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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEONON JAMES ALSTON,
Petitioner,
v.
J. MACOMBER,
Respondent.

No. 2: 14-cv-1500 JAM KJN P

FINDINGS & RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2012 conviction for first degree residential burglary with the victim present in violation of California Penal Code § 459. (Court Transcript (“CT”) at 312.) Petitioner is serving a sentence of 19 years imprisonment. (Id.)

This action proceeds on the original petition. (ECF No. 1) Petitioner raises the following claims: 1) jury instruction error; 2) insufficient evidence; 3) evidentiary error; and 4) witness perjury.

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

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1 II. Standards for a Writ of Habeas Corpus

2 An application for a writ of habeas corpus by a person in custody under a judgment of a
3 state court can be granted only for violations of the Constitution or laws of the United States. 28
4 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
5 application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California,
6 202 F.3d 1146, 1149 (9th Cir. 2000).

7 Federal habeas corpus relief is not available for any claim decided on the merits in state
8 court proceedings unless the state court’s adjudication of the claim:

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

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

13 28 U.S.C. § 2254(d).

14 Under section 2254(d)(1), a state court decision is “contrary to” clearly established United
15 States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in
16 Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a
17 decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537
18 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)).

19 Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas court
20 may grant the writ if the state court identifies the correct governing legal principle from the
21 Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s
22 case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because
23 that court concludes in its independent judgment that the relevant state-court decision applied
24 clearly established federal law erroneously or incorrectly. Rather, that application must also be
25 unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (it is “not enough
26 that a federal habeas court, in its independent review of the legal question, is left with a ‘firm
27 conviction’ that the state court was ‘erroneous.’”) (internal citations omitted). “A state court’s
28 determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded

1 jurists could disagree’ on the correctness of the state court’s decision.” Harrington v. Richter,
2 131 S. Ct. 770, 786 (2011).

3 The court looks to the last reasoned state court decision as the basis for the state court
4 judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). If there is no reasoned decision,
5 “and the state court has denied relief, it may be presumed that the state court adjudicated the
6 claim on the merits in the absence of any indication or state-law procedural principles to the
7 contrary.” Harrington, 131 S. Ct. at 784-85. That presumption may be overcome by a showing
8 that “there is reason to think some other explanation for the state court’s decision is more likely.”
9 Id. at 785 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).

10 “When a state court rejects a federal claim without expressly addressing that claim, a
11 federal habeas court must presume that the federal claim was adjudicated on the merits – but that
12 presumption can in some limited circumstances be rebutted.” Johnson v. Williams, 133 S. Ct.
13 1088, 1096 (Feb. 20, 2013). “When the evidence leads very clearly to the conclusion that a
14 federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to” de
15 novo review of the claim. Id. at 1097.

16 Where the state court reaches a decision on the merits but provides no reasoning to
17 support its conclusion, the federal court conducts an independent review of the record.
18 “Independent review of the record is not de novo review of the constitutional issue, but rather, the
19 only method by which we can determine whether a silent state court decision is objectively
20 unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). Where no reasoned
21 decision is available, the habeas petitioner has the burden of “showing there was no reasonable
22 basis for the state court to deny relief.” Harrington, 131 S. Ct. at 784. “[A] habeas court must
23 determine what arguments or theories supported or, . . . could have supported, the state court’s
24 decision; and then it must ask whether it is possible fairminded jurists could disagree that those
25 arguments or theories are inconsistent with the holding in a prior decision of this Court.” Id. at
26 786.

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1 III. Factual Background

2 The opinion of the California Court of Appeal contains a factual summary. After
3 independently reviewing the record, the undersigned finds this summary to be accurate and
4 adopts it herein.

5 BACKGROUND

6 In the evening of June 6, 2011, Sandra Ortiz was in her living room
7 when her two small dogs began barking. She looked out her
8 window and saw defendant. Ortiz had seen defendant in the
9 neighborhood a number of times and near the house twice before.
10 Defendant was on a bicycle, stopped near her car, and was using a
11 cell phone. He appeared to be looking in the window of her car and
12 stayed there for a long time. As she watched, defendant approached
13 the house next door. That house had been vacant for over a year,
14 and frequently attracted transients. Ortiz changed vantage points
15 and watched defendant from the bathroom window. She heard a
16 loud noise and saw defendant scaling the fence into her yard.

17 Ortiz called 9-1-1. She watched defendant enter her backyard,
18 approach a parked motorcycle in the yard, and go to her back door.
19 She heard the doorknob turning, but the door did not open. She
20 heard defendant forcibly remove the screen covering the bathroom
21 window. She saw defendant put his fingers inside the window to
22 push it open. The window had previously been nailed, so it could
23 not be opened fully. After defendant opened the window a few
24 inches, he put his whole arm inside to try to remove the nail and his
25 face pressed up against the glass of the bathroom window. Ortiz
26 reported to the 9-1-1 operator "He's coming in my house."
27 Defendant did not get inside the house.

28 Police officers arrived at the scene approximately six minutes after
receiving the 9-1-1 dispatch. They saw defendant standing in the
backyard of Ortiz's home and ordered him not to move. Ortiz
identified defendant as the prowler. She pointed out the screen that
had been removed from the window. Ortiz told officers defendant
had tried to stick his head through the window, but could not get
into the house. She also indicated defendant had put both hands
inside the window trying to feel around and push the window open
further. Both on the night of the incident and a few months later,
she told officers that defendant had ripped the screen off the
bedroom window, but had not entered the home because the
window was nailed shut. Ortiz maintained she told the officers
defendant removed the screen from the bathroom window, not the
bedroom window.

Ortiz told a defense investigator defendant did not put his head
through the window. He had tried to put his head through, but could
not because the window did not open fully. She also told the
defense investigator defendant's hands were the only thing that
crossed the threshold of the window and defendant never entered
the house. Ortiz clarified that when she said defendant had not

1 entered the house, she meant his whole body did not physically
2 come all the way inside the house.

3 The information charging defendant with first degree burglary (§
4 459) alleged “defendant did unlawfully enter an inhabited dwelling
house occupied by SANDY ORTIZ, with the intent to commit
larceny and any felony.”

