(HC) Huff v. Martel Doc. 31

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ERICK HUFF,

Petitioner, 2: 08 - cv - 3053 - JAM TJB

vs.

WARDEN MARTEL,

Respondent. FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

Petitioner is a state prisoner proceeding *pro se* with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2005 conviction for attempted murder, assault with a deadly weapon, burglary and robbery. He seeks relief on several grounds, specifically that: (1) prejudicial error occurred when the trial court admitted evidence of other instances of domestic violence by the Petitioner against the victim ("Claim I"); (2) prejudicial error occurred when the trial court admitted prior acts of domestic violence by the Petitioner against the victim that had not been disclosed to defense counsel by the prosecution before trial ("Claim II"); (3) trial counsel was ineffective for failing to object to the admission of certain other instances of domestic violence by the Petitioner against the victim ("Claim III"); (4) the cumulative effect of his first three claims warrants reversal of Petitioner's convictions ("Claim

IV"); (5) Petitioner was denied his federal constitutional right to a fair trial when the trial court failed to clarify in the jury instructions that the "force" used in a robbery must be used to effectuate that robbery ("Claim V"); (6) trial counsel was ineffective for failing to object to the trial court's jury instructions on robbery and/or should have requested a more detailed pinpoint jury instruction so that the jury was specifically instructed that the "force" used in the robbery was used to effectuate that robbery ("Claim VI"); (7) the attempted murder conviction lacked sufficient evidence ("Claim VII"); (8) the trial court failed to properly instruct the jury on attempted murder, specifically the "intent" requirement ("Claim VIII"); and (9) trial counsel was ineffective for failing to object to the trial court's jury instruction on attempted murder ("Claim IX"). Upon careful review of the record and the applicable law, the undersigned will recommend that Petitioner's habeas petition be denied.

II. FACTUAL BACKGROUND[1]

> In October 2004, Jeanetta Anderson lived with her "cousin's baby's mother" Tanya Kennedy at Kennedy's apartment. Anderson was dating defendant, and they planned to move into an apartment of their own on November 2, 2004. The "move-in" costs for the apartment were approximately $612.
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> On November 1, 2004, Anderson purchased money orders totaling $612.50 and placed them in her purse. Defendant knew she had the money orders because she showed them to him.
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> That evening, Anderson and defendant watched a movie at Kennedy's apartment. Kennedy was not home, but she telephoned the apartment every 10 or 20 minutes to see if Anderson's cousin had called. Kennedy's calls angered defendant. He told Anderson "he wanted his time," which meant he wanted to have sex. When Anderson's cousin telephoned around midnight and Anderson answered, defendant punched Anderson in the face, blackening her eye and cutting her lip. Anderson told defendant to "get out," and he eventually left.
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> At approximately 8:00 a.m. the next morning (November 2, 2004), defendant returned to Kennedy's apartment. He said he had

[1] This statement of facts is taken from the January 22, 2008 opinion by the California Court of Appeal for the Third Appellate District (hereinafter "Slip. Op."), lodged as document 3 by the Respondent and filed with this Court on July 10, 2009.

forgotten his wallet. Anderson retrieved his wallet while he waited outside. As she handed him his wallet, he told her that if he saw her with another man "he was going to kill" her and the other man. He also told her he had cheated on her. She responded by calling him a "dirty dog" and a "nasty bitch," and he kicked in the door.

Anderson ran toward the telephone, intending to call 911, however, defendant "snatched it" and said, "Bitch, I'm going to kill you," grabbed a butcher knife off the kitchen counter, and began stabbing her. After he stabbed her four times, the knife broke off in her arm. He then kicked her on her right side, grabbed her purse, which contained the money orders, and ran out the door.

After removing the knife blade from her arm, Anderson crawled down the steps towards a downstairs apartment. A neighbor found her there and called for help.

Anderson sustained numerous stab wounds to her arms and legs, including a five-inch-long "deep cut" to her right calf and a six-inch-long "deep cut" to her right thigh. She also suffered cuts to her hands while attempting to defend herself. She required a blood transfusion and was hospitalized for three or four days as a result of her injuries.

At approximately 9:00 a.m. that same morning, defendant was found hiding in some bushes in a field near Kennedy's apartment. Anderson's purse and the money orders were found in a duffle bag next to defendant . . .

Prior to trial, the People moved under Evidence Code section 1109 to admit evidence regarding an incident in September 2004 (September 2004 incident). According to the People, the incident occurred while defendant and Anderson were living with Anderson's adult niece, Shenelle Carter. "[Carter] heard a thump coming from a bedroom. She went to investigate. She saw . . . Anderson and [defendant] inside the bedroom. [Anderson] had blood all over her face. [Carter] also observed blood on [Anderson's] clothes, the wall, and the bed. [Defendant] admitted to [Carter] that he 'did it.'" Defendant conceded the September 2004 incident was admissible "[s]ubject to foreseeable hearsay objections" and the People establishing he and Anderson were in a "domestic relationship." The trial court ruled the incident was admissible, finding "[i]t would be close in time, and it sounds as if there is some witness that may testify to it." The court added, "Of course, it may be hearsay objected to."

