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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

MICHAEL UPTON KERSHAW,)	Case No. 2:06-CV-01430-MMS
)	
Petitioner,)	ORDER DENYING PETITION FOR A
v.)	WRIT OF HABEAS CORPUS
)	
MIKE EVANS,)	
)	
Respondents.)	
_____)	

Before the court is Michael Upton Kershaw’s petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. A jury found Kershaw guilty of three counts of nonforcible child molestation. The jury also sustained a recidivist allegation based on Kershaw’s 1996 conviction for forcible child molestation. The state court sentenced Kershaw to state prison for an aggregate term of 105 years to life.

FACTUAL BACKGROUND

This court presumes state court findings of fact to be correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The following facts are taken from the unpublished opinion of the California Court of Appeal, Third Appellate District:

In May 1999, the victim [Holly Swett] (born July 1985) and her

1 friend [Kerrie Vigrass] (born August 1985) made plans by phone to
2 rendezvous with the latter's boyfriend [Blake Robinson] (the 15 year old
3 cousin of the defendant) at the defendant's apartment. The victim had
4 previously dated the cousin as well. The victim spoke with the defendant
5 in the course of the conversation; he happened to mention that he had
6 served a jail term and was 24. The victim lied to her mother about her
7 destination; the friend's mother knew where she was going. The two
8 girls met the defendant and his cousin at the mall, then the group walked
9 to his apartment.

10 As the defendant and the teenagers sat in the living room, his
11 mother and her companion emerged from one of the bedrooms and asked
12 if the girls were there with their mothers' permission. The victim
13 answered affirmatively. The older couple returned to their bedroom.
14 Wanting a better "buzz" than the beer in the apartment provided, the
15 quartet left to obtain stronger libations, which the defendant purchased
16 for them with money they provided. Back at the apartment, the victim
17 had five shots of vodka; she testified she was not "big-time" inebriated
18 as a result. While they drank, the victim told the defendant she was either
19 13 (her testimony) or 14 (her friend's testimony).

20 The foursome retired to the defendant's bedroom, where they
21 briefly played "Truth or Dare." As the cousin and the victim's friend
22 wanted to be alone, the defendant and the victim went into the living
23 room, closing the door to the bedroom behind them. At least an hour
24 passed before the couple in the bedroom rejoined the others.

25 After the victim and the defendant exchanged several kisses, they
26 lay on the sofa watching television. The defendant's mother and her
27 companion emerged from their bedroom and left the apartment. After a
28 while, the defendant asked if the victim was interested in sexual activity
with him. She declined. Some time later, he repeated the question, and
she again declined. This time, he nonetheless slid off her bikini bottom,
spread her legs, and began to copulate her vagina orally [which served
as the basis for Count 1], followed by digital penetrations [which served
as the basis for Count 2]. She did not protest; "[i]t was kind of like a
mutual thing." He stopped. She pulled up her bathing suit. He asked if
she would engage in further sexual activity with him. She declined. After
a few minutes, they rejoined the couple in the bedroom (according to the
victim; her friend did not testify to this interruption). The defendant and
the victim then returned to the living room. While he touted the
advantages of a 24-year-old sexual partner, the defendant removed her
bikini bottom again. Stripping off his pants, he began to have intercourse
with the victim. [The intercourse served as the basis for Count 3]. After
a moment or two, she decided she could not participate any longer. She
pushed the defendant away and pulled on her clothes.

29 The other couple now emerged from the bedroom. The three
30 teenagers were getting tired. According to the victim, the girls walked to
31 the store with the defendant for some cigarettes and snacks. After they
32 got back to the apartment, the defendant's mother and her companion
33 returned. The girls shared a cigarette outside, then the teens all went to

1 sleep in the defendant's bedroom while he slept on the couch. According
2 to her friend, before smoking outside, the victim mentioned to her while
3 they were in the kitchen that she had engaged in sexual activity with the
4 defendant. She did not appear upset. The defendant's mother and her
5 boyfriend [left] the apartment when the girls came back inside, and did
6 not return before the victim fell asleep.

7 The next morning, the defendant drove the girls back to their
8 neighborhood. The victim reported the incident to her aunt. About two
9 weeks later, the victim gave a statement to the authorities after her
10 mother notified them. About a week after the defendant's arrest, his
11 cousin threatened the victim, telling her a group of girls would be
12 assaulting her. This never happened, and the cousin later apologized to
13 the victim's mother for the threat.

