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

JOSEPH KNIGHT COX,

Petitioner,

No. CIV S-08-2107 LKK KJM P

vs.

JAMES A. YATES,

Respondent.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a California prisoner proceeding pro se with an application for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges his 2006 Yolo County convictions and sentences for several sex offenses.

I. Standards For Habeas Relief

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Also, federal habeas corpus relief is not available for any

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1 claim decided on the merits in state court proceedings unless the state court’s adjudication of the
2 claim:

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

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

7 28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”).¹ It is the habeas
8 petitioner’s burden to show he is not precluded from obtaining relief by § 2254(d). See
9 Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

10 The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are
11 different. As the Supreme Court has explained:

12 A federal habeas court may issue the writ under the “contrary to”
13 clause if the state court applies a rule different from the governing
14 law set forth in our cases, or if it decides a case differently than we
15 have done on a set of materially indistinguishable facts. The court
16 may grant relief under the “unreasonable application” clause if the
17 state court correctly identifies the governing legal principle from
18 our decisions but unreasonably applies it to the facts of the
particular case. The focus of the latter inquiry is on whether the
state court’s application of clearly established federal law is
objectively unreasonable, and we stressed in Williams [v. Taylor],
529 U.S. 362 (2000)] that an unreasonable application is different
from an incorrect one.

19 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the
20 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply
21 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8
22 (2002).

23 The court will look to the last reasoned state court decision in determining
24 whether the law applied to a particular claim by the state courts was contrary to the law set forth

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26 ¹ Title 28 U.S.C. § 2254(d) establishes a precondition to federal habeas relief, not
grounds for entitlement to habeas relief. Fry v. Pliler, 127 S. Ct. 2321, 2326-27 (2007).

1 in the cases of the United States Supreme Court or whether an unreasonable application of such
2 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S.
3 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial
4 of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court
5 must perform an independent review of the record to ascertain whether the state court decision
6 was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other
7 words, the court assumes the state court applied the correct law, and analyzes whether the
8 decision of the state court was based on an objectively unreasonable application of that law.

9 “Clearly established” federal law is that determined by the Supreme Court.
10 Arredondo v. Ortiz, 365 F.3d 778, 782-83 (9th Cir. 2004). At the same time, it is appropriate to
11 look to lower federal court decisions as persuasive authority in determining what law has been
12 “clearly established” and the reasonableness of a particular application of that law. Duhaime v.
13 Ducharme, 200 F.3d 597, 598 (9th Cir. 1999); Clark v. Murphy, 331 F.3d 1062 (9th Cir. 2003),
14 overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63 (2003); cf. Arredondo, 365 F.3d at
15 782-83 (noting that reliance on Ninth Circuit or other authority outside bounds of Supreme Court
16 precedent is misplaced).

17 II. Background

18 On direct appeal, the California Court of Appeal summarized the facts presented
19 at petitioner’s trial as follows:

20 Between July 2001 and November 2003, defendant lived with D.B.
21 in Knights Landing with their infant daughter A. and D.B.’s three
22 young children from a prior marriage, E.G., K.G., and H.G.
23 Defendant and D.B. were married on March 16, 2002, after A. was
24 born. During the time they lived together, defendant took care of
25 the children while D.B. was at work.

26 E.G.

E.G. was born in September 1994. One time when she was about
seven and one-half or eight years old, she was playing with H.G.
when defendant entered the room. H.G. left but when E.G. tried to
leave too, defendant barred her exit and put his hands down her

1 underpants and touched her "private part" on her skin. Defendant
2 touched her the same way on another occasion when she was
3 approximately eight years old, although this time he touched her
4 over her clothing.

5 K.G.

6 K.G. was born in May 1996 and was between the ages of five and
7 six when he lived with his mother and defendant. On two
8 occasions in the daytime during that time, defendant played a
9 "tent" game with K.G. and his sisters on the bed in D.B.'s
10 bedroom. The children were clothed and defendant was naked
11 except for a blanket that was draped over him while he bent over
12 on his hands and knees. K.G. lay beside defendant partially
13 covered by the blanket with his arm touching defendant's arm,
14 while his two sisters crawled on their stomachs between
15 defendant's arms and legs, trying not to touch defendant's penis.
16 The girls went through the tent twice on one day and two or three
17 times on the other day.