At trial, Anderson testified, without objection, concerning another incident that occurred in approximately August 2004, while she lived in an apartment on Howe Avenue (Howe Avenue incident). Defendant, who had been staying with Anderson "seven days" a week, punched her in the face several times, leaving her with a

> black eye, "busted" lip, and bruises. During cross-examination, Anderson denied striking or biting defendant during this incident. The parties later stipulated "that [on] August 16, 2004, at 3:52 a.m. at [a residence on] Howe Avenue, [the] Sacramento County Sheriff's Department responded to a 911 hang-up call. The deputies knocked on the door, and a young girl answered. She was later identified as [A.S.]. [A.S.] pointed to the back bedroom and said, 'They're in there.' [A.S.] opened the bedroom door and revealed a man standing just inside the door. He was identified as [defendant]. A female was standing behind him in the room. She identified herself as Jeanetta Anderson. [Defendant] had several human bite marks on the left side of his body, and [Anderson's] face was covered in blood." The stipulation was read to the jury.
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> Carter testified concerning a third incident. During cross-examination, defense counsel asked her whether she had "ever gotten mad at [defendant] before," and she responded: "When he tried to make us hit other cars when he was choking [Anderson] . . . . That's the only time I got mad at him" (car incident). The People followed up on Carter's testimony concerning the car incident during redirect. Without objection, Carter explained that sometime after the September 2004 incident, she, Anderson and defendant were riding in a car; Anderson was driving and defendant was sitting in the passenger seat. Anderson and defendant began arguing, and defendant attempted to make the car run into other cars by pulling on the steering wheel. Defendant then attempted to choke Anderson, Anderson elbowed him, and they began fist fighting. Anderson eventually pulled over, and defendant got out and started walking . . .
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> Defendant did not testify at trial. The defense did not dispute that defendant stabbed Anderson. Rather, the defense argued, among other things, that defendant (1) did not intend to kill Anderson when he stabbed her in her extremities; and (2) was not guilty of robbery because the force he used was not administered to effectuate the taking of the purse.

(Slip. Op. at p. 2-7 (footnotes omitted).)

III. PROCEDURAL HISTORY

After a jury trial, Petitioner was convicted of attempted murder, assault with a deadly weapon, residential burglary, robbery and that Petitioner inflicted great bodily injury and used a deadly and dangerous weapon. Petitioner was sentenced to twenty-four years imprisonment. Petitioner appealed to the California Court of Appeal, Third Appellate District. In his appeal, Petitioner raised Claims I-VI in his appellate brief. The California Court of Appeal affirmed the

judgment on January 22, 2008. The California Supreme Court denied Petitioner's petition for review on April 9, 2008 without comment.[2] Petitioner filed his federal habeas petition in this Court on February 20, 2009 raising the same claims as he did before the state courts.[3]

IV. APPLICABLE LAW AND FEDERAL HABEAS STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254 governs the instant petition because it was filed after April 24, 1996. Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States: or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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[2] A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. See 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. See Baldwin v. Reese, 541 U.S. 27, 29 (2004); Fields v. Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005). Petitioner only raised Claims I, II and V to the California Supreme Court on direct appeal. Because Claims III, IV, VI, VII, VIII, and IX were not raised in Petitioner's petition for review to the California Supreme Court, they are deemed unexhausted. Nevertheless, unexhausted claims may "be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies in the courts of the State." 28 U.S.C. § 2254(b)(2). A federal court considering a habeas corpus petition may deny an unexhausted claim on the merits when it is perfectly clear that the claim is not "colorable." See Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005).

Additionally, Claims VII-IX are found within Petitioner's handwritten "Ex. D" which he attached to his federal habeas petition. This Court will consider Claims VII-IX as if they were raised by Petitioner in his federal habeas petition because the pleadings of *pro se* litigants are held to a less stringent standard than pleadings drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

[3] Petitioner attached the majority of his appellate brief that was filed on direct appeal with the California Court of Appeal as an exhibit to his federal habeas petition. As evidence that Petitioner wanted this brief incorporated into his actual habeas petition, the Petitioner crossed out where the brief said "appellant" and changed it to "Petitioner."

If a 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 petitioner's habeas claims. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). The court looks to the last reasoned state court decision as the basis for the state court judgment. See Alvila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). If a 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 § 2254(d). See Larson v. Palmateer, 515 F.3d 1057, 1062 (9th Cir. 2010).