14 The defendant testified, admitting two prior convictions for sexual
15 offenses with young girls. He was familiar with the victim's friend but
16 had never seen the victim before the two girls appeared at the apartment
17 uninvited to see his cousin. The girls were visibly inebriated. He saw a
18 liquor bottle in one of their backpacks. After 5-10 minutes, the defendant
19 left. He was upset because the girls' presence was a violation of his
20 parole conditions. He came home after an hour. Everyone was watching
21 a movie on television. The defendant thought he detected a peculiar
22 smell in the rear of the apartment, which may have been marijuana. After
23 the movie ended, his cousin disappeared into the bedroom with his
24 girlfriend for about a half-hour. The defendant's mother remained with
25 him and the victim in the living room. When the couple returned from
26 the bedroom, the victim asked to talk to the cousin in the bedroom. They,
27 too, were gone about a half-hour before returning. After the teens retired
28 to his bedroom to go to sleep, the defendant remained awake in the living
room until the early hours of the morning. His mother and her
companion intermittently checked in on him.

According to the defendant's cousin, the girls phoned him that day
to tell him they were coming over uninvited. The cousin, the defendant's
mother, and the mother's companion all essentially corroborated the
defendant's account. All denied supplying any liquor or marijuana that
night. The defendant's mother noted she removed a liquor bottle from
one of the girls' backpacks to replace the contents with water.

The defendant's female cousin (sister to the other cousin) had met
the victim previously through a mutual friend. She testified she was
riding in a car with the victim, the victim's mother and sister, and
another passenger in September 1999. Someone asked the victim if
anything had happened between the victim and the defendant. The victim
said to "tell the lawyer nothing happened." The female cousin admitted
she was no longer friendly with the victim, but had simply stayed in
contact with her to find out more information for the case.

1 10, 2002).

2 **PROCEDURAL BACKGROUND**

3 Kershaw was convicted by a jury on February 15, 2000 of three counts of
4 lewd and lascivious acts on a child under fourteen, in violation of California Penal
5 Code § 288(a). The jury also found that the allegation of a prior conviction for
6 forcible child molestation, see Cal. Penal Code § 288(b), was true. The state court
7 sentenced Kershaw to an aggregate state prison term of 105 years to life. It
8 imposed a sentence of 50 years to life for each count (25 years to life for each
9 count, Cal. Penal Code § 667.71, doubled to 50 years to life under California's
10 Three Strikes Law, California Penal Code § 667(e)). The court stayed the
11 execution of count two because the court found that counts one (oral copulation)
12 and two (digital penetration) constituted only one incident. It also imposed a
13 consecutive five-year enhancement pursuant to California Penal Code § 667(a) for
14 the jury's finding that Kershaw was a habitual sex offender.

15 On August 14, 2000, Kershaw filed a timely notice of appeal with the
16 California Court of Appeal. The state appellate court affirmed the judgment.
17 Kershaw, 2002 WL 27168, at *7. On February 19, 2002, Kershaw filed a petition
18 for review with the California Supreme Court. The California Supreme Court
19 denied this petition on March 27, 2002.

20 On March 19, 2003, Kershaw filed a habeas corpus petition in state court.
21 The state court dismissed all of Kershaw's claims. It first held an evidentiary
22 hearing on the issue of whether Kershaw was aware of his maximum sentence
23 exposure during the plea bargaining process. At the conclusion of the hearing, the
24 court denied the claim, and dismissed the petition. A petition for habeas corpus
25 was later filed in the California Supreme Court. This petition was also denied.

26 After exhausting his state court remedies, Kershaw filed the current federal
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1 habeas petition. He alleges the following: (1) ineffective assistance of counsel; (2)
2 that admission of certain evidence violated his due process rights; and (3) that the
3 trial court failed in its duty to explain legal issues in response to a specific jury
4 inquiry.

5 The writ of habeas corpus is available to “a person in custody pursuant to a
6 judgment of a State court only on the ground that he is in custody in violation of
7 the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). As
8 dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a
9 district court’s standard of review is as follows:

10 An application for a writ of habeas corpus on behalf of a person in
11 custody pursuant to the judgment of a State court shall not be granted
12 with respect to any claim that was adjudicated on the merits in State
13 court proceedings unless the adjudication of the claim—

14 (1) resulted in a decision that was contrary to, or involved an
15 unreasonable application of, clearly established Federal law, as
16 determined by the Supreme Court of the United States; or

17 (2) resulted in a decision that was based on an unreasonable
18 determination of the facts in light of the evidence presented in the
19 State court proceeding.