5 The jury was instructed with CALCRIM No. 1700 that “[t]he
6 defendant is charged in Count 1 with burglary in violation of Penal
Code section 459. [¶] To prove that the defendant is guilty of this
7 crime, the People must prove that: [¶] 1. The defendant entered a
building; [¶] AND [¶] 2. When he entered a building, he intended to
8 commit theft.” The jury was also instructed that “[t]he People do
not have to prove that the defendant actually committed theft.
9 Under the law of burglary, a person enters a building if some part of
his or her body penetrates the area inside the building’s outer
10 boundary. A building’s outer boundary includes the area inside a
window screen.”

11 The jury found defendant guilty as charged. In bifurcated
12 proceedings, the trial court found three prior conviction allegations
true. The trial court sentenced defendant to an aggregate term of 19
13 years in prison, imposed various fines and fees, and awarded 303
days of presentence custody credit.

14 People v. Alston, 2013 WL 4477055 at *1-2 (2013).

15 IV. Discussion

16 A. Claim 1: Jury Instruction Error

17 In claim one, petitioner alleges that the trial court erred by failing to instruct as to
18 attempted burglary and trespass. The California Court of Appeal was the last state court to issue
19 a reasoned decision addressing these claims.

20 *Trespass*

21 The California Court of Appeal rejected petitioner’s claim challenging the trial court’s
22 failure to instruct on trespass for the reasons stated herein:

23 Defendant also contends the trial court should have instructed sua
24 sponte on trespass. He admits trespass is not a lesser included
offense under the elements test, but he argues the allegations in the
25 information rendered trespass a lesser included offense under the
accusatory pleading test.

26 Under the accusatory pleading test, we look to “whether the
27 accusatory pleading describes the greater offense in language such
that the offender, if guilty, must necessarily have also committed
the lesser crime. [Citation.]” (People v. Moon, *supra*, 37 Cal.4th at
28 pp. 25–26.) We do not consider the evidence adduced at trial.

1 (People v. Lohbauer (1981) 29 Cal.3d 364, 369–71.)

2 Residential burglary is the entry of a dwelling house with the intent
3 to commit a felony. (§§ 459 & 460, subd (a).) Criminal trespass,
4 also known as “unauthorized entry,” is the entry of a residence
5 without the owner’s consent. (§ 602.5, subd. (a).) It is settled that
6 trespass is not a lesser included offense of burglary under the
7 elements test, because burglary may be committed by a person who
8 has permission to enter a dwelling. (People v. Lohbauer, supra, 29
9 Cal.3d at p. 369.) Nonetheless, defendant contends the accusatory
10 pleadings test is satisfied. He points to the language of the
11 information, which alleged defendant “unlawfully” entered Ortiz’s
12 home. He says the nonconsensual entry required for trespass is
13 necessarily included in the allegation that defendant committed an
14 unlawful entry.

15 In a burglary, however, the entry is unlawful because it is
16 committed with the intent to commit a felony. Here, the information
17 alleged defendant “unlawfully” entered Ortiz’s home “with the
18 intent to commit larceny and any felony.” It did not allege that
19 defendant “unlawfully” entered Ortiz’s home “without the owner’s
20 consent.” The information alleges it was defendant’s intent to steal
21 that made his entry unlawful, not the owner’s lack of consent.
22 Accordingly, the information did not allege a trespass under the
23 accusatory pleading test, and the trial court did not have a sua
24 sponte duty to instruct on trespass.

25 People v. Alston, 2013 WL 4477055 at *3.

26 A lesser related offense is an offense with elements different from the charged offense but
27 which bears a relationship to the charged offense. See Hopkins v. Reeves, 524 U.S. 88, 97
28 (1998). A lesser included offense is an offense whose elements are a subset of the elements of the
29 charged offense. See United States v. Rivera -Alonzo, 584 F.3d 829, 832 (9th Cir. 2009). The
30 California Court of Appeal’s determination that trespass is a lesser related offense, rather than a
31 lesser included offense, is binding on this court. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005)
32 (state court interpretation of state law binds a federal court in a habeas action).

33 The United States Supreme Court does not require that a criminal defendant receive a jury
34 instruction on lesser related offenses. See Hopkins v. Reeves, 524 U.S. at 96–97. Accordingly,
35 the trial court’s refusal to read an instruction on trespass did not violate petitioner’s constitutional
36 rights. The denial of this claim by the California Court of Appeal was not an unreasonable
37 application of clearly established Supreme Court authority.

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1 *Attempted Burglary*

2 The California Court of Appeal denied petitioner’s claim challenging the trial court’s
3 failure to give an attempted burglary instruction for the reasons stated herein:

4 Defendant contends the trial court erred in failing to instruct sua
5 sponte on the lesser included offense of attempted burglary.

6 A trial court has a sua sponte obligation to instruct on lesser
7 included offenses “‘if the evidence “raises a question as to whether
8 all of the elements of the charged offense are present and there is
9 evidence that would justify a conviction of such a lesser offense.””
10 [Citation.]” (People v. Moon (2005) 37 Cal.4th 1, 25.)

11 “An attempt to commit a crime consists of two elements: a specific
12 intent to commit the crime, and a direct but ineffectual act done
13 toward its commission.” (§ 21a.) “In any criminal prosecution, ‘The
14 jury ... may find the defendant guilty of any offense, the
15 commission of which is necessarily included in that with which he
16 is charged, or of an attempt to commit the offense.’ (§ 1159.) Thus,
17 where there is evidence that would absolve the defendant from guilt
18 of the charged offense but would support a finding of guilt of
19 attempt to commit the charged offense, an instruction on attempt is
20 mandatory. [Citation.]” (People v. Hamlin (2009) 170 Cal.App.4th
21 1412, 1454.)

22 Defendant argues the trial court should have instructed on
23 attempted burglary because there was a “factual inconsistency as to
24 the element of ‘entry’.... The jury could have reasonably found that
25 [defendant] intended to enter the residence and commit the
26 burglary, but was not successful in entering the window.”