18 On another occasion when H.G. was three years old, K.G., H.G.
19 and E.G. took a bath with defendant. They were all in the bathtub
20 together and H.G. saw defendant's penis and defendant's feet
21 touched K.G. E.G. told her mother that she and her two siblings
22 took a bath with defendant. Sometime in the summer of 2003,
23 K.G. told D.B. that he and his sisters took a bath with defendant
24 and the following day, she told defendant to leave the residence.

25 H.G.

26 H.G., who was born in March 1998, lived primarily with her
biological father and stepmother, and her brothers K.G. and J., but
she visited her mother and defendant occasionally. One day when
she was about three years-old and was visiting her mother and
defendant, defendant touched her vagina with his hand and put his
finger "two inches" inside her "peepee" and moved his hand,
which felt "bad." This first incident took place before A. was born
in February 2001.

Defendant touched her that way "a lot," meaning more than three
times and K.G. and E.G. were in the room during at least one of the
incidents. The last time defendant touched her was when she was
in kindergarten.

On June 14, 2002, after one of her visits with her mother and
defendant, H.G.'s stepmother was bathing her when she
complained of a rash on her vaginal area. Her stepmother noticed
she was having a lot of rashes and asked whether anyone had
touched her private parts. H.G. became quiet and looked confused
and uncomfortable, but upon further questioning, told her
stepmother defendant rubbed her vaginal area with his fingers.

1 M.

2 M. was born in June 1997 and is the daughter of T.D. and
3 defendant. Prior to the birth of her brother T., born January 2005,
4 M. lived in an apartment in Woodland with defendant, her mother
5 and her brother K.

6 On May 17, 2004, M. spoke to Debbie Presti, a social worker with
7 the Yolo County Child Protective Services unit, in her apartment
8 where she lived with her parents. At that time, M. told Presti
9 defendant had “done a bad touch on her butt” in her mother’s
10 bedroom in the yellow house.

11 The following day, Presti conducted a formal multi-disciplinary
12 interview with M. During that interview, M. told Presti defendant
13 touched her “butt” by placing his fingers insidier her “butt,” which
14 she identified as her vagina, and also touched her butt with his
15 foot. M. said she saw defendant’s penis, which she called a
16 “wienie,” when he was naked and acting “strange” or “crazy.” She
17 ran away from him because it was “gross.” She explained that his
18 penis touched her hand “a tiny bit” when he made her touch it and
19 that “a tiny drop of . . . pee” came out. She described his penis as
20 “a little hard and a lot of softness” and said it touched her hand 10
21 times when she was approximately four years old.

22 M. told Presti that when she was five years old and before she was
23 in kindergarten, while she and her family were living in the yellow
24 house, defendant put his penis in her “butt,” pointing to her rectum
25 and vagina. M. said the touchings occurred in a lonely place that
26 no one could find but when asked where it was, she said “you just
go across the street and . . . you go past Wal-mart and then you’ll
see it right there.” She did not tell her mother about these
touchings because defendant told her not to tell and she thought
she would get in trouble with defendant.

Uncharged Offenses

19 C.S., who was born in December 1977 and is defendant’s younger
20 sister, testified that when she was between seven and 14 years of
21 age, she lived with defendant and her parents. During that time,
22 defendant touched her with his hand and his penis in her vaginal
23 area both under and over her clothing. When he used his hand, he
24 only touched the outside of her vagina but when he used his penis
25 he would occasionally insert it into her vagina. The touchings
26 would last about five minutes.

The first touching took place in the bathroom of their home when
C.S. was seven and defendant was 12. He touched her with his
hand about 20 times and he inserted his penis into her more than
three times.

1 As C.S. grew older and understood about sexual intercourse, she
2 asked defendant to stop because she did not want to get pregnant.
3 When she was 13 years old, her parents discovered that defendant
4 had been molesting her and her father spoke to defendant but
5 defendant continued to molest her. She never reported the
6 molestations to the police and was angry with defendant for a
7 period of time. However, she has since forgiven him and when
8 they spoke about what he had done to her, he thanked her for
9 forgiving him and told her he was very sorry for what he had done.

