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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

DALE DUGGER,)	
Petitioner,)	CASE NO. 2:07-cv-2674 BJR
)	
v.)	
)	ORDER GRANTING IN PART AND
WILLIAM WIENER, et al.,)	DENYING IN PART MOTION FOR A
Respondent.)	CERTIFICATE OF APPEALABILITY

Before the court is Petitioner Dale Dugger’s Motion for a Certificate of Appealability. The court, having reviewed the relevant documents and being fully informed, finds and rules as follows:

INTRODUCTION

Mr. Dugger is a California state parolee. He filed an application for a writ of habeas corpus challenging his 2005 conviction on charges of resisting arrest and attempting to inflict injury on a peace officer in the performance of his duty. This court denied the petition on December 9, 2010. Petitioner now moves for a certificate of appealability pursuant to 28 U.S.C. § 2253. He seeks certification on the following issues, whether: (1) Petitioner was denied the right to present a complete defense in violation of the Sixth and Fourteenth Amendments; (2) the

1 prosecutor committed prejudicial misconduct; and (3) the trial court committed prejudicial error
2 in failing to instruct the jury on specific intent.

3 ANALYSIS

4 A certificate of appealability is authorized, “if the applicant has made a substantial
5 showing of the denial of a constitutional right.” 28 U.S.C. (c)(2). To meet this standard, a
6 petitioner must show that the issues are debatable among reasonable jurists or that the questions
7 are adequate to deserve encouragement to proceed further. *Hayward v. Marshall*, 603 F.3d 546,
8 554 (9th Cir. 2010) (en banc, abrogated on other grounds by *Swarthout v. Cooke*, 131 S.Ct. 859
9 (Jan. 24, 2011) (per curiam)). Courts “must be careful to avoid conflating the standard for
10 permission to appeal with the standard for obtaining a writ of habeas corpus.” *Lambright v.*
11 *Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000). “[O]bviously the petitioner need not show that he
12 should prevail on the merits since he has already failed in the endeavor.” *Barefoot v. Estelle*, 463
13 U.S. 880, 893 n. 4 (1983) (internal quotation marks and citations omitted) (superseded on other
14 grounds by 28 U.S.C. § 2253(c)(2)). “Indeed, a claim can be debatable even though every jurist
15 of reason might agree, after the [certificate of appealability] has been granted and the case has
16 received full consideration, that [the] petitioner will not prevail.” *Miller-El v. Cockrell*, 537 U.S.
17 322, 338 (2003).

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20 Mr. Dugger argued in his habeas petition that the trial court’s exclusion of certain witness
21 testimony denied him his right to “present a complete defense.” Dkt. No. 33 at 4. Mr. Dugger
22 sought to present evidence of the arresting rangers’ alleged reputation for singling out and
23 harassing homeless individuals, pursuant to California Evidence Code § 1103. The trial court
24 conducted a Section 402 hearing to determine the admissibility of the evidence, and at the
25 conclusion of the hearing, concluded that the evidence was “barely relevant, if that, and if it’s

1 relevant, I find it to be so attenuated and unhelpful and time consuming that I would exclude it
2 under [California Evidence Code §] 352.” Dkt. No. 27, Lod. Doc. 1, Opinion of the Court of
3 Appeal, Third Appellate District, at 13 -18. The Appellate Court affirmed the trial court’s
4 decision to exclude the evidence. *Id.* at 18.

5 On review, this court held that the exclusion of the evidence under California Evidence
6 Code § 352 was not an unreasonable application of clearly established federal law, noting that as
7 a federal habeas court, this court is not at liberty to review the state courts decisions on matters
8 of admissibility of evidence under state rules. *See* Dkt. No. 30 at 10 citing *Estelle v. McGuire*,
9 502 U.S. 62, 67-68 (1991). Petitioner argues that this court should have looked beyond the state
10 courts’ characterization of the proposed evidence and analyzed whether its exclusion violated his
11 constitutionally protected right to present a complete defense.
12

13 Supreme Court precedent dictates that a criminal defendant has a right to present
14 evidence in support of his defense. *See e.g. Chambers v. Mississippi*, 410 U.S. 284 (1973)
15 (holding that defendant was denied a fair trial when the state’s evidentiary rules prevented him
16 from calling witnesses who would have testified that another witness made trustworthy,
17 inculpatory statements on the night of the crime); *Rock v. Arkansas*, 483 U.S. 44, 56-62 (1987)
18 (Arkansas’ per se rule excluding all hypnotically enhanced testimony was unconstitutional when
19 used to restrict defendant’s right to testify). The common thread running through these cases is
20 that “states may not impede a defendant’s right to put on a defense by imposing mechanistic...or
21 arbitrary...rules of evidence.” *LaGrand v. Stewart*, 133 F.3d 1253, 1266 (9th Cir.), *cert. denied*,
22 525 U.S. 971 (1998).
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25 Such is not the case here. The trial court concluded, after the Section 402 hearing, that the
proposed testimony was “barely relevant,” “attenuated,” “unhelpful,” “time consuming,” and that