27 But to prove burglary, “it has long been settled that ‘[a]ny kind of
28 entry, complete or partial, ... will’ suffice. [Citations.] All that is
needed is entry ‘inside the premises’ [citation], not entry inside
some inner part of the premises.” (People v. Valencia (2002) 28
Cal.4th 1, 13 (italics omitted) (Valencia)), disapproved of on a
different point by People v. Yarbrough (2012) 54 Cal.4th 889, 894.)
“It is settled that a sufficient entry is made to warrant a conviction
of burglary when any part of the body of the intruder is inside the
premises.” (People v. Failla (1966) 64 Cal.2d 560, 569.) Putting a
hand or fingers in an open window constitutes an entry for purposes
of burglary. (People v. Massey (1961) 196 Cal.App.2d 230, 236.)
Furthermore, “penetration into the area behind a window screen
amounts to an entry of a building within the meaning of the
burglary statute even when the window itself is closed and is not
penetrated,” because it violates both the occupant’s possessory
interest in the building and her personal interest in freedom from
violence that might ensue from an unauthorized intrusion.
(Valencia, supra, 28 Cal.4th at p. 13, fn. omitted.)

29 Defendant’s argument is based upon asserted inconsistencies in the
statements made by Ortiz. Defendant says Ortiz (1) told officers
defendant did not “enter” the home, but ripped the screen off the

1 bedroom window; (2) told the defense investigator only defendant's
2 hands crossed the threshold of the window; (3) later told officers
3 she saw defendant feeling around the window trying to push it in
4 and to, unsuccessfully, stick his head in the window; and (4)
5 testified at trial that defendant removed the screen from the
6 bathroom window, put his whole arm inside the window and then
7 on cross-examination testified he only put his fingers through the
8 window, not his whole hand.

9 Even if Ortiz's testimony had some inconsistencies, they do not
10 provide a basis on which defendant could be absolved of burglary.
11 Even under defendant's version of Ortiz's statements, she described
12 an actual entry into her home, not an attempt. In each statement,
13 Ortiz indicated that either defendant's hands, fingers or arm entered
14 through the window and in each statement she maintained he
15 removed a window screen. There was no basis for the jury to find
16 defendant did not successfully enter the home.

17 People v. Alston, 2013 WL 4477055 at *2-3.

18 The United States Supreme Court has held that the failure to instruct on a lesser included
19 offense in a capital case is constitutional error if there was evidence to support the instruction.
20 Beck v. Alabama, 447 U.S. 625, 638, 638 (1980). The Supreme Court, however, has not decided
21 whether to extend this rationale to non-capital cases. The Ninth Circuit has declined to extend
22 Beck to find constitutional error arising from the failure to instruct on a lesser included offense in
23 a non-capital case. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000) (per curiam) (in non-
24 capital case, failure of state court to instruct on lesser included offense does not alone present a
25 federal constitutional question cognizable in a federal habeas corpus proceeding). Accordingly,
26 petitioner's claim challenging the trial court's failure to sua sponte instruct the jury on the lesser
27 included offense of attempted burglary does not raise a constitutional claim.

28 The Ninth Circuit has recognized that "the *refusal* by a court to instruct a jury on lesser
included offenses, when those offenses are consistent with defendant's theory of the case, may
constitute a cognizable habeas claim" under clearly established federal law. Solis, 219 F.3d at
929 (emphasis added). However, as indicated above, petitioner's counsel did not ask for an
instruction regarding attempted burglary. Petitioner has not cited –and the court is unaware of –
any authority for the proposition that it is a violation of due process for the trial court not to sua
sponte instruct the jury on a lesser included offense. See Bradley v. Biter, 2014 WL 5660682, at
*7 (C.D. Cal. Nov. 4, 2014) (finding no authority for proposition that a trial court's failure to sua

1 sponte instruct the jury on a lesser included offense violates a petitioner’s due process rights).

2 For the reasons discussed above, the denial of this claim by the California Court of Appeal
3 was not an unreasonable application of clearly established Supreme Court authority.

4 B. Claims 2, 3 4

5 In claim two, petitioner alleges that there was insufficient evidence to support his
6 conviction. In claim three, petitioner alleges that the trial court erred in permitting the
7 prosecution to introduce into evidence, in the rebuttal, the gloves petitioner wore at the time of his
8 arrest. In claim four, petitioner alleges that eyewitness Ortiz committed perjury.

9 Respondent argues that claims 2, 3 and 4 are procedurally barred.

10 1. Legal Standard

11 The procedural default doctrine forecloses federal review of a state prisoner's federal
12 habeas claims if those claims were defaulted in state court pursuant to an independent and
13 adequate state procedural rule. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).
14 Generally, “federal habeas relief will be unavailable when (1) ‘a state court [has] declined to
15 address a prisoner's federal claims because the prisoner had failed to meet a state procedural
16 requirement,’ and (2) ‘the state judgment rests on independent and adequate state procedural
17 grounds.’” Walker v. Martin, 562 U.S. 307, 316 (2011) (quoting Coleman, 501 U.S. at 729-30).
18 A state procedural rule is “adequate” only if it is clear, consistently applied, and well established
19 at the time of petitioner’s default. Walker, 562 U.S. at 316. The respondent bears the burden of
20 proof with respect to the “adequacy” of a state procedural bar. Bennett v. Mueller, 322 F.3d 573,
21 585-86 (9th Cir. 2003). “[A] procedural default does not bar consideration of a federal claim on
22 either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly
23 and expressly’ states that its judgment rests on a state procedural bar.” Harris v. Reed, 489 U.S.
24 255, 263 (1989).

25 When a state prisoner has defaulted on his federal claim in state court pursuant to an
26 independent and adequate state procedural rule, federal habeas review of the claim is barred
27 unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the
28 alleged violation of federal law, or demonstrate that failure to consider the claims will result in a

1 fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

2 2. Analysis: Are Claims Defaulted?

3 Petitioner raised claims 2, 3 and 4 in state habeas petitions. The Sacramento County
4 Superior Court issued a reasoned decision denying petitioner's habeas petition. (Respondent's
5 Lodged Document 8.) The California Court of Appeal and California Supreme Court denied
6 petitioner's state habeas petitions without comment or citation. (Respondent's Lodged
7 Documents 10, 12.) Accordingly, the undersigned "looks through" the unexplained denials by
8 the California Court of Appeal and California Supreme Court to the Superior Court's reasoned
9 denial on procedural grounds. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("[W]here, as
10 here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will
11 presume that a later decision rejecting the claim did not silently disregard that bar and consider
12 the merits.")