6 Defense

7 Defendant took the stand and denied committing all of the charged
8 acts. He testified that D.B.'s children did not get along, that E.G.
9 was a bully who would slap H.G., and there were times when he
10 had to spank E.G. and K.G. as a disciplinary measure.

11 Concerning the bathtub incident, defendant explained that he was
12 taking a bath by himself when the three children came into the
13 bathroom and proceeded to undress themselves and then tried to
14 climb into the bathtub. Defendant was embarrassed and jumped
15 out of the tub, wrapped a towel around himself, and got dressed.
16 E.G. was just stepping into the tub as he was about to get out, but
17 he was never in the bathtub with all three children at the same
18 time.

19 Defendant categorically denied touching H.G. inappropriately at
20 any time, playing a "tent" game with K.G. or the other children, or
21 taking off his clothes while the children were playing around him.
22 He also denied touching M.'s private parts, touching her
23 inappropriately, or being naked in her presence.

24 He admitted laying on top of his sister but denied ever putting his
25 penis inside her. He testified that he did not know that type of
26 behavior was wrong until he was about 12 or 13 years old and his
27 father spoke to him about sexual matters. He now thinks that
28 conduct is unacceptable.

29 Opinion of Third District Court of Appeal filed Sept. 5, 2007 (Resp't's Lodged Doc. #4) (Op.) at
30 3-9 (footnotes omitted).

31 III. Arguments And Analysis

32 A. Crying Juror

33 In his first claim, petitioner asserts the trial court violated his Constitutional right
34 to a fair trial by failing to explore the partiality of one of the jurors, juror no. 7, after she was seen
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1 crying in the hallway subsequent to hearing H.G. testify.² Pet. at 7-15.³ This claim, as with all of
2 petitioner's claims, was presented on direct appeal in the California Court of Appeal. The Court
3 of Appeal did not directly address petitioner's Constitutional claim. Instead, the court addressed
4 the state law aspects of the claim. The Court of Appeal summarized the facts relevant to
5 petitioner's first claim as follows:

6 On the first day of trial, following the lunch recess, defense counsel
7 advised the court that when he left the courtroom at the noon
8 break, he noticed juror No. 7 sitting in the hall "crying
9 strenuously." It concerned him, so he informed the prosecutor and
10 was informed the court was in possession of a written note from
11 that juror. When counsel left the courtroom again, the juror was
12 still in the hallway "crying hard." Counsel told the court he had
13 concerns about whether the juror could be fair and impartial based
14 upon her strong reaction so early in the case when the first witness
15 had not even completed her testimony.

16 The trial court advised counsel it had in fact just received a note
17 from the juror and read the note into the record as follows: "How
18 is asking [the child witness] to talk about privates in front of a
19 room full of strange adults an okay practice? Is this really the right
20 thing to do? It seems cruel."

21 The court denied counsel's request to replace the juror, unless she
22 communicated with the court and indicated she was unable to
23 proceed in this case. However, the court indicated it would speak
24 to the jury about the tension between the formality of a trial and the
25 informality it would normally use in communicating with minors.

26 H.G., who had been testifying at the time, resumed the witness
stand and at the conclusion of her testimony, the court addressed
the jury. The court spoke about the problem of having young
children testify in court about sexual matters, explained that in the
past, child witnesses did not pose a problem because children were
considered incompetent to testify, but now that they are allowed to
testify, courts must struggle with the question of making the
courtroom child friendly while protecting defendants' rights. The
court indicated that it had advised counsel it would waive some of

23 ² Petitioner also argues that the trial court violated California law by not delving further
24 into whether juror no. 7 could be impartial. Pet. at 10-14. However, the court cannot grant
25 petitioner relief for this asserted violation of state law, nor any of the other violations of state law
petitioner alleges in his habeas petition, because habeas relief can only be granted for a violation
of federal law. 28 U.S.C. § 2254(a).

26 ³ Page references are to those assigned by the court's CM/ECF system.

1 the formalities and take more frequent breaks and if it sees “that a
2 child is exceedingly uncomfortable, we may give the child five or
3 ten minutes to calm down.” The court reassured the jury “none of
4 us here in the courtroom are trying to make the process any more
difficult than it is,” acknowledged that it is difficult for the
witnesses and for everyone involved and “to bear with us as we
march through this.”

