimony at trial. (RT at 224.) Prior to the attack Watson had never seen petitioner in person, but had seen a photograph of him.[16] (RT at 224, 249.) Watson described the attacker as about six feet tall, one hundred and eighty to two hundred pounds. (RT at 691.) Petitioner is five feet, nine inches, one hundred and seventy to one hundred and seventy-five pounds. (Id.) At the hospital on March 13, 2001, Watson told detectives that the assailant looked a little like Robyn's husband, petitioner. (RT at 355.)

In his closing arguments, petitioner's trial counsel focused on these identification issues and argued to the jury that Robyn's testimony identifying petitioner as her attacker was not

[16] There were conflicting accounts presented at trial as to whether this picture was fuzzy or out of focus. (RT at 249-50, 355.)

credible and pointing out that Watson did not obtain a good look at the attacker. (RT at 714-20.) Yet, despite this evidence and counsel's cross-examination, the jury at petitioner's trial apparently credited the testimony identifying petitioner as the perpetrator of the attack on Robyn. Based on the evidence presented at trial, a rational juror could find that petitioner was the assailant. Petitioner has failed to satisfy his heavy burden in attempting to disturb the jury's verdict.

With respect to petitioner's claim that there was insufficient evidence for a finding of premeditation, this claim is also meritless for the reasons discussed by the court above in discussing petitioner's claim two regarding the failure to preserve the tape recorded conversation between petitioner and Robyn. The evidence presented at trial was sufficient for a rational juror to conclude that petitioner acted with premeditation in the assault on Robyn.[17]

The state appellate court's rejection of petitioner's insufficiency of the evidence arguments was based on a reasonable construction of the evidence in this case and is not contrary to or an objectively unreasonable application of clearly established federal law. See Woodford v. Visciotti, 537 U.S. 19, 25 (2002); see also 28 U.S.C. § 2254(d)(1). Therefore, petitioner is not entitled to habeas relief with respect to his insufficiency of the evidence claims.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

[17] The jury did not find petitioner guilty of premeditated attempted murder of the other victim, Watson.

shall be served and filed within seven days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 15, 2009.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD: ab
john1223.hc