1 its probative value was substantially outweighed by the probability that its admission would
2 necessitate undue consumption of time. (*See* Dkt. No. 25, 1RT 70-71.). “[T]he Constitution
3 leaves to the judges who must make [decisions regarding the admissibility of evidence] ‘wide
4 latitude’ to exclude evidence that is ‘repetitive..., only marginally relevant’...[the Court has]
5 never questioned the power of the States to exclude evidence through the application of
6 evidentiary rules that themselves serve the interests of fairness and reliability—even if the
7 defendant would prefer to see that evidence admitted.” *Crane v. Kentucky*, 476 U.S. 683, 689-90
8 (1986) (citations omitted); *see also, Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (defendant does
9 not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise
10 inadmissible under standard rules of evidence; the exclusion of evidence does not violate the Due
11 Process Clause unless it offends some fundamental principle of justice).

13 In denying the habeas petition, this court found that the trial court’s decision to exclude
14 the reputation evidence pursuant to Section 352 had ample support in the record. Nevertheless,
15 the court finds that Mr. Dugger has raised a colorable, non-frivolous, constitutional argument
16 with respect to whether the trial court erred in excluding the reputation evidence and the jury was
17 not given an accurate picture of incident between the rangers and Mr. Dugger. Accordingly, the
18 court will issue a certificate of appealability on this issue.

20 Next Mr. Dugger contends that this court erred in holding that the prosecutor’s
21 misstatement of evidence to the jury constituted harmless error. At trial the rangers testified that
22 they were patrolling the bike trial on the evening of the incident in response to complaints they
23 had received from bicycle commuters. The complaints did not specifically reference Mr. Dugger.
24 However, during closing arguments, the prosecutor argued that the rangers were patrolling the
25 area in response to complaints specifically about Mr. Dugger. Defense objected and the trial

1 court issued an immediate admonition and later instructed the jury that statements by counsel are
2 not evidence.

3 Relying on *Darden v. Wainwright*, 477 U.S. 168 (1986), the appellate court concluded
4 that the challenged statement did not establish a pattern that “so infected the trial with unfairness
5 as to make the resulting conviction a denial of due process.” Dkt. No. 27, Opinion of the Court of
6 Appeal at 24. In his habeas petition, Mr. Dugger argued that the appellate court misstated the
7 rule of *Darden*, arguing that the Supreme Court does not require a pattern of misconduct. After
8 reviewing the record, including the closing arguments, this court rejected Mr. Dugger’s argument
9 and instead held that the appellate court’s reject of prosecutorial misconduct claim was neither
10 contrary to nor an unreasonable application of controlling principles of federal law. The
11 statement was brief, not repeated, and immediately followed by an admonition from the court.
12 This court finds that reasonable jurist could not find this determination debatable. Accordingly, a
13 certificate of appealability will not issue on this claim.
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15 Mr. Dugger’s final argument is that the trial court’s failure to instruct the jury on specific
16 intent deprived him of a jury finding on an essential element of the crime for which he was
17 convicted. Mr. Dugger was charged with unlawfully attempting by means of threats and violence
18 to deter and prevent the rangers from performing their duties and knowingly resisting by the use
19 of force and violence in violation of California Penal Code § 69. The trial court instructed the
20 jury on the first prong of section 69 (attempt) but failed to instruct on the second prong
21 (resisting). The appellate court held that the trial court erred in failing to instruct on specific
22 intent, but concluded that the error was harmless because the record showed that the prosecution
23 relied on evidence that Mr. Dugger actually resisted the rangers in violation of the second prong
24 of section 69 (requiring only general intent). See Dkt. No. 27, Lod. Doc. 1, Opinion of the Court
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1 of Appeal, at 31-35. On habeas review, this court rejected Mr. Dugger's claim, noting that the
2 appellate court's interpretation of section 69 is binding on this court. In order to find for Mr.
3 Dugger on this claim, this court would have had to disagree with the appellate court's
4 determination on a question of state law: namely, that there are two separate prongs defining a
5 violation of section 69, and two different corresponding *mens rea* elements associated with each
6 prong. That is something that this court cannot do on federal habeas review. Accordingly, Mr.
7 Dugger has failed to make a substantial showing of the denial of a constitutional right and a
8 certificate of appealability will not issue on this claim.
9

10 CONCLUSION

11 Based on the foregoing, it is HEREBY ORDERED that the request for a certificate of
12 appealability is GRANTED on Petitioner's first claim and DENIED on the remaining two
13 claims.

14 DATED this 6th day of June, 2011.

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17 /s/ Barbara Jacobs Rothstein

18 Barbara Jacobs Rothstein
19 U.S. District Court Judge
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