V. PETITIONER'S CLAIMS FOR REVIEW

A. Claims I, II and III, IV

In these four claims, Petitioner asserts that: (1) prejudicial error occurred when the trial court admitted evidence of other instances of domestic violence by the Petitioner against the victim (Claim I); (2) prejudicial error occurred when the trial court admitted prior acts of domestic violence by the Petitioner against the victim that had not been disclosed to defense counsel by the prosecution before trial (Claim II); (3) trial counsel was ineffective for failing to object to the admission of certain other instances of domestic violence by the Petitioner against the victim (Claim III); (4) the cumulative effect of his first three claims warrants reversal of Petitioner's convictions (Claim IV).[4] The California Court of Appeal stated the following with respect to these claims:

> Defendant contends the trial court erred in admitting evidence concerning the September 2004 incident because "[t]here was no evidence [he] was tried or convicted of this prior incident." He claims that he was prejudiced by the error in that "[h]ad the jury not heard the evidence of the [September] 2004 offense, it may

[4] Petitioner used his appellate brief to the California Court of Appeal as his template for his federal habeas petition. In that appellate brief which this Court deems incorporated into Petitioner's habeas petition, Petitioner's cumulative error claim only related to the cumulative effect of the first three claims (Claims I, II and III of Petitioner's federal habeas petition). For purposes of analyzing Petitioner's cumulative error claim in his federal habeas petition, this Court will only analyze the purported cumulative error claim as it relates to Claims I, II and III.

well have agreed with the defense theory that since [Anderson] was cut only on her limbs, it showed [defendant] did not intend to kill her." Defendant also contends the court erred in admitting evidence concerning the Howe Avenue and car incidents because those incidents "had not been revealed to [defense] counsel [prior to] trial." He claims that he was prejudiced by the People's failure to disclose this evidence prior to trial because "he thus had no chance to investigate and prepare cross-examination, or to present any rebuttal evidence" concerning those incidents. He further asserts that "by hearing evidence of even more violent acts, the jury's passions were likely inflamed." As we shall explain, defendant forfeited these claims by failing to preserve them for appellate review. Anticipating our ruling, defendant asserts that the failure to preserve the issues constituted ineffective assistance of counsel. Because defendant did not dispute that he stabbed Anderson, he cannot establish that he was prejudiced by the admission of evidence concerning his prior acts of domestic violence. Accordingly, his ineffective assistance claim must fail . . .

Defendant conceded at trial that evidence of the September 2004 incident was admissible, "[s]ubject to foreseeable hearsay objections" and the People establishing that he and Anderson were in a "domestic relationship." At no point did he argue that the evidence was inadmissible because there was no evidence he was tried and convicted as a result of the September 2004 incident. By failing to do so, he forfeited this claim on appeal. (People v. Partida, (2005) 37 Cal. 4th 428, 435 (Partida) ["If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial."]; People v. Raley, (1992) 2 Cal. 4th 870, 892.)

Defendant likewise failed to object to the admission of evidence concerning the Howe Avenue[5] or the car incidents.[6] Again, his

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[5] The California Court of Appeal also explained in a footnote that, "To the contrary, he stipulated to the admission of evidence concerning the Howe Avenue incident. Defendant asserts that he was simply "making the best of a bad situation." (Slip. Op. at p. 8 n.4.)

[6] In another footnote, the California Court of Appeal noted with respect to the car incident that:

> Evidence concerning the car incident was first admitted during *defense* counsel's cross-examination of Carter. Thus, while the People are required to "disclose the evidence to the defendant" of prior domestic violence to be introduced at trial prior to trial, absent a showing of good cause "why a disclosure should be

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> failure to object forfeits any claim he may have regarding the introduction of that evidence . . .
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> Defendant asserts the failure to object constituted ineffective assistance of counsel. In order to demonstrate ineffective assistance of counsel, defendant must show counsel's actions were, objectively considered, both deficient under prevailing professional norms and prejudicial. (Strickland v. Washington (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].) We need not determine whether counsel's performance was deficient if we can dispose of the ineffectiveness claim on the ground of lack of sufficient prejudice. (Id. at p. 697 [80 L.Ed.2d at p. 699.) To establish prejudice, a defendant must show "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." (Id. at p. 687 [80 L.Ed.2d at p. 693].) As we shall explain, defendant cannot demonstrate prejudice and thus cannot establish a viable claim of ineffective assistance of counsel. The trial court instructed the jurors in accordance with CALIC No. 2.50.02 that if they were convinced by a preponderance of the evidence that defendant committed a prior offense involving domestic violence, they could, but were not required to, infer that he was "likely to commit and did commit *the crime . . . of which he is accused.*" The jury was further instructed that it could "not consider this evidence for any other purpose." "[a]ny possibility the jury might have misunderstood the purpose of [the prior acts] evidence was obviated by the limiting instruction, which we presume the jury understood and followed." (People v. Panah, (2005) 35 Cal. 4th 395, 492.)
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> When considered as a whole and in the context of the case, it is clear that the instruction's reference to "the crime . . . of which he is accused" referred to the act of domestic violence of which defendant stood accused, namely, stabbing Anderson with a knife, and not the crime of attempted murder. Thus, the most the jury could have inferred from the evidence that defendant committed prior acts of domestic violence is that defendant was likely to and did stab Anderson, which is precisely what the People argued to the jury: "[i]f you think by 51 % or more that [defendant] committed the act of the choking [(the car incident)] or the head butting [(the September 2004 incident)] or the punching [(the Howe Avenue incident)] on the prior occasions, then what you are able to do, but you don't have to, you are permitted . . . to infer that he had the disposition towards committing further acts of domestic violence, like in this particular case." Defendant, however, did not