5 Op. at 9-11.

6 The Supreme Court has never found that a trial judge must conduct an inquiry as
7 to bias when presented with circumstances resembling those in this case. The Ninth Circuit
8 recognized as much in Sims v. Rowland, 414 F.3d 1148, 1153 (9th Cir. 2005). In Sims, a habeas
9 petitioner argued that, under the Due Process Clause of the Fourteenth Amendment, he was
10 entitled to an evidentiary hearing concerning juror bias when some jurors informed the court they
11 were afraid of the possibility petitioner had become aware of their personal information, such as
12 their addresses, during voir dire. Id. at 1149-50. The Ninth Circuit rejected this argument based
13 in part on the fact that the Supreme Court has never found “that a failure to investigate potential
14 juror bias presents structural error,” which would entitle a habeas petitioner to relief regardless of
15 a showing of prejudice. Id. at 1153.

16 In light of the foregoing, petitioner’s first claim is barred by 28 U.S.C. § 2254(d).
17 The adjudication of his claim in state court did not result in a decision that is contrary to, or
18 involves an unreasonable application of clearly established federal law as determined by the
19 Supreme Court of the United States, nor is the decision based on an unreasonable determination
20 of the facts in light of the evidence presented in the state court.

21 B. Testimony Of Petitioner’s Sister

22 As indicated above, petitioner’s sister testified that petitioner committed several
23 inappropriate and unwanted sex acts upon her. Petitioner claims the testimony deprived him of a
24 fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Pet. at 16-26.
25 Petitioner focuses on the “substantially different” and inflammatory nature of the uncharged acts
26 his sister described, namely that he engaged in sexual intercourse with her. In contrast, he says

1 none of the children who testified at his trial said he forced them to have sexual intercourse. Pet.
2 at 16-17.

3 Petitioner fails to explain exactly how the evidence deprived him of a fair trial.
4 To the extent petitioner argues that the evidence should not have been admitted because it does
5 nothing more than show petitioner has a propensity for committing the crimes charged, petitioner
6 is precluded from obtaining relief by 28 U.S.C. § 2254(d) because the Supreme Court has never
7 held that propensity evidence is unconstitutional. See Estelle v. McGuire, 502 U.S. 62, 75 n. 5
8 (1991) (Court declined to rule on the constitutionality of propensity evidence).

9 Petitioner seems to suggest the court must analyze his claim under Chapman v.
10 California, 386 U.S. 18 (1967), but the Chapman harmless error standard is not applicable in this
11 action. In Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), the Supreme Court found that, in an
12 action filed under 28 U.S.C. § 2254, the appropriate level of prejudice that must be shown for a
13 violation of a Constitutional right – when prejudice must be shown – is “substantial and injurious
14 effect or influence in determining the jury’s verdict.”

15 In any event, admission of evidence violates the Due Process Clause of the
16 Fourteenth Amendment only if there are no permissible inferences the jury can draw from the
17 evidence. Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005). Here, it was permissible for
18 jurors to infer that petitioner’s prior conduct with his sister made it more likely that he committed
19 the crimes charged. While “propensity” evidence is not always allowable under the Due Process
20 Clause, exceptions have been made for sex offense cases as long as the probative value of the
21 evidence is not far outweighed by prejudicial effect. See United States v. LeMay, 260 F.3d 1018,
22 1025-26 (9th Cir. 2001). For the reasons stated by the Court of Appeal in response to petitioner’s
23 claim concerning the testimony of his sister, the probative value of the testimony of petitioner’s
24 sister was not far outweighed by prejudicial effect. See Op. at 18-21. Therefore, petitioner’s
25 second claim must be rejected.

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1 C. Sentence

2 1. Sentence Longer Than Authorized By State Statute

3 Petitioner makes several arguments regarding his sentence. First, petitioner
4 claims his sentence violates the Due Process Clause of the Fourteenth Amendment because it is
5 longer than a sentence authorized by state statute. Pet. at 25-29 (citing inter alia Wasko v.
6 Vasquez, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987)).