13 The Superior Court denied petitioner's state habeas petitions for the reasons stated herein:

14 Petitioner Leonon Alston filed this petition alleging that his 2011
15 burglary conviction was the product of errors during trial. Specifically, he contends that there was insufficient evidence to
16 support his conviction, the court erred in allowing certain evidence to be admitted, and that the victim provided false testimony.

17 A petition for writ of habeas corpus cannot serve as a second appeal
18 or substitute appeal. (In re Harris (1993) 5 Cal.4th 813, 829.) Claims that could have been raised on appeal are not cognizable on
19 habeas corpus unless the petitioner can show that (1) clear and
20 fundamental constitutional error strikes at the heart of the trial
21 process; (2) the court lacked fundamental jurisdiction; (3) the court
22 acted in excess of jurisdiction not requiring a redetermination of
23 facts; or (4) a change in law after the appeal affected the petition.
(In re Dixon (1953) 41 Cal.2d 756, 759; In re Harris, supra at p.
828.) In addition, habeas corpus is not available to review the
credibility of witnesses or to weigh the evidence supporting the
judgment of conviction. (Ex parte La Due (1911) 161 Cal.632,
635.)

24 Claims of insufficient evidence may generally be raised only on
25 appeal. Likewise, the court's decision to admit or exclude evidence
26 and issues related to trial testimony are part of the record, and thus
27 could have been appealed. As petitioner failed to raise these
arguments on appeal or show that they fall within one of the
exceptions, they cannot be raised in this petition.

28 (Respondent's Lodged Document 8.)

1 The Superior Court found that petitioner's claims should have been raised on direct
2 appeal, citing In re Dixon. Under In re Dixon, 41 Cal. 2d 756, 759 (1953), habeas corpus cannot
3 serve as a substitute for appeal and absent special circumstances, habeas relief is not available for
4 a claimed error that could have been, but was not raised on direct appeal. The independence or
5 adequacy of California's Dixon rule has recently been addressed by the United States Supreme
6 Court. In Johnson v. Lee, the Supreme Court determined California's Dixon bar is a "well-
7 established procedural bar that is adequate to bar to federal habeas review." 136 S. Ct. 1802,
8 1807 (2016). Accordingly, petitioner's claims are procedurally barred unless he can establish
9 cause for the default and actual prejudice as a result of the alleged violation of federal law, or
10 demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.
11 Coleman v. Thompson, 501 U.S. 722, 750 (1991).

12 To show "cause" for a procedural default under a traditional cause-and-prejudice analysis,
13 a petitioner must demonstrate that some objective factor external to the defense impeded his or
14 his counsel's efforts to comply with the state procedural rule at issue. Coleman, 501 U.S. at 731.
15 Prejudice requires a finding of actual harm resulting from the alleged constitutional violation.
16 Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991).

17 3. Cause

18 In the reply to the answer, petitioner argues that his state appellate counsel refused his
19 request to raise claims 2, 3 and 4 in his direct appeal. Thus, petitioner argues, he failed to raise
20 these claims based on ineffective assistance of appellate counsel.

21 While ineffective assistance of counsel may constitute cause for procedural default, to
22 satisfy exhaustion principles, the ineffective assistance of counsel claim must be presented to the
23 state courts as an independent claim before it may be used to establish cause for procedural
24 default. Murray v. Carrier, 477 U.S. 478, 488-89 (1986); see also Edwards v. Carpenter, 529 U.S.
25 446 (2000). Petitioner did not give the state courts an opportunity to consider whether appellate
26 counsel was ineffective for not raising on direct appeal the issues now set forth as federal grounds
27 2, 3 and 4. Accordingly, ineffective assistance of appellate counsel for failing to raise claims 2, 3
28 and 4 cannot serve as cause to overcome the procedural default of these grounds.

1 4. Prejudice—Claim 2

2 In claim 2, petitioner argues that to demonstrate burglary, the prosecutor had to prove that
3 he intended to commit larceny. Petitioner argues that the fact that he was wearing gloves was not
4 sufficient to prove that he intended to steal from Ortiz.

5 California Penal Code § 459 defines burglary, in relevant part, as follows: “Every person
6 who enters any home ... with intent to commit grand or petit larceny or any felony is guilty of
7 burglary.” “Intent to steal is often proved by circumstantial evidence.” People v. Abilez , 41
8 Cal.4th 472, 508 (2007).

9 There is sufficient evidence to support a conviction if, “after viewing the evidence in the
10 light most favorable to the prosecution, any rational trier of fact could have found the essential
11 elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319
12 (1979).

13 The factual background, summarized by the California Court of Appeal, demonstrates that
14 there was sufficient evidence that petitioner entered Ortiz’s home with the intent to commit
15 larceny. Petitioner was wearing gloves in June, from which “the jury could reasonably infer he
16 intended to avoid leaving fingerprints.” People v. MacClain, 2012 WL 5866549 at *3 (Cal. App.
17 2012). In addition, petitioner’s other actions were circumstantial evidence of intent to commit
18 larceny. Petitioner jumped over Ortiz’s fence to enter her backyard rather than knocking on the
19 front door. Petitioner looked around at the car in the backyard and the shed. When he could not
20 open the backdoor, petitioner ripped the screen off the window. From these actions, and the fact
21 that petitioner was wearing gloves, a rational trier of fact could conclude that petitioner had the
22 intent to commit larceny. Accordingly, petitioner has not demonstrated prejudice with respect to
23 this procedurally defaulted claim.

24 5. Prejudice—Claim 3

25 In claim 3, petitioner alleges that the trial court erred in permitting the prosecutor to admit
26 into evidence, during her rebuttal, the gloves that he was found wearing. Petitioner argues that
27 these gloves should have only been admitted during the prosecutor’s case-in-chief.