20 28 U.S.C. § 2254(d).

21 **DISCUSSION**

22 **I. Ineffective Assistance of Counsel Claims**

23 Several of Kershaw’s claims relate to ineffective assistance of counsel.
24 Specifically, Kershaw alleges that his trial counsel was ineffective because: (1)
25 trial counsel failed to properly advise Kershaw of the possible penal consequences
26 of proceeding to trial rather than accepting a plea bargain; (2) trial counsel failed to
27 present certain evidence; (3) trial counsel failed to locate and present a witness;
28 and (4) trial counsel failed to effectively cross-examine a witness. Kershaw further
claims that the cumulative effect of trial counsel’s errors constituted ineffective
assistance of counsel.

1 Kershaw claims that “trial counsel incorrectly informed him that he would only
2 receive 15 years to life if convicted at trial and would only serve at the most 15
3 years.” He further claims that if he had been properly advised of his maximum
4 exposure, he would have accepted the plea bargain of sixteen years.

5 Kershaw raised this claim in his habeas petition before the California
6 Superior Court. Following an evidentiary hearing, the Superior Court denied this
7 claim on the merits. This claim was also raised in the habeas petition to the
8 California Supreme Court, where it was denied without opinion. Because the
9 California Supreme Court issued a summary denial, this court looks through that
10 decision to the last reasoned decision of the California Superior Court, see Ylst v.
11 Nunnemaker, 501 U.S. 797, 801-06 (1991), which held that the preponderance of
12 the evidence supported that Kershaw knew of his maximum exposure. The state
13 court’s factual findings are entitled to deference under 28 U.S.C. § 2254(e)(1),
14 which provides that “a determination of a factual issue made by a State court shall
15 be presumed to be correct. The applicant shall have the burden of rebutting the
16 presumption of correctness by clear and convincing evidence.”

17 During the state habeas court’s evidentiary hearing, there was extensive
18 testimony by three attorneys, Amy Rogers, James Warden, and Dan Davis, all of
19 whom represented Kershaw in some capacity during the proceedings against him.
20 The attorney who served as Kershaw’s trial counsel for the evidentiary portion of
21 trial, Lloyd Riley, had died by the time the evidentiary hearing was held. Kershaw
22 also testified on his own behalf at the evidentiary hearing.

23 Each of the attorneys testified that they advised Kershaw that he was facing
24 life in prison. Rogers testified that she would have advised Kershaw that the odds
25 would be “substantially good” that he would be serving a life sentence for the
26 charges that were brought against him. Warden testified that he thought fifteen
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1 years to life would be the likely sentence in Kershaw’s case. Warden further
2 testified that he very clearly explained to Kershaw that fifteen years to life could
3 mean life imprisonment and that Kershaw could spend the rest of his life in
4 confinement. Davis, who was retained after Kershaw was convicted, testified that
5 Kershaw said he was facing a sentence of fifteen years to life.

6 In contrast, Kershaw testified that he was told that he would only serve a
7 maximum of fifteen years. Although he acknowledged that he was told he was
8 facing fifteen years to life, he testified that Warden told him that he would serve
9 only fifteen years, and that Riley told him that he would serve “between the eight
10 and twelve range – years. No life.”

11 After the evidentiary hearing, the state habeas court rejected Kershaw’s
12 claim. The trial court did not find Kershaw’s testimony credible. It did not credit
13 Kershaw’s testimony that none of his attorneys ever told him that he would receive
14 a sentence of more than fifteen years. It found that Kershaw’s testimony was
15 directly contradicted by Warden’s testimony. Further, it found that Kershaw’s
16 testimony was contradicted by Rogers’s testimony that her general practice is to sit
17 down and give a defendant a copy of the complaint and discuss each count that the
18 defendant is charged with having committed. The trial court also found that the
19 preponderance of the evidence supported a finding that there was a complaint filed
20 at the beginning of Kershaw’s case that charged him with multiple life exposures
21 on multiple counts and that the preponderance of the evidence supported a finding
22 that Rogers notified Kershaw of these facts.