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> denied, restricted, or deferred," they cannot be said to have violated the notice requirement where they do not "introduce" the evidence.

(Slip. Op. at p. 9 n.5 (internal citations omitted).)

> (and does not) dispute that he stabbed Anderson. Accordingly, he cannot establish that he was prejudiced by the admission of evidence concerning the September 2004, the Howe Avenue or the car incidents, and his claim of ineffective assistance of counsel therefore fails.[7]
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> Given our conclusion that defendant forfeited his challenge to the admission of evidence concerning his prior acts of domestic violence, and, in any event, cannot establish that he was prejudiced by its admission, his contention that the cumulative effect of the trial court's errors in admitting the evidence necessarily fails.

(Slip. Op. at p. 7-11.)

Initially, to the extent that Petitioner's claim alleges that the admission of the other domestic violence incidents into evidence was improper (Claim I) under the California Evidence Code, Petitioner raises a state law claim that is not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (stating that "it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions). Instead, evidence erroneously admitted into evidence warrants habeas relief only when it results in a denial of a fundamentally fair trial in violation of the right to due process. See Briceno v. Scribner, 555 F.3d 1069, 1077 (9th Cir. 2009) (quoting Estelle, 502 U.S. at 67-68). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See Payne v. Tennessee, 501 U.S. 808, 825 (1991). The category of infractions that violate "fundamental fairness" has been defined very narrowly. See Estelle, 502 U.S. at 73. In Holley v. Yarbororugh, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal

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[7] The California Court of Appeal also stated in a footnote that:

> To the extent defendant contends the admission of evidence concerning the September 2004, the Howe Avenue and the car incidents violated his right to due process, his contention fails because, for the reasons previously discussed, its admission did not make his trial "fundamentally unfair." (Partida, supra, 37 Cal. 4th at p. 436.)

(Slip. Op. at p. 11-12 n.8.)

citation omitted), the Ninth Circuit explained that:

> The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process. Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or prejudicial evidence constitutes due process.

Thus, a habeas petitioner "bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005), as amended by 421 F.3d 1154 (9th Cir. 2005).

Petitioner does argue that the admission of the Howe and car domestic violence incidents violated his due process rights. As noted above, the evidence was permitted pursuant to California Evidence Code § 1109 which permits evidence of a defendant's prior domestic violence in a prosecution for an offense involving domestic violence. Petitioner relies on pre-AEDPA cases such as McKinney v. Rees, 993 F.3d 1378 (9th Cir. 1993) in support of his request for habeas relief in Claim I. However, for purposes of this habeas petition, Petitioner has not demonstrated that the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the Untied States." 28 U.S.C. § 2254(d)(1). The Supreme Court has yet to rule on whether propensity evidence admitted in a criminal trial pursuant to state law violates the Due Process Clause. See Estelle, 502 U.S. at 75 n.5 ("[W]e express no opinion on whether state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). Accordingly, since the Supreme Court has not clearly established that use of propensity evidence in a criminal trial violates due process, a state court's decision on the matter cannot be contrary to or an unreasonable application of Supreme Court precedent under AEDPA. See Alberni v. McDaniel, 458 F.3d 860, 866-67 (9th Cir. 2006) (denying due process claim upon the use of propensity evidence for want of a "clearly established" rule from the Supreme Court); see also Mejia v. Garcia, 534 F.3d 1036, 1046 (9th Cir. 2008). Thus, Petitioner is not entitled to

relief on Claim I.[8]

In Claim II, Petitioner asserts prosecutorial misconduct in failing to disclose to the defense that it would introduce evidence concerning the Howe Avenue and car domestic violence incidents at trial. He argues that their admission prejudiced his trial regarding his attempted murder conviction. The California Court of Appeal determined that Petitioner forfeited his opportunity to challenge the admission of these prior domestic violence incidents because he failed to object at trial. Respondent asserts that Petitioner failed to object to the introduction of this evidence at trial so that this Claim is now procedurally defaulted.