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1 The admission of evidence is not subject to federal habeas review unless a specific
2 constitutional guarantee is violated or the error is of such magnitude that the result is a denial of
3 the fundamentally fair trial guaranteed by due process. Henry v. Kernan, 197 F.3d 1021, 1031
4 (9th Cir. 1999); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986). Due process is violated
5 only if there are “no permissible inferences the jury may draw from the evidence.” Jammal v.
6 Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991). The Supreme Court “has not yet made a clear
7 ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process
8 violation sufficient to warrant issuance of the writ.” Holley v. Yarborough, 568 F.3d 1091, 1101
9 (9th Cir. 2009). Even if an evidentiary error is of constitutional dimension, the court must
10 consider whether the error had a substantial and injurious effect on the verdict. Brecht v.
11 Abrahamson, 507 U.S. 619, 638 (1993); Dillard v. Roe, 244 F.3d 758, 767 n.7 (9th Cir. 2001).

12 During the prosecution’s case-in-chief, prosecution witness Officer Hitchcock testified
13 that when he made contact with petitioner after he was arrested, petitioner was wearing gloves.
14 (RT at 268.) Officer Hitchcock testified that he thought it was odd for petitioner to be wearing
15 gloves because it was June. (Id. at 273.) Therefore, the gloves supported the prosecution’s
16 theory, presented in the case-in-chief, that petitioner wore the gloves in order to facilitate larceny.
17 Accordingly, the jury could draw a permissible inference from the gloves.

18 Pursuant to the case law cited above, petitioner’s claim alleging that the trial court
19 improperly allowed admission of the gloves during the prosecution’s rebuttal does not state a
20 cognizable federal claim. For this reason, petitioner has not demonstrated prejudice with respect
21 to this procedurally defaulted claim.

22 6. Prejudice—Claim 4

23 In claim 4, petitioner argues that victim Ortiz committed perjury. “[T]he [Supreme] Court
24 has consistently held that a conviction obtained by the knowing use of perjured testimony is
25 fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false
26 testimony could have affected the judgment of the jury.” United States v. Agurs, 427 U.S. 97,
27 103 (1976) (footnotes omitted). The essential elements of such successful claim are that (1) the
28 testimony is false or perjured, (2) the prosecutor knew that the testimony was false or perjured,

1 and (3) the false testimony was material. Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en
2 banc); see Napue v. Illinois, 360 U.S. 264, 269 (1959); Murtishaw v. Woodford, 255 F.3d 926,
3 959 (9th Cir. 2001).

4 A witness testifying under oath commits perjury if she “gives false testimony concerning a
5 material matter with the willful intent to provide false testimony, rather than as a result of
6 confusion, mistake, or faulty memory.” United States v. Dunnigan, 507 U.S. 87, 94 (1993). Not
7 every discrepancy in testimony translates into perjury. Lambert v. Blackwell, 387 F.3d 210, 249
8 (3d Cir. 2004). Falsity is not established merely by showing that the witness made an earlier
9 inconsistent statement, or that the witness's testimony differs from that of another witness. See
10 United States v. Zuno–Arce, 44 F.3d 1420, 1423 (9th Cir. 1995). “Discrepancies in testimony
11 ...could as easily flow from errors in recollection as from lies.” Id.

12 Petitioner argues that Ortiz’s conflicting statements demonstrate that she committed
13 perjury. In the reply to the answer, petitioner cites nine examples of alleged perjury: 1) the photo
14 and the sun; 2) “don’t remember every detail”; 3) “I didn’t see/did”; 4) prior contact with
15 appellant; 5) dogs; 6) gloves; 7) “he saw me” comment; 8) brother; 9) bedroom
16 window/bathroom window.

17 For the reasons discussed herein, the undersigned does not find that Ortiz committed
18 perjury.

19 *The Photo and the Sun*

20 Petitioner argues that Ortiz testified falsely regarding her inability to photograph
21 petitioner. (ECF No. 32 at 29.) Ortiz testified that she went to her bathroom to watch petitioner
22 because she wanted to take a picture of him and observe how he was able to get into the vacant
23 house next door. (RT at 103.) Ortiz testified that she was unable to take the picture because the
24 sun was too bright. (Id. at 104.) The responding officers were dispatched to the scene at 8:11
25 p.m. and arrived at 8:16 p.m. (RT at 575.) Petitioner argues that based on when the officers were
26 dispatched, Ortiz must have been watching him around 8:00 p.m. (ECF No. 32 at 29.) Petitioner
27 argues that on most days, the sun usually sets by 8:00 p.m. (Id.) Petitioner argues that Ortiz’s
28 testimony that the sun was too bright to photograph him was false because the sun had set by 8:00

1 p.m.

2 Sacramento Police Officer Wiseman testified that when he arrived on the scene at 8:15
3 p.m. it was light outside. (RT at 575-76.) Officer Wiseman testified, “It was earlier than dusk. I
4 couldn’t tell you how light it was.” (Id. at 576.) Based on this testimony, and considering that
5 the incident occurred in June, the undersigned finds that petitioner has not demonstrated that Ortiz
6 testified falsely regarding her inability to photograph petitioner due to bright sun.

7 *Don’t Remember Every Detail*

8 Petitioner next argues that Ortiz testified falsely regarding her memory of the incident.
9 (ECF No. 32 at 30.) Citing page 129 of the reporter’s transcript, petitioner argues that Ortiz
10 testified that she did not remember every detail of what happened. (Id.) Citing page 130 of the
11 reporter’s transcript, petitioner argues that Ortiz testified that she did remember every detail of the
12 incident. (Id.)

13 After reviewing the pages of the transcript cited by petitioner, it appears that petitioner is
14 referring to the following testimony:

15 Q: Now, do you remember advising the police officers on the day
16 of the event that he had –that you didn’t think this person ever
entered your home?

17 A: Right, I did tell them that he tried to get in, and I did tell them
18 that he tried to stick his head through but the window wasn’t high
enough.

19 Q: So you said he definitely tried to push the window up, right?

20 A: Right.

21 Q: But that he couldn’t get into the house?

22 A: He couldn’t get in. The window wasn’t high enough.

23 Q: Okay. And in the 911 call, do you recall telling the 911
24 operator that he’s –he came in my house by the bathroom?

25 A: I don’t recall saying he came in the house. I said he’s at the
bathroom window, trying to break in.

26 Q: Okay. And do you recall telling the 911 operator that he went
27 through the house to get in the bathroom?

28 A: The police went through the house to get – to go through the
back to get him outside the bathroom window.

1 Q: Okay. So when you're telling the 911 operator that he went
2 through the house to get in the bathroom and the guy left, that –
3 you're talking about the police officer that was there who went
4 through your home that night, that day?