23 The trial court made further findings regarding whether Kershaw would
24 have accepted a plea, and concluded that Kershaw would not have accepted any
25 plea agreement. The trial judge recalled instances in which Kershaw, competently
26 represented by Riley, repeatedly protested Kershaw’s innocence and stated that
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1 Kershaw wanted the case to go to trial because Kershaw was innocent. On the
2 basis of the trial judge’s own recollection of Kershaw’s case, and its assessment of
3 Kershaw’s credibility, the court found that Kershaw’s testimony that he wanted to
4 take a plea was false.

5 The state court’s finding that Kershaw was appropriately advised by
6 multiple counsel that he had life exposure on multiple counts is entitled to a
7 presumption of correctness. 28 U.S.C. § 2254(e)(1). Kershaw has not presented
8 the requisite “clear and convincing evidence” to overcome this presumption. Id.
9 Kershaw cannot show that the state court’s decision is “based on an unreasonable
10 determination of the facts in light of the evidence presented in the State court
11 proceedings.” Id. § 2254(d)(2).

12 Kershaw’s argument that the state court’s determination of the facts was
13 unreasonable is unavailing. Kershaw first argues that Rogers’s testimony is
14 irrelevant because it was made before the prosecutor changed the charges from
15 four counts under 288(a) to three charges under 288(b). Kershaw’s argument
16 misses the point. Regardless of which section of California Penal Code § 288 was
17 charged, California Penal Code § 667.71 is the relevant statute that determined
18 Kershaw’s maximum liability. California Penal Code § 667.71, as it existed at the
19 time Kershaw’s offenses were committed, provided that “[a] habitual sex offender
20 is punishable by imprisonment in the state prison for 25 years to life.” This statute
21 existed during the time Rogers served as Kershaw’s counsel. At the September 23,
22 1999, hearing, while Kershaw was represented by Warden, the prosecution stated
23 on the record that it expected to charge Kershaw’s “priors and enhancements.”
24 The information filed against Kershaw on October 1, 1999, the same day that the
25 plea offer expired, contained allegations that Kershaw fell within the habitual sex
26 offender statute, California Penal Code § 667.71. It was not unreasonable for the

1 state court to find that Kershaw’s attorneys had advised him that he faced multiple
2 life terms.

3 Moreover, Warden testified that he explained to Kershaw that the odds were
4 “substantially good” that he was facing life imprisonment. Kershaw himself
5 testified that he was told he was facing “15 to life.” The state court found that
6 Kershaw had a fair understanding that he faced multiple life exposures, but that he
7 “may not have wanted to hear that.”

8 Kershaw continues to assert what is belied by the record. Numerous times
9 in his testimony given during the state habeas evidentiary hearing, Kershaw stated
10 that he was told he was facing fifteen to life, but went on to state that he was also
11 told that he would not receive more than fifteen years. Even in his petition to this
12 court, Kershaw states, “[T]rial counsel incorrectly informed Petitioner that he
13 would only receive 15 years to life if convicted at trial and would only serve at the
14 most 15 years.” Petition at 15. It was not unreasonable for the state court to
15 determine that Kershaw was adequately told by numerous counsel that he faced
16 fifteen years to life on numerous counts, but that Kershaw chose to take the risk of
17 going to trial. There is no clear and convincing evidence to rebut the state court’s
18 findings that Kershaw was advised that he could get life imprisonment if he
19 proceeded to trial, and therefore the state court did not make an unreasonable
20 determination of the facts.

21 Giving the state court’s findings of fact their due deference, the state court’s
22 decision was neither contrary to nor an unreasonable application of Supreme Court
23 precedent. There was no “gross error” on the part of counsel such that the advice
24 Kershaw was given was “so insufficient that it undermined his ability to make an
25 intelligent decision about whether to accept the [plea] offer.” Turner, 281 F.3d at
26 880-81 (citing United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992); McMann v.

1 Richardson, 397 U.S. 759, 772 (1970)). Kershaw was informed that he faced
2 multiple life exposures, which is what he received after a proper jury trial.
3 Additionally, Kershaw cannot establish prejudice because, again, giving the state
4 court’s findings of fact their due deference, Kershaw cannot demonstrate a
5 reasonable probability that he would have accepted the plea offer if he was given
6 all the information he claims he lacked. Turner, 281 F.3d at 879.