7 Petitioner was sentenced, among other things, to three consecutive terms of
8 fifteen-years-to-life imprisonment on counts 8, 14 and 15. CT 678. The sentences were imposed
9 based on the version of California Penal Code § 667.61(b) in effect between 1998 and 2006.⁴ RT
10 985:11-986:2 That statute read as follows:

11 . . . [A] person who is convicted of an offense specified in
12 subdivision (c) under one of the circumstances specified in
13 subdivision (e) shall be punished by imprisonment in the state
prison for life and shall not be eligible for release on parole for 15
years . . .

14 Cal. Pen. Code § 667.61(b). With respect to count 8, petitioner was found guilty of committing a
15 lewd and lascivious act on M.D. as defined in California Penal Code § 288(a). CT 632. As for
16 counts 14 and 15, petitioner was found guilty of committing § 288(a) lewd and lascivious acts
17 upon H.G. CT 639, 641. Committing a § 288(a) lewd and lascivious act is an offense
18 “specified” in subdivision (c)(7) of California Penal Code § 667.61,⁵ and one of the
19 circumstances “specified” in subdivision (e) of § 667.61(e)(5) is that “the defendant has been
20 convicted in the present case or cases of committing an offense specified in subdivision (c)
21 against more than one victim.”

22
23 ⁴ All references herein to California Penal Code § 667.61 are to the version in effect
24 between 1998 and 2006.

25 ⁵ California Penal Code § 667.61(c)(7) read as follows: “A violation of subdivision (a) of
26 Section 288, unless the defendant qualifies for probation under subdivision (c) of Section
1203.066.” Petitioner does not allege that he qualified for probation under California Penal Code
§ 1203.066(c).

1 Petitioner claims the sentence enhancements imposed under § 667.61(b) are
2 invalid because certain facts supporting the enhancements had to be explicitly pled and they were
3 not. California Penal Code § 667.61(I) required that “[f]or any of the penalties provided in
4 [§ 667.61] to apply, the existence of any fact required under subdivision . . . (e) shall be alleged
5 in the accusatory pleading. . .” Therefore, for petitioner to have been eligible for the
6 enhancements he in fact received, the charging documents had to explicitly indicate that
7 enhancements under § 667.61(b) were applicable because petitioner committed an offense
8 specified in subdivision (c) of § 667.61, that is, lewd and lascivious conduct, and the offense was
9 committed under a circumstance specified in subdivision (e) of § 667.61, that is, that petitioner
10 committed the offense against more than one victim. See People v. Mancebo, 27 Cal.4th 735,
11 743-45 (2002).

12 The Court of Appeal agreed that the multiple victim enhancement was not pled in
13 compliance with § 667.61. However, the court affirmed petitioner’s sentence, finding that any
14 error was harmless because: 1) petitioner was informed in the charging documents that the state
15 would seek to have his sentence enhanced under California Penal Code § 667.61(b), see CT 37-
16 38, and the multiple victim basis for the enhancement was the only basis that could make the
17 § 667.61(b) enhancement apply; and 2) the record does not suggest that petitioner would have
18 presented any defense other than the one he presented if he had been explicitly charged with the
19 multiple victim enhancement. Op. at 34-35. What the Court of Appeal failed to recognize is that
20 because the § 667.61(b) enhancement was not adequately pled for purposes of § 667.61,
21 petitioner was deprived of his Constitutional right to be sentenced to a term of imprisonment
22 only to the extent authorized by state statute. See Wasko, 820 F.2d at 1091 n.2. Section
23 § 667.61(I) provides that the § 667.61 enhancements can only apply if certain requirements are
24 met and they were not.

25 Moreover, applying 28 U.S.C. § 2254(d), Supreme Court authority clearly
26 establishes that a person convicted of a crime has a right to a sentence that is no longer than one

1 authorized by statute. See Board of Pardons v. Allen, 482 U.S. 369, 381 (1987) (failing to grant
2 inmate parole when required by statute violates due process); Hicks v. Oklahoma, 447 U.S. 343,
3 346 (1980) (where state statute provides for imposition of sentence in discretion of the jury, it is
4 a violation of due process to take discretion away from jury); Whalen v. United States, 445 U.S.
5 684, 690 (1980) (District of Columbia defendant denied due process when he was ordered to
6 serve consecutive sentences because Congress had not authorized imposition of consecutive
7 sentences). Section 2254(d) does not act as a bar to habeas relief because the California Supreme
8 Court’s and Court of Appeal’s rejection of petitioner’s claim concerning the § 667.61(b)
9 enhancement is contrary to the Supreme Court precedent identified above.