5 A: *I don't remember. I'm not quite –I was – I don't recall every
6 little detail of what happened, because it—I don't recall.*

7 Q: So is it fair to say that you're testifying based on your memory
8 today?

9 A: No, I can –this is—this isn't a memory. This is a nightmare. I
10 can't even sleep at night. Okay? I did not even leave. *I remember
11 every little detail.*

12 Defense counsel: Objection. Nonresponsive.

13 Court: Sustained just at this point. Next question.

14 Q: *All right. Ma'am, today, are you basing your testimony on what
15 you remembered of the event of June 6?*

16 A: *Yes.*

17 (Id. at 129-30 (emphasis added).)

18 The testimony quoted above does not demonstrate that Ortiz committed perjury. When
19 Ortiz testified that she could not remember every detail of what happened, it appears that she was
20 referring to what she said to the 911 operator. Moreover, this statement was made after a series
21 of confusing questions from defense counsel. When Ortiz testified that she could remember the
22 details of what happened, it appears that she was referring to her observations of petitioner. The
23 testimony quoted above does not demonstrate a willful intent to testify falsely. See United States
24 v. Dunnigan, 507 U.S. 87, 94 (1993) (confusion, mistake, faulty memory do not amount to
25 perjury.) Moreover, inconsistencies in witness testimony are for the jury to resolve, and do not
26 establish that a witness committed perjury or that the prosecutor knowingly introduced false
27 testimony. United States v. Geston, 299 F.3d 1130, 1135 (9th Cir. 2002).

28 *"I didn't see/did"*

Petitioner argues that Ortiz testified inconsistently regarding seeing petitioner remove the
window screen and put his hands in the window. Citing reporter's transcript pages 115-16,
petitioner argues that Ortiz first testified that she did *not* see petitioner try to enter her house, but

1 then testified that she did see petitioner try to enter the house.

2 In relevant part, Ortiz testified:

3 Q: You said that you saw the man press his face up against the
4 window.

5 A: No, he had already torn the screen off.

6 Q: Did you see him do that?

7 A: I only seen the last part of it when it got stuck on the very top
8 right here. This part here was stuck up here, and he finally ripped it
9 off, and that's what he did.

10 Q: And the screen – when you say the screen, did he damage the
11 screen when he ripped it off?

12 A: It was already damaged. There was a little hole in it already.

13 Q: Okay. And what did you observe the man do next?

14 A: I ran. I didn't observe any more.

15 Q: Okay. Do you recall telling the officer, "He's coming" – you
16 heard on the 911 call – "He's coming in my house. He's coming in
17 my house"?

18 A: Yeah.

19 Q: Did you actually see him trying to come inside your house?

20 A: Yes, he did. He couldn't put his head through – he didn't lift it
21 high enough –because there was a nail there.

22 ****

23 Q: Okay. And when the man started – he ripped off the screen,
24 you say he started to try to come into the house; is that right?

25 A: Right.

26 Q: Did he raise the –

27 A: He only raised it about a good four inches, maybe.

28 Q: Okay.

A: -- then it was already. So it was all the way up to about six
inches, maybe.

Q: Did the man actually stick his hands inside the window in order
--

A: Yes.

1 Defense Counsel: Objection. Foundation.

2 Court: I'm going to sustain.

3 Defense Counsel: Move to strike.

4 Court: It is stricken by the ruling.

5 Q: Did you see the man stick his hands in and raise the window?

6 A: Right. I seen his whole arms trying to reach for the nail.

7 (RT at 115-17.)

8 Petitioner appears to argue that in the testimony quoted above, Ortiz testified that she ran
9 away after seeing petitioner pull off the screen, but later testified that she saw petitioner reach his
10 hand in the window and try to remove the nail. Petitioner argues that if Ortiz ran away after he
11 removed the screen, she could not have seen him reaching his hand in the window. Petitioner
12 also argues that on the 911 tape, Ortiz is heard saying, "Wait, wait. I think I hear him coming
13 into my house." (ECF No. 32 at 30.) Petitioner argues that it is reasonable to infer from Ortiz's
14 statement in the 911 call that she thought petitioner was coming into her house, but that she did
15 not actually see him put his hands inside the window.

16 The testimony quoted above is somewhat confusing regarding the timing of Ortiz's
17 observations of petitioner ripping off the screen, putting his fingers in the window and when Ortiz
18 ran away. However, this testimony does not amount to perjury. See United States v. Dunnigan,
19 507 U.S. 87, 94 (1993) (confusion, mistake, faulty memory do not amount to perjury); Geston,
20 299 F.3d at 1135 (inconsistencies in testimony are for the jury to resolve, and do not establish that
21 a witness committed perjury).

22 The undersigned observes that Ortiz later testified on cross-examination in greater detail
23 regarding her observations. She testified that she saw petitioner put his fingers inside the
24 window, and then she ran away. (RT at 162-65.) On re-direct examination, Ortiz also testified
25 that she "took off running" when she saw petitioner put his fingers in the window and start raising
26 the window up. (Id. at 202.) This later testimony helped to clarify the confusing testimony
27 quoted above.

28 ///

1 In addition, contrary to what petitioner claims, the transcript from the 911 call indicates
2 that Ortiz affirmatively told the 911 operator that petitioner was coming into her house:

3 Ortiz: Oh my God, what if he tries to come into the window...

4 911 Operator: Well...

5 Ortiz: I think they're all locked though I think ...I'm pretty sure
6 they're all nailed down.

7 911 Operator: Okay, well keep an eye ... (inaudible) (both
8 speaking at once).

9 Ortiz: (Whispering) Oh my, wait, wait I think I hear him coming in
10 and this is the back.

11 911 Operator: Through the bathroom?

12 Ortiz: Yeah, because of the window practically you can open it but
13 you really can't because I have a little ... (gasps) *Oh my God, he's
14 trying to, he's coming in my house! He's coming in my house!*

15 (ECF No. 32 at 52 (emphasis added.))

16 While it is not entirely clear from the transcript quoted above what Ortiz witnessed, she
17 clearly told the 911 operator that petitioner was coming into her house.