7 **2. Alleged failure to investigate and present evidence.**

8 Kershaw claims that his trial counsel, Riley, provided ineffective assistance
9 by failing to investigate and present evidence that Kershaw’s cousin, Blake
10 Robinson, had sexual intercourse with the victim, Holly Swett. Robinson
11 presented a declaration post-trial stating that he did not “tell the entire truth” about
12 what he witnessed on the day in question. He declared that he had sexual
13 intercourse with Swett when Kershaw had left the apartment, and that he and Swett
14 had previously dated. Robinson speculated that the reason Swett told her mother
15 that she had sex with Kershaw, rather than Robinson, was because Swett knew that
16 her mother would be hard on her if she knew that Swett had sexual intercourse
17 with Robinson. Kershaw claims his trial counsel rendered ineffective assistance by
18 not questioning Robinson regarding these matters. Kershaw further claims that
19 Robinson’s testimony on these matters would have supported Kershaw’s defense
20 and negatively affected Swett’s credibility.

21 The state appellate court rejected Kershaw’s claim because it found that
22 Kershaw’s counsel was not ineffective. Robinson testified as a defense witness,
23 and corroborated the testimony of Kershaw and the defense’s other witnesses.
24 Robinson testified that the girls came over uninvited, that Kershaw left the
25 apartment as soon as the girls arrived, and when Kershaw did return, Kershaw and
26 Swett were not alone on the couch as Swett had claimed they were. The court
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1 reasoned that because Robinson had a central role in the events of the night in
2 question, even more so than the mother or her companion, it is reasonable to
3 assume that defense counsel wanted to exclude evidence of Robinson's unlawful
4 sexual conduct because any marginal amount of additional impeachment
5 Robinson's testimony would have generated was not worth the detriment to
6 Robinson's credibility. Kershaw, 2002 WL 27168 at *4-5.

7 The state court's decision was neither contrary to nor an unreasonable
8 application of Supreme Court precedent. First, it is unclear whether Kershaw's
9 trial counsel, Riley, was told that Robinson had sex with Swett. Robinson's
10 declaration is unclear on this point. It does not state that Robinson told Riley that
11 he had sex with Swett that night. Kershaw does not allege that Riley failed to do a
12 reasonable investigation of Robinson. During the motion for a new trial presented
13 to the state trial court, Kershaw's defense attorney at the time (Davis) sought to
14 prove that Riley knew about Robinson having had sex with Swett. David offered
15 Kershaw as a witness to testify that, at some point, he told Riley that Robinson had
16 sex with Swett on the night in question. Even assuming Kershaw would have
17 provided this self-serving testimony, it would not necessarily have credibly
18 established that Kershaw did indeed relay this information to Riley.

19 Even if trial counsel did know of this information, there was no ineffective
20 assistance. The record supports the state court's finding that Kershaw's trial
21 counsel engaged in reasonable trial tactics in this case. Reasonable tactical
22 decisions cannot form the basis of a finding of ineffective assistance. See
23 Gonzalez v. Knowles, 515 F.3d 1006, 1015 (9th Cir. 2008) (counsel's decision not
24 to call certain witnesses was a reasonable trial tactic and not deficient
25 performance); Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (counsel's
26 decision not to corroborate testimony, although not the best tactic, did not
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1 constitute deficient performance). Kershaw’s trial counsel had sought to exclude
2 testimony about other sex acts Robinson committed with his then-girlfriend, Kerrie
3 Vigrass, because testimony of other sex acts going on nearby would be prejudicial
4 to Kershaw. Noting what was discussed during a sidebar conversation, the trial
5 judge remarked that “there was a specific defense objection to testimony about
6 what had gone on between [Kerrie] and Blake in the bedroom because [Kershaw’s
7 trial counsel] didn’t want the jury feeling bad towards the defendant because
8 [Kerrie] and Blake may have been engaging in various actions in the bedroom.”

9 Robinson was one of the only witnesses who was present during the events
10 at issue who testified in support of Kershaw’s defense. He was therefore an
11 important witness whose credibility mattered a great deal. Trial counsel could
12 reasonably believe that testimony of Robinson’s sexual acts with the victim would
13 distract the jury and cause it to look with disfavor on both his client and his key
14 witness, Robinson. There was a possible cost and no clear advantage to Kershaw
15 in establishing a sexual relationship between Robinson and the victim. As the state
16 trial judge found, “Mr. Riley did a competent job.”