A state court's refusal to hear the merits of a claim because of the petitioner's failure to follow a state procedural rule is considered denial of relief on an independent and adequate state ground. See Harris v. Reed, 489 U.S. 255, 260-61 (1989). The state rule for these purposes is only "adequate" if it is "firmly established and regularly followed." Id. (citing Ford v. Georgia, 498 U.S. 411, 424 (1991)); see also Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003) ("[t]o be deemed adequate, the state law ground for decision must be well-established and consistently applied."). The state rule must also be "independent" in that it is not "interwoven with the federal law." Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)). Furthermore, procedural default can only block a claim in federal court if the state court, "clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263. This means that the state court must have specifically stated that it was denying relief on a procedural ground. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Acosta-Huerta v. Estelle, 7 F.3d 139, 142 (9th Cir. 1993). In this case, as previously stated, the California Court of Appeal specifically stated that it was denying relief on this claim for Petitioner's failure to object to the admission of the Howe Avenue and car domestic violence

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[8] Additionally, even if this Court could consider Claim I on the merits, for the reasons discussed infra with respect to Claims II and III, this claim would be deemed procedurally defaulted due to defense counsel's failure to object to this evidence being admitted at trial.

incidents at trial.

Pursuant to Section 353 of California's Evidence Code, also known as the contemporaneous objection rule, "evidence is admissible unless there is an objection, the grounds for the objection are clearly expressed, and the objection is made at the time the evidence is introduced." Melendez v. Pliler, 288 F.3d 1120, 1125 (9th Cir. 2002). California's contemporaneous objection rule is an independent and adequate state procedural bar where a party has failed to make a timely objection to the admission of the challenged evidence. See Chein v. Shumsky, 323 F.3d 747, 751-52 (9th Cir. 2003). Petitioner makes no showing that the contemporaneous objection rule was not an adequate and independent basis for the state court's decision.

Nevertheless, even if the state rule is independent and adequate, the claim may be reviewed by the federal court if the petitioner can show: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. See Coleman, 501 U.S. at 749-50. In Claim III, Petitioner argues that his trial counsel should have objected to the admittance of the Howe Avenue and car domestic violence incidents into evidence based for the reasons outlined in Claims I and II and that this evidence resulted in his attempted murder conviction.

"Cause" to excuse default exists if the petitioner "can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Ineffective assistance of counsel may be cause to excuse default only if the procedural default was the result of an independent constitutional violation. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000) ("Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution."). Thus, "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the same standard established in Strickland v. Washington, [466 U.S. 668 (1984)] [the federal courts] discern no inequity in

requiring him to bear the risk of attorney error that results in procedural default." Murray, 477 U.S. at 488.

The Sixth Amendment guarantees effective assistance of counsel. In Strickland, 466 U.S. 668, the Supreme Court articulated the test for demonstrating ineffective assistance of counsel. First, the petitioner must show that considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. See id. at 688. Petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. See id. at 690. The federal court then must determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. See id.

Second, a petitioner must affirmatively prove prejudice. See id. at 693. 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. A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by 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) (citing Strickland, 466 U.S. at 697).

In this case, it is easier to dispose of Petitioner's ineffective assistance claim on the ground of a lack of sufficient prejudice. Petitioner failed to show prejudice warranting a reversal in his attempted murder conviction in trial counsel's failure to object to the admittance of the Howe Avenue and car domestic violence incidents into evidence. As previously noted in Part II, testimony at trial indicated that Petitioner kicked down the door of the apartment where Ms. Anderson was staying and told her that he was going to kill her. He then grabbed a kitchen knife and proceeded to stab her several times. Petitioner does not show that there was a reasonable

probability that his conviction for attempted murder would have been different had defense counsel objected to the admittance of these two other domestic violence incidents. Therefore, Petitioner is not entitled to habeas relief on Claim III.

Since Petitioner cannot show any prejudice from defense counsel's failure to object to the admission of these two additional other domestic violence incidents, his argument that defense counsel's "ineffectiveness" can overcome the procedural default on Claim II is without merit. Additionally, Petitioner has not presented a credible claim establishing his actual innocence, see Calderon v. Thompson, 523 U.S. 538, 559 (1998), and thus cannot demonstrate that failure to consider the procedurally defaulted Claim II on the merits will result in a fundamental miscarriage of justice. See Coleman v. Thompson, 509 U.S. 722, 729 (1991). Accordingly, Petitioner is not entitled to habeas relief on Claim II.[9]

In Claim IV, Petitioner alleges that the cumulative effect of Claims I, II and III require the reversal of his convictions. The California Court of Appeal rejected this claim explaining that Petitioner forfeited his challenge to the admission of evidence concerning his prior acts of domestic violence and that he could not establish that he was prejudiced by their admission into evidence.