10 For the reasons identified above, the court will recommend that petitioner’s
11 sentences on Counts 8, 14 and 15 be vacated and this matter be remanded to the Superior Court
12 of Yolo County for re-sentencing.

13 2. Apprendi

14 Petitioner’s second claim regarding his sentence is that the § 667.61(b)
15 enhancements should be struck because the jury never explicitly found that the enhancements
16 applied, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, the Supreme
17 Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for
18 a crime beyond the prescribed statutory maximum must be submitted to a jury and proved
19 beyond a reasonable doubt.” Id. at 490. Here, jurors found beyond a reasonable doubt that
20 petitioner committed three lewd and lascivious acts against two different victims. CT 632, 639,
21 641. This was all the jury needed to find to satisfy Apprendi.

22 3. “Substantial Sexual Contact”

23 Petitioner’s last claim regarding his sentence is premised upon the fact that jurors
24 were instructed to determine whether petitioner engaged in “substantial sexual conduct.” Pet. at
25
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1 30-33.⁶ The court need not address this claim, however, because the fact that jurors were
2 instructed to determine whether petitioner engaged in “substantial sexual conduct” did not affect
3 the verdicts in any way, as “substantial sexual conduct” was not an element of any possible
4 sentence enhancement. See Op. at 36-37. It appears the “substantial sexual conduct” instruction
5 was given in error, but any error was harmless.

6 D. Insufficiency Of Evidence

7 Petitioner’s last claim is that there was insufficient evidence presented at trial to
8 support several of his convictions. Pet. at 35-39. In Jackson v. Virginia, 443 U.S. 307, 319
9 (1979), the Supreme Court held the relevant question with respect to sufficiency of evidence
10 claims arising under the Constitution is whether, after viewing the evidence in the light most
11 favorable to the prosecution, *any* rational trier of fact could have found the essential elements of
12 the crime beyond a reasonable doubt.” (Emphasis in original.)

13 1. “Tent Game”

14 In Counts 2, 3, 10, 12 and 13, petitioner was charged with attempting lewd and
15 lascivious acts in violation of California Penal Code §§ 21(a) and 288(a). CT 468-469, 472-473.
16 In Count 9 petitioner was charged with committing a lewd and lascivious act in violation of
17 California Penal Code § 288(a). CT 471-472. All of these counts arose from the “tent games”
18 described above. Petitioner asserts the evidence presented at trial is insufficient to sustain the
19 convictions on these counts.

20 First, petitioner claims that K.G.’s testimony regarding the “tent games” was not
21 credible because K.G. made and later retracted an allegation that petitioner put his penis in E.G.’s
22 mouth. Pet. at 36-37. Assessment of the credibility of a witness is generally beyond the scope of

23
24 ⁶ Petitioner also asserts “the jury, then, was never instructed to find the fact of a multiple
25 victim circumstance as to counts 8, 14, and 15.” Pet. at 32-33. Petitioner fails to point to
26 anything suggesting this fact, by itself, constitutes a violation of his Constitutional rights. To the
extent petitioner complains that his sentence was not properly supported by factual findings made
by the jury, the court’s recommended remand for resentencing on counts 8, 14 and 15 would
provide a remedy.

1 habeas review, Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004), and petitioner fails to
2 present good cause to depart from that rule here.

3 Second, petitioner asserts the evidence regarding the “tent game” was insufficient
4 because the conduct attributed to petitioner was significantly different than any of the other
5 conduct alleged:

6 All the other counts, except the bath incident which was highly
7 suspect also, involved appellant’s acts directed toward his touching
8 of the children; they did not involve acts by appellant that would
9 have caused the children to touch him. Moreover, the other acts
10 were straightforward; they did not involve any “game” or
11 subterfuge.