17 Furthermore, Kershaw cannot show any prejudice from the failure to present
18 Robinson’s testimony. First, establishing that Robinson had sex with Swett is not
19 particularly relevant to whether Kershaw had sex with Swett. Second, Robinson’s
20 testimony would have been subject to impeachment because he had given
21 statements before trial to a court-appointed investigator wherein he stated that he
22 and Swett kissed, but did not indicate that he slept with Swett on the night in
23 question. Finally, it is unlikely that the jury would have believed Robinson. The
24 jury did not credit his version of the facts, as evidenced by the verdict against
25 Kershaw. It is also unlikely that the jury would have believed Robinson’s
26 testimony that Swett lied to the police and committed perjury to avoid her mother’s
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1 anger. Kershaw thus cannot meet the prejudice requirement necessary to make out
2 a Strickland claim. There is no reasonable probability that the result of the
3 proceeding would have been different even if testimony was presented that
4 Robinson had sex with Swett on the day in question. Accordingly, the state court's
5 decision denying this claim was not contrary to nor an unreasonable application of
6 Supreme Court precedent.

7 **3. Alleged failure to locate and present a witness.**

8 Kershaw claims that trial counsel failed to locate and present an alleged
9 witness, Veronica Ishmael (also referred to as Ishmale). According to Kershaw,
10 Kershaw's trial counsel subpoenaed Ishmael for a date when the trial was not in
11 session. Kershaw alleges that Ishmael was a passenger in a car when Swett denied
12 having sex with Kershaw and could have heard such a statement. He further
13 claims that Ishmael's testimony would have substantiated the testimony of Kara
14 Robinson, Kershaw's cousin, and that Ishmael would have been a credible,
15 unbiased witness because she was not related to or acquainted with Kershaw, and
16 she was friendly with Swett. Kershaw claims this failure to locate and present
17 Ishmael constituted ineffective assistance of counsel.

18 The state appellate court rejected the claim because there was neither a
19 witness statement nor a declaration from which to discern the substance of
20 Ishmael's testimony. The state court reasoned that without any evidence, it was
21 reasonable to assume that defense counsel did not provide ineffective assistance by
22 failing to locate and present Ishmael. Kershaw, 2007 WL 27168, at *5. The state
23 court's finding that the failure to call Veronica Ishmael did not constitute
24 ineffective assistance of counsel was not contrary to nor an unreasonable
25 application of Supreme Court precedent, nor an unreasonable determination of the
26 facts. Further, Kershaw has not established that he was prejudiced by his counsel's
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1 purported failure to investigate.

2 Kershaw still has not presented any statement or declaration in this court to
3 show that Ishmael would have testified that Swett told her that she did not have sex
4 with Kershaw. Moreover, aside from Kershaw’s self-serving affidavit, there is no
5 evidence of record that a subpoena was sent to Ishmael for a date when court was
6 not in session. The failure to present evidence is fatal to Kershaw’s claim. See
7 Dows v. Woods, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting an ineffectiveness
8 claim based on trial counsel’s failure to interview or call an alibi witness where
9 there was no evidence in the record that the witness would have testified favorably
10 for the defense).

11 **4. Alleged failure to effectively cross-examine a witness.**

12 Kershaw claims that his trial counsel rendered ineffective assistance in
13 failing to effectively cross-examine Swett. More specifically, Kershaw claims
14 there were certain “inconsistencies” in Swett’s testimony that trial counsel failed to
15 discuss with Swett. For example, Kershaw states that “Ms. Swett testified that they
16 went to the store to get cigarettes, yet Ms. Vigrass testified that she had cigarettes
17 that she had taken from her mom. Ms. Swett testified that she told [Kershaw] she
18 was thirteen, Ms. Vigrass testified that Ms. Swett told [Kershaw] she was
19 fourteen.” Further, Kershaw asserts that Swett never mentioned being alone with
20 Blake Robinson, but that Vigrass corroborated Blake Robinson’s testimony that he
21 and Swett were alone for a period of time.

22 This claim was raised in Kershaw’s state habeas petition. The state court,
23 citing In re Harris, 5 Cal. 4th 813, 829 (1993) (discussing In re Waltreus, 62 Cal.
24 2d 218 (1965)), denied the petition on the basis that the argument had been raised
25 and rejected on direct appeal. On direct appeal, Kershaw claimed that trial counsel
26 failed to impeach Swett with statements she made to law enforcement officers.