18 *Prior Contact*

19 Petitioner next argues that Ortiz committed perjury when she testified inconsistently
20 regarding whether petitioner had acknowledged her during her prior sightings of him. (ECF No.
21 32 at 31.) Petitioner cites Ortiz's testimony that during the week prior to the incident, she saw
22 petitioner riding his bike around. (RT at 125.) Ortiz looked at petitioner, but "I don't know if he
23 realized it." (*Id.*) Citing page 172 of the reporter's transcript, petitioner argues that Ortiz later
24 testified that petitioner acknowledged her going into her house.

25 Ortiz later clarified that she saw petitioner on two different occasions prior to June 6,
26 2011. (RT at 204-05.) In the testimony cited by petitioner, Ortiz appears to be describing two
27 different incidents. The testimony cited by petitioner does not constitute perjury.

28 Petitioner also claims that Ortiz testified falsely regarding seeing petitioner in the vacant
house next door. Petitioner cites the following testimony:

Q: And at any time had you seen him over at the abandoned house

1 next door to yours?

2 A: He's been there a couple of times with other people.

3 Q: With other people?

4 A: Right.

5 Q: And the other people, are they African American, black?

6 A: I don't know. It was nighttime. I didn't keep looking. It was
7 nighttime, and I just shut the window.

8 (RT at 153.)

9 Petitioner argues that if Ortiz was unable to determine if the other people with petitioner
10 were African American because it was night, then how was she able to identify petitioner, who is
11 also African American? While petitioner may have a point, this testimony was not material. See
12 Hayes v. Brown, 399 F.3d 972, 984-85 (9th Cir. 2005) (to succeed on a claim alleging that the
13 state knowingly used false evidence, petitioner must demonstrate that the evidence was material;
14 materiality is determined by whether there is "any reasonable likelihood that the false testimony
15 could have affected the judgment of the jury."). Assuming Ortiz testified falsely regarding seeing
16 petitioner previously at the vacant house at night, there is no reasonable likelihood that this
17 testimony could have affected the judgment of the jury.

18 Petitioner also argues that Ortiz testified inconsistently regarding whether she had seen
19 petitioner on her property before June 6, 2011. (ECF No. 32 at 31-32.) Petitioner cites the
20 following portion of the transcript from the 911 tape:

21 911 Operator: Okay. You don't have to if you don't want to.
22 You've seen him in your yard before?

23 A: No, I--I—I never really paid attention because when they stay
24 next door, I never think they'd come to my house, you know.

24 (Id. at 50.)

25 At trial, Ortiz testified that she had seen one person on her property before, although it is
26 not clear whether she meant petitioner:

27 Q: So the other time when the other people were there with this
28 person, you didn't run through your house and call 911 and seek to
take photos on that date?

1 A: I didn't do that because they had gone on my property thinking
2 that's where he was –that they were at, because they were yelling
3 somebody's name out, and that's the only reason I got up and
4 looked again.

5 Q: Okay. So on that particular time, they were on your property
6 also?

7 A: Right.

8 ***

9 Q: Okay. So the people with –the person you saw ride the bike
10 was over at the abandoned house with other people. They were on
11 your property on a specific date?

12 A: One person only was on my property. The rest were next door.

13 (RT at 154-55.)

14 It is not clear from either the 911 tape or the testimony quoted above whether Ortiz saw
15 petitioner on her property prior to June 6, 2011. In any event, Ortiz's testimony quoted above is
16 not perjury because, at most, this testimony is inconsistent with her statement on the 911 tape.
17 Geston, 299 F.3d at 1135 (inconsistencies in testimony are for the jury to resolve, and do not
18 establish that a witness committed perjury).

19 *Dogs*

20 Petitioner alleges that on the 911 tape, Ortiz is heard consoling a dog. (ECF No. 32 at 51
21 (transcript from 911 tape).) Shortly after this, Ortiz told the 911 operator that petitioner was
22 trying to get into her house. (Id. at 52.) Petitioner alleges that there is no barking heard on the
23 911 tape. (Id. at 32.) The trial transcript supports this claim. (RT at 193.) Petitioner argues that
24 the lack of barking on the 911 tape suggests that Ortiz did not see petitioner trying to open the
25 window. (ECF No. 32 at 32.) Petitioner argues that if Ortiz's dogs were with her when she
26 allegedly saw him opening the window, they would have barked. (Id.)

27 Ortiz testified that one of her dogs barks when it hears someone outside. (RT at 156.)
28 However, Ortiz testified that she held on to that dog's "snuzzle" to keep her from barking during
the incident. (Id.) The undersigned also observes that Ortiz later testified that,

She was barking the whole entire time until he was in the bathroom
window, when I picked her up, covered her snuzzle and ran into my
bedroom, threw her on the bed. I really just threw her and went

1 back to where I was at, because the dispatch was talking to me,
2 asking me, “What is he doing now?”

3 (Id. at 184.)

4 Ortiz was later asked if she could explain why her dog could not be heard barking during
5 the 911 tape. (Id. at 193.) Ortiz responded,

6 A: The only thing I can think of is the last part of it was when I
7 threw her in the bedroom. As far as before that, why she didn’t get
8 on the tape, I don’t know, because she was barking. She was in the
9 kitchen when the whole incident was –started.

10 And then she did see him, and she started to run over. That’s why I
11 grabbed his [sic] nose, whatever, snuzzle and ran to the bedroom,
12 threw her in there, shut the door, and ran back into the kitchen.

13 Q: As you sit here today, you remember your dog barking; is that
14 correct?

15 A: Yeah, she was barking. I don’t know why it’s not on the thing.

16 (Id.)

17 Ortiz’s testimony regarding her dog barking and speculation regarding why it could not be
18 heard on the 911 tape does not constitute perjury. Ortiz offered a reasonable explanation
19 regarding why her dog could not be heard. Even assuming Ortiz’s dog was not barking, the
20 record does not suggest that Ortiz intended to testify falsely. See United States v. Dunnigan, 507
21 U.S. 87, 94 (1993) (confusion, mistake, faulty memory do not amount to perjury.) For these
22 reasons, the undersigned does not find that Ortiz’s testimony regarding her dog barking during the
23 incident constituted perjury.