12 Pet. at 37.

13 Petitioner’s arguments here would have been appropriate in closing argument as a
14 comment on the evidence presented. However, the arguments do not provide an adequate basis
15 for finding that jurors were irrational in finding petitioner guilty beyond a reasonable doubt for
16 the offenses committed during the “tent games.” While the “tent games” were different in certain
17 respects from some of the other crimes charged, that fact adds little if anything to determining
18 whether the “tent games” actually happened.

19 Third, petitioner claims there was no evidence to corroborate the testimony of
20 K.G.; E.G. denied any participation in the “tent games” and H.G. described a different game in
21 which the participants were clothed. Pet. at 37. Essentially, this is a challenge to the credibility
22 of K.G. and thus generally beyond the scope of habeas review, with no reason to depart from the
23 general rule in this instance. Bruce, 376 F.3d at 957.

24 2. Bathtub Incident

25 In Counts 4, 11 and 16, petitioner was charged with committing lewd and
26 lascivious acts upon E.G., K.G. and H.G. in violation of California Penal Code section 288(a),
with the acts arising out of the bathtub incident described above. CT 469-470, 472, 474. With
respect to Count 4, petitioner claims that the evidence presented to the jury was not sufficient to

1 sustain his conviction because there was not sufficient evidence to establish that petitioner
2 touched K.G. with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual
3 desires of petitioner or K.G. Pet. at 37-38. See CT 584 (jury instruction); Cal. Penal Code
4 § 288(a); People v. Martinez, 11 Cal.4th 434, 453 (1995). With respect to E.G. and H.G.
5 petitioner claims the evidence does not establish there was any touching.

6 The California Court of Appeal addressed this claim as follows:

7 Here H.G. testified she took a bath with defendant when she was
8 three years-old, which would have been in 2001. E.G. and K.G.
9 testified they were all in the bathtub together, and K.G. testified
10 defendant's foot touched him. From this evidence the jury could
11 reasonably find defendant was naked in the tub with three children,
12 two of whom were old enough to bathe themselves, and he had
13 committed other lewd and lascivious acts on these three children
14 and others. These circumstances raise a strong inference (1) that
15 defendant acted with lewd intent and (2) given the tight fit of three
16 children and one adult in a bathtub, that he necessarily touched all
17 the children. The evidence is therefore sufficient to support the
18 verdicts.

19 See Op. at 27. Petitioner does not disagree with the Court of Appeal's summary of the evidence
20 presented.

21 The court finds that the Court of Appeal's rejection of petitioner's sufficiency of
22 the evidence claim concerning the bathtub incident is not based upon an unreasonable
23 determination of the facts presented at trial. Furthermore, the decision is not at odds with any
24 Supreme Court precedent. As suggested by the Court of Appeal, a rational trier of fact could
25 have found the contested elements of lewd and lascivious conduct were proved beyond a
26 reasonable doubt.

27 3. "Substantial Sexual Conduct"

28 In Count 15, petitioner was charged with committing a lewd and lascivious act
29 upon H.G. in violation of California Penal Code section 288(a). CT 474; CT 641 (verdict form).
30 Petitioner claims his conviction on Count 15 must be reversed because there was insufficient
31 evidence to establish that petitioner engaged in "substantial sexual conduct" with H.G. Pet. at

1 38-39. However, as indicated above “substantial sexual conduct” is not an element of lewd and
2 lascivious conduct in California, an element of any other crime charged, nor was it used as a
3 basis for enhancing petitioner’s sentence. CT 642. For these reasons, plaintiff’s claim regarding
4 Count 15 should be rejected.

5 IV. Conclusion

6 For the foregoing reasons, the court will recommend that petitioner’s application
7 for writ of habeas corpus be granted to the extent petitioner requests that his sentences on counts
8 8, 14 and 15 be vacated. The court will recommend that the application be denied in all other
9 respects.

10 Accordingly, IT IS HEREBY RECOMMENDED that:

11 1. Petitioner's application for a writ of habeas corpus be granted in part and
12 denied in part as follows:

13 A. Granted to the extent petitioner requests that his sentences on counts 8,
14 14 and 15 be vacated; and

15 B. Denied in all other respects.

16 2. This matter be remanded to the Superior Court of Yolo County for re-
17 sentencing consistent with the findings and recommendations made herein.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
20 one days after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections

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

4 DATED: May 12, 2010.

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8 U.S. MAGISTRATE JUDGE
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