1 The present claim relates to a failure to effectively cross-examine Swett on other
2 inconsistencies of her statements with statements of other witnesses. This claim
3 was raised in Kershaw’s California Supreme Court habeas petition, where it was
4 denied without opinion. Where there is no state court decision articulating a
5 rationale on the merits of the constitutional violation alleged, the claim is reviewed
6 de novo because “there is no state court decision on [the] issue to which to accord
7 deference.” Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); see also
8 Menendez v. Terhune, 422 F.3d 1012, 1025-26 (9th Cir. 2005); Nulph v. Cook,
9 333 F.3d 1052, 1056-57 (9th Cir. 2003).

10 On the merits of the claim, Kershaw points to “inconsistencies” in Swett’s
11 testimony, but they are not inconsistencies within Swett’s trial testimony or
12 inconsistencies of trial testimony with prior statements. Rather, they are
13 inconsistencies with testimony or declarations made by other witnesses, statements
14 that were not necessarily appropriate subjects for cross-examination of Swett.
15 Kershaw does not allege that counsel failed to bring out testimony from Swett that
16 could have been favorable to Kershaw. The jury had the duty as fact finder to
17 determine whose testimony was credible, and, ultimately, correct. There was no
18 deficient performance of counsel, and, in any event, Kershaw can show no
19 prejudice. Even if the alleged inconsistencies of witnesses had been highlighted by
20 counsel in cross-examining Swett, the inconsistencies were not of great magnitude,
21 relating, for example, as to how many people went out to buy cigarettes, and
22 whether she and Robinson were alone together in Robinson’s room. There is no
23 reasonable probability that highlighting minor differences in the witnesses’
24 testimony would have changed the jury’s decision.

25 **5. Whether cumulative errors warrant granting petition.**

26 Kershaw claims that the cumulative effect of trial counsel’s errors
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1 constituted ineffective assistance and violated his federal constitutional rights.
2 This claim was raised in Kershaw’s state habeas petition where it was incorrectly
3 dismissed as having been decided on direct appeal. It was also then raised before
4 the California Supreme Court in Kershaw’s state habeas appeal.

5 Like Kershaw’s previous ineffective assistance claim, this claim was
6 presented on direct appeal, but the state court nonetheless dismissed the claim,
7 citing In re Harris. As with the previous claim, this court has jurisdiction, see Hill,
8 321 F.3d at 789, and reviews de novo, see Pirtle, 313 F.3d at 1167; Menendez, 422
9 F.3d at 1025-26; Nulph, 333 F.3d at 1056-57.

10 “[T]he cumulative effect of multiple errors can violate due process even
11 where no single error rises to the level of a constitutional violation or would
12 independently warrant reversal.” Parle v. Runnels, 505 F.3d 922, 927 (9th Cir.
13 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973)). A federal
14 court should grant habeas relief if “the combined effect of individually harmless
15 errors render[ed] a criminal defense ‘far less persuasive than it might [otherwise]
16 have been.’” Id. (alteration in original) (quoting Chambers, 410 U.S. at 294).
17 Under the applicable harmless error standard, relief will be granted on a
18 cumulative error claim “only if the error[s] had a ‘substantial or injurious effect’ on
19 the verdict.” Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)).
20 The cumulative effect of multiple errors is considered harmless “[i]f the evidence
21 of guilt [was] otherwise overwhelming.” Id. at 928. Kershaw has not
22 demonstrated any deficiencies of counsel, and even assuming there were
23 deficiencies, that they had a “substantial and injurious effect” on the jury’s verdict.
24 Therefore, this claim is denied.

25 **II. Whether the state court’s admission of evidence of “other acts” violated**
26 **due process.**

27 Pursuant to California Code of Evidence § 1108, the trial court allowed
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1 presentation of evidence of Kershaw's commission of two prior sexual offenses,
2 and excluded evidence of three other offenses. In addition to admitting the records
3 of conviction into evidence as exhibits, the trial court permitted the testimony of
4 the two victims of Kershaw's prior convictions. Kershaw complains that
5 permitting the evidence of his two prior convictions was an evidentiary error that
6 amounted to a deprivation of due process. Petition at 31 (citing Estelle v.
7 McGuire, 502 U.S. 62, 67-68 (1991)).