24 *Gloves*

25 Petitioner argues that Ortiz made inconsistent statements regarding whether he was
26 wearing gloves. Petitioner cites a report by Sacramento Police Officer Lopez containing a
27 statement he took from Ortiz on August 27, 2011. (ECF No. 32 at 72.) In this statement, Ortiz
28 stated, “I don’t ever remember him wearing gloves. I was focusing on his face the entire time.”

(Id.) In contrast, Ortiz testified that petitioner was wearing gloves. (RT at 163.)

Ortiz’s trial testimony that petitioner wore gloves is puzzling based on her statement to
Officer Lopez that she did not remember petitioner wearing gloves. However, these inconsistent

1 statements do not establish perjury. Geston, 299 F.3d at 1135 (inconsistencies in testimony are
2 for the jury to resolve, and do not establish that a witness committed perjury).

3 Moreover, to succeed on a claim alleging that the state knowingly used false evidence,
4 petitioner must demonstrate that the evidence was material. Hayes v. Brown, 399 F.3d at 984-85.
5 Even if Ortiz testified falsely that petitioner wore gloves, as discussed above, the prosecutor
6 presented other evidence that petitioner wore gloves during the June 6, 2011 incident. Assuming
7 Ortiz’s testimony that petitioner wore gloves was false, there is no reasonable likelihood that this
8 false testimony affected the judgment of the jury because of the other credible evidence that
9 petitioner was wearing gloves.

10 *“He saw me” Comment*

11 Petitioner argues that in the transcript of the 911 call, Ortiz told the operator that petitioner
12 was standing in her backyard next to the moped when he saw her. (ECF No. 32 at 34, 51
13 (transcript of 911 call).) Petitioner argues that at trial, Ortiz testified that petitioner was at the
14 backdoor when he saw her. (RT at 113.) Petitioner argues that the space between the backdoor
15 and the moped is “great enough to constitute two conflicting storylines.” (ECF No. 32 at 34.)

16 Ortiz testified that when she told the dispatcher that petitioner saw her, petitioner was
17 approaching the backdoor. (RT at 113.) The transcript of the 911 tape states, in relevant part,

18 Ortiz: He’s on the side now and there’s a –a moped but the moped
19 doesn’t work. You know another thing that I think he took one of
20 my tables in the back because I see it next door.

21 911 Operator: Oh dear.

22 Ortiz: Not that it’s—yep, he seen me. He seen me.

(ECF No. 32 at 51.)

23 Ortiz’s testimony that petitioner was approaching the backdoor when he saw her is not
24 clearly inconsistent with her statement to the 911 operator. Even assuming Ortiz made
25 inconsistent statements, her allegedly inconsistent trial testimony regarding when petitioner saw
26 her does not constitute perjury. See United States v. Dunnigan, 507 U.S. at 94 (confusion,
27 mistake, faulty memory do not amount to perjury); Geston, 299 F.3d at 1135 (inconsistencies in
28 testimony are for jury to resolve, and do not establish that a witness committed perjury).

1 Moreover, this testimony is not material. Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005)
2 (materiality is determined by whether there is “any reasonable likelihood that the false testimony
3 could have affected the judgment of the jury.”).

4 *Brother*

5 Petitioner argues that Ortiz made inconsistent statements regarding her brother’s
6 whereabouts. (ECF No. 32 at 34.) Petitioner argues that she told the 911 operator that her
7 brother was staying at someone’s house for one week. (Id.) Petitioner argues that at trial, Ortiz’s
8 testimony suggested that her brother was living at the house with her at the time of the incident.
9 (Id. at 34.)

10 For the following reasons, Ortiz’s testimony regarding her brother’s whereabouts did not
11 constitute perjury. The transcript from the 911 call indicates that Ortiz stated that her brother
12 lived at the house with her, but was staying at somebody’s house for three weeks. (Id. at 50.) At
13 trial, Ortiz clarified that during the week prior to and after June 6, 2011, her brother was at her
14 house off and on. (Id.)

15 He [Ortiz’s brother] was living there, yes, but he was – like I said, it
16 was in –he lived in –the person that sold the house lived around
17 Citrus Heights/Fair Oaks area. So he would go, and he was selling
the person – his boss-- really, it was his boss at one time’s trucks.

18 So he would come and go, but in the nighttime, most of the –the
19 majority of the time, by nine, ten o’clock, he wasn’t there for those
off-and-on weeks.

20 (Id. at 138.)

21 According to Ortiz, her brother was at home with her off-and-on during the week before
22 the incident, because he was taking care of someone else’s property. Thus, her statements to the
23 911 operator and her trial testimony regarding her brother’s whereabouts were not inconsistent.

24 *Bedroom/Bathroom Window*

25 Petitioner argues that Ortiz made inconsistent statements regarding whether petitioner
26 tried to enter her bedroom window versus her bathroom window. (ECF No. 32 at 34.) Ortiz told
27 the 911 operator that petitioner was entering through the bathroom window. (Id. at 52.)
28 Petitioner cites the report by Officer Lopez, which states that Ortiz told him that petitioner tried to

1 enter her bedroom window. (Id. at 74.) Petitioner argues that Ortiz told the defense investigator
2 that petitioner tried to enter the bedroom window. (Id. at 34.) However, the defense
3 investigator's report indicates that Ortiz stated that petitioner tried to enter her bathroom
4 window.¹ (Id. at 68-69.)

5 For the following reasons, the undersigned finds that Ortiz's testimony that petitioner tried
6 to enter her bathroom window did not constitute perjury. Ortiz testified that petitioner tried to
7 break into the bathroom window. (RT at 114-118.) On cross-examination, Ortiz testified that
8 Officer Lopez incorrectly recorded in his report that Ortiz told him that petitioner tried to break
9 into her bedroom window. (Id. at 160.) Ortiz testified that her bedroom windows did not have
10 screens, like her bathroom window. (Id.) Ortiz testified that she told Officer Lopez that
11 petitioner tried to break into a bathroom window. (Id. at 161.)

12 Ortiz was shown a photograph, marked as People's Exhibit 28. (Id. at 123.) Ortiz
13 testified that the photograph showed the window that petitioner tried to enter. (Id.) Officer
14

15 ¹ The defense investigator's report states, in relevant part,

16 After (Alston) found that my back door was locked, I saw him walk
17 over toward the side of the