The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. See Chambers v. Mississippi, 410 U.S. 284, 298, 302-03 (1973). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers, 410 U.S. at 290 n.3). "[C]umulative error warrants habeas relief only where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643

[9] Additionally, even if this Court were to consider Claim I on the merits, it too would be procedurally defaulted.

(1974). "Such 'infection' occurs where the combined effect of the errors had a 'substantial and injurious effect or influence on the jury's verdict.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). Thus, "where the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." Id. (quoting Chambers, 410 U.S. at 294). However, if evidence of guilt is overwhelming, errors are considered "harmless" and the conviction will generally be affirmed. See Parle, 505 F.3d at 928.

In this case, the evidence of Petitioner's guilt was overwhelming, and thus, this Court cannot say that the "errors" of which Petitioner complains of in Claims I, II and III had a substantial and injurious effect or influence on the jury's verdict. Even assuming that the evidence concerning the Howe Avenue and car domestic violence incidents were not admitted into evidence, the case against Petitioner would have still included evidence sufficient to convince the jury that Petitioner was guilty beyond a reasonable doubt based on the record, particularly the testimony of the victim. Petitioner is not entitled to federal habeas relief on his claim of cumulative error in Claim IV.

B. Claims V & VI

In Claim V, Petitioner asserts that the trial court failed to clarify in the jury instructions that the "force" used in a robbery must be used to effectuate that robbery. He argues that the court should have clarified that the larcenous intent by the defendant must coincide or precede the force used. Petitioner alleges that this failure by the trial court constituted a denial of constitutional rights to a fair trial as guaranteed by the due process clause and right to a jury trial with respect to the robbery conviction. Respondent argues that this claim is procedurally defaulted. In Claim VI, Petitioner alleges that trial counsel was ineffective by failing to object to the robbery jury instructions and/or should have requested a more pinpoint instruction.

The California Court of Appeal analyzed these two claims in its opinion and stated the following:

Defendant asserts the trial court erred by failing, sua sponte, to "clarify that the force used in a robbery must be used to effectuate the robbery." In defendant's view, the trial court's instructions improperly permitted the jury to convict him of robbery based on a finding that he formed the intent to steal Anderson's property after he stabbed her. Defendant, however, forfeited the issue by failing to object to the court's instructions or requesting a clarifying instruction. Anticipating our ruling, defendant again asserts that the failure to object or request a clarifying instruction constituted ineffective assistance of counsel. As we shall explain, the trial court's instructions concerning the use of force were adequate. Thus, defendant's ineffective assistance claim must fail . . .

If defendant wished a clarifying jury instruction on after-acquired intent, he should have requested it. (People v. Bolden, (2002) 29 Cal. 4th 515, 556-557 (Bolden) [it is incumbent upon a defendant to ask for amplifying instructions on after-acquired intent]; People v. Kimble (1988) 44 Cal. 3d 480, 503 [sua sponte instructions are required as to the principles of law openly and closely related to the evidence; instructions amplifying an element of an offense are required only upon a request].) By failing to request a clarifying instruction, defendant forfeited the issue on appeal. (People v. Rodrigues (1994) 8 Cal. 4th 1060, 1140.) . . .

Defendant asserts the failure to object to the court's instructions or request a clarifying instruction constituted ineffective assistance of counsel. As noted, in order to demonstrate ineffective assistance of counsel, defendant must show counsel's actions were, objectively considered, both deficient under prevailing professional norms and prejudicial. (Strickland v. Washington, supra, 466 U.S. at p. 687 [80 L.Ed.2d at p. 693].) In order to show trial counsel's performance was deficient, defendant must show that counsel "failed to act in a manner to be expected of [a] reasonably competent attorney [ ] acting as [a] diligent advocate [ ]." (People v. Pope (1979) 23 Cal. 3d 412, 425.) Where, as here, the record fails to show why counsel acted or failed to act as he did, the contention fails unless counsel failed to provide an explanation upon request or there could be no satisfactory explanation. (People v. Mendoza Tello, (1997) 15 Cal. 4th 264, 266-67; Pope, at p. 425.) There is a reasonable explanation for counsel's alleged omission; thus, defendant cannot demonstrate his counsel's performance was deficient, and his ineffective assistance of counsel claim must fail.

As defendant correctly notes, "[t]o support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. [Citation.] '[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft.' [Citation.] The wrongful intent and the act of force or fear 'must concur in the sense that the act must be motivated by the intent.'" (People v. Marshall (1997)

15 Cal. 4th 1, 34.)

Here, the jury was instructed with CALJIC No. 9.40, which defines the crime of robbery. As given, it provides in pertinent part: "Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accompanied by means of force [or] fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery . . .

"In order to prove this crime, each of the following elements must be proved:
"4. The taking was accomplished either by force or fear; . . . "
In Bolden, a capital case, the California Supreme Court rejected an argument that the jury instructions on the offense of robbery were inadequate because "they failed to state [the] defendant's application of force must have been motivated by an intent to steal." (Bolden, supra, 29 Cal. 4th at p. 555; see also id. at p. 556.) The court found that "[t]he standard jury instructions on felony murder (CALJIC No. 8.21) and robbery (CALJIC No. 9.40), which the trial court used to instruct the jury, adequately explain that for the crime of robbery the defendant must form the intent to steal before or during rather than after the application of force to the victim, and that *the defendant must apply the force for the purpose of accomplishing the taking.*" (Bolden, at p. 556, italics added.)

The italicized statement in Bolden is what defendant claims was missing from the instructions in this case. (Bolden, supra, 29 Cal. 4th at p. 556.) Bolden effectively held that the standard robbery instruction (CALJIC No. 9.40), which was given here, adequately covers the issue. (Bolden, at p. 556, see also People v. Tapia (1994) 25 Cal. App. 4th 984, 1026-28.)

"The trial court need not give instructions which are covered by other properly given instructions." (People v. Tapia, supra, 25 Cal. App. 4th at p. 1028.) Accordingly, the trial court did not err in failing, sua sponte, to "clarify that the 'force' used in a robbery must be used to effectuate that robbery."

Finally, we reject defendant's contention that defense counsel's failure to request a clarifying instruction constituted ineffective assistance of counsel. Given our analysis, counsel reasonably could have concluded that the court's instructions were adequate.

(Slip. Op. at p. 12-16 (footnotes and ellipses omitted).)

The California Court of Appeal found that Petitioner had forfeited Claim V because Petitioner failed to object to the specified jury instructions at trial and/or request a more pinpoint

jury instruction. California's contemporaneous objection rule is an independent and adequate state procedural bar where a party has failed to make a timely objection. See Chein, 323 F.3d at 751-52. By failing to object to the trial court's robbery jury instruction so as to further clarify the "force" issue with respect to a robbery charge, Claim V is procedurally defaulted. See Paulino v. Castro, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (jury instruction claim procedurally barred by virtue of California Court of Appeal's decision finding that claim was waived).

Petitioner attempts to overcome this procedural default by arguing that counsel was ineffective for failing to object to the robbery jury instruction and/or for failing to request a more pinpoint jury instruction. As previously stated, ineffective assistance of counsel may be cause to excuse default only if the procedural default was the result of an independent constitutional violation. See Edwards, 529 U.S. at 451. Once again, this Court must analyze whether trial counsel's performance fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 688. Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The California Court of Appeal determined that trial counsel's performance did not fall below an objective standard of reasonableness after concluding that the court's jury instructions were adequate. The jury was instructed with CALJIC No. 9.40 which defines the crime of robbery; specifically, the jury was instructed that:

> The defendant is accused in Count Four of having committed the crime of robbery, a violation of Section 211 of the Penal Code. Every person who takes personal property in the possession of another against the will and from the person or immediate presence of that person accompanied by means of force, fear and with the specific intent to permanently deprive that person of the property is guilty of the crime of robbery, a violation of Section 211 of the Penal Code.
>
> The word "takes" or "taking" require proof that, number one, taking possession of personal property, and number two, carrying it away for some distance, whether slight or otherwise. Immediate presence means an area within the alleged victim's

reach, observation or control so that he or she could, if not overcome by violence or prevented by fear, retain that possession of the subject property.

Against the will means without consent.

In order to prove this crime, each of the following elements must be proved:
Number one, a person had possession of property of some value, however slight;
Number two, the property was taken from that person or from the immediate – or from her immediate presence;
Number three, the property was taken against the will of that person;
Number four, the property – the taking was accomplished either by force or fear;
Number five, the property was taken with the specific intent to permanently deprive that person of the property.

(Reporter's Tr. 455-57.) The jury was also instructed with CALJIC No. 3.31 as the trial judge explained to the jury that:

In the crimes charged in Counts One, Three, Four, and attempted manslaughter and grand theft of a person, which are lesser crimes thereto, there must exist a union or joint operation of act or conduct and a certain specific intent in the crime of the perpetrator – in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed.
The specific intent required is included in the definitions of the crimes and allegations set forth elsewhere in these instructions.

(Id. at 449.) As the Petitioner noted in his federal habeas petition, the California Court of Appeal previously considered the same argument that the Petitioner makes in this case with respect to the force requirement in the robbery jury instructions in People v. Tapia, 25 Cal. App. 4th 984, 1026-28, 30 Cal. Rptr. 3d 851 (1994). In Tapia, the defendant alleged that the trial court erred when it failed to give an additional instruction requested by the defense that at the time of the application of force, the perpetrator had the specific intent to permanently deprive the victim of the property. See id. at 1-26-27. In that case, as in Petitioner's case, the trial court instructed the jury using CALJIC Nos. 9.40 and 3.31. See id. at 1026-27. In Tapia, the California Court of Appeal specifically found that the jury was not inadequately instructed as the trial court did not need to

give instructions which were covered by other properly given jury instructions. See id. at 1028.

In light of this case law and the fact that the trial court instructed the jury using CALJIC Nos. 9.40 and 3.31, Petitioner's trial counsel's performance did not fall below an objective standard of reasonableness for failing to object to the robbery jury instructions and/or for failing to request a more pinpoint instruction regarding the use of force in the robbery jury charge. Thus, Claim VI is does not warrant this Court granting Petitioner federal habeas relief.

As Petitioner has failed to show that trial counsel was ineffective in Claim VI, it cannot constitute the cause required to overcome his procedurally defaulted Claim V. Furthermore, Petitioner has not presented a credible claim establishing his actual innocence with respect to his robbery conviction, see Calderon, 523 U.S. at 559, and thus cannot demonstrate that failure to consider the procedurally defaulted Claim V on the merits will result in a fundamental miscarriage of justice. See Coleman, 509 U.S. at 729. Accordingly, Petitioner is not entitled to habeas relief on Claim V.

C. Claim VII

Next, Petitioner asserts that his attempted murder conviction lacked sufficient evidence because "there was no credible evidence beyond a reasonable doubt other than mere conjecture that appellant allegedly attempted to kill Jeanetta Anderson (Pet'r's pet. at p. 68).

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 at 982 (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).

As noted in supra Part V.A, the victim testified at trial that Petitioner kicked down the door of the apartment where she was staying and told her that he was going to kill her. He then grabbed a kitchen knife and proceeded to stab her several times. The record evidence could reasonably support a finding that Petitioner attempted to kill the victim. Petitioner's insufficiency claim is without merit.

D. Claim VIII

In Claim VIII, the Petitioner alleges that the trial court failed to properly instruct the jury on attempted murder. Specifically, Petitioner alleges that the trial court failed to instruct the jury regarding the "intent" requirement (Pet'r's Pet. at p. 71). A claim that a state court violated a federal habeas petitioner's due process rights by omitting a jury instruction requires a showing that the error so infected the entire trial that the resulting conviction violated due process. See Henderson v. Kibbe, 431 U.S. 145, 155 (1977); Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005).

The trial court instructed the jury on both general and specific intent. (Reporter's Tr. at 449.) The court explained to the jury that:

> General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent even though he may not know that his act or conduct is unlawful.
> In the crimes charged in Count One, Three, Four . . . there must exist a union or joint operation of act or conduct and a certain specific intent in the crime of the perpetrator – in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed.
>
> The specific intent required is included in the definitions of the crimes and allegations set forth elsewhere in these instructions. The defendant is accused in Count One of having committed the crime of attempted murder in violation of Section 664/187 of the Penal Code.
>
> Every person who attempts to murder another human being is

> guilty of a violation of Penal Code Section 664/187.
> Murder is the unlawful killing of a human being with malice aforethought.
>
> In order to prove attempted murder, each fo the following elements must be proved:
> Number one, a direct but ineffectual act was done by one person toward – towards killing another human being; and.
> Number two, the person committing the act harbored expressed malice aforethought, namely *a specific intent to kill, unlawfully, another human being*.

(Reporter's Tr. at 449-50 (emphasis added).) Contrary to Petitioner's assertion, as detailed above the trial court instructed the jury regarding the intent necessary to prove attempted murder. Petitioner cannot show that any purported "omission" so infected the trial that the attempted murder conviction violated Petitioner's due process rights. Therefore, Claim VIII is without merit.

E. Claim IX

In Claim IX, Petitioner asserts that trial counsel was ineffective for failing to object to the trial court's jury instruction on attempted murder due to the jury instructions failure regarding the "intent" requirement. (Pet'r's Pet. at p. 74.) Trial counsel's inaction regarding this claim does not meet the Strickland standard to show ineffective assistance of counsel. As noted in supra Part V.D, the trial court specifically instructed the jury on the intent required to find the Petitioner guilty of attempted murder. Thus, trial counsel's "omission" did not fall below an objective standard of reasonableness. See Strickland, 466 U.S. at 688. Petitioner is not entitled to relief on Claim IX.

VI. CONCLUSION

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that Petitioner's application for 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

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
3 shall be served and filed within seven days after service of the objections. The parties are
4 advised that failure to file objections within the specified time may waive the right to appeal the
5 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In any objections he
6 elects to file, petitioner may address whether a certificate of appealability should issue in the
7 event he elects to file an appeal from the judgment in this case. *See* Rule 11, Federal Rules
8 Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability
9 when it enters a final order adverse to the applicant).
10 DATED: September 9, 2010

TIMOTHY J BOMMER
UNITED STATES MAGISTRATE JUDGE

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