8 In trials for sexual offenses, prior sexual acts may be admissible under
9 California Evidence Code § 1108, provided the safeguards of section 352 are
10 followed. The California Court of Appeal affirmed the trial court, adequately
11 explaining why two prior sexual offenses were admitted and three others were
12 excluded. Kershaw, 2002 WL 27168, at *3. The prior offenses that were admitted
13 were ones that involved circumstances very similar to the crimes charged, and the
14 court therefore determined that the two prior sexual offenses were relevant, and not
15 unduly prejudicial.

16 The U.S. Supreme Court has never held that prior sexual acts are
17 inadmissible under federal law. See Estelle, 502 U.S. at 75 n.5 (1991).
18 Furthermore, California Evidence Code § 352 provided adequate due process
19 safeguards to protect Kershaw's federal right to a fundamentally fair trial. Pulley
20 v. Harris, 465 U.S. 37, 41 (1984); see United States v. LeMay, 260 F.3d 1018,
21 1027 (9th Cir. 2001) (upholding constitutionality of a federal rule of evidence that
22 is analogous to California Evidence Code § 1108 so long as the evidence was also
23 subjected to the balancing test of the Federal Rule of Evidence equivalent of
24 California Evidence Code § 352). Admission of the evidence did not violate
25 Kershaw's constitutional right to due process and the state court's denial of his
26 claim was not contrary to nor an unreasonable application of Supreme Court
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1 precedent, nor an unreasonable determination of the facts.

2 **III. Whether the state court’s denial to clarify a jury instruction warrants**
3 **granting the petition.**

4 In instructing the jury, the trial court provided California Criminal Jury
5 Instruction 2.01 regarding the sufficiency of circumstantial evidence. In relevant
6 part, that instruction provides that “a finding of guilt as to any crime may not be
7 based on circumstantial evidence unless the proved circumstances are not only (1)
8 consistent with the theory that the defendant is guilty of the crime, but (2) cannot
9 be reconciled with any other rational conclusion.” CALJIC No. 2.01. After the
10 jury retired to deliberate, the jury asked for clarification regarding the portion of
11 the trial judge’s instruction that read “cannot be reconciled with any other rational
12 conclusion.” The trial judge informed the jury that “unless otherwise defined, the
13 wording of instructions is to be understood in their common usage meaning. I am
14 unable to further clarify ‘cannot be reconciled with any other rational conclusion.’”
15 Outside the presence of the jury, the trial judge gave the reason for not attempting
16 to give a more expansive explanation. The judge told counsel “when the terms are
17 everyday usage meaning, the Court is not inclined to further elaborate on what is or
18 isn’t meant by ‘reconciled’ or is or isn’t meant by ‘any other rational conclusion.’”

19 Kershaw’s petition argues that the judge’s failure to explain the language of
20 the jury instruction rises to the level of a federal constitutional violation, citing
21 Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). The Supreme Court
22 stated there that “[w]hen a jury makes explicit its difficulties a trial judge should
23 clear them away with concrete accuracy.” Bollenbach is inapposite to Kershaw’s
24 case because Bollenbach involved an erroneous instruction, not a disinclination to
25 try to further clarify commonly used words that are part of a correct instruction. In
26 Weeks v. Angelone, 528 U.S. 225, 231 (2000), the Supreme Court itself
27 distinguished Bollenbach as dealing with an instruction that was “palpably

1 erroneous.” In contrast, the jury instruction in Kershaw’s case has specifically
2 been upheld as constitutional by the Ninth Circuit. See Gibson v. Ortiz, 387 F.3d
3 812, 825 (9th Cir. 2004). Due process did not require further explanation.

4 The inquiry must focus on “whether there is a reasonable likelihood that the
5 jury has applied the challenged instruction in a way that violates the Constitution.”
6 Id. (citing Boyde v. California, 494 U.S. 370, 280 (1990)) (internal quotation
7 marks omitted). There is no reasonable likelihood that the jury applied this
8 instruction in a way that violated the Constitution, because, as the trial court
9 correctly observed, the words at issue in the instruction have a common meaning,
10 and are not legal terms of art. The jury was fully and accurately instructed, and
11 there were no ambiguities or deficiencies. Kershaw’s challenge that the failure to
12 clarify the phrase “so infected the entire trial that the resulting conviction violated
13 due process” fails. Weeks, 528 U.S. at 234.

14 PETITION DENIED.

15
16 DATED: August 12, 2009

17
18 /s/ Mary M. Schroeder
19 MARY M. SCHROEDER,
20 United States Circuit Judge
21 Sitting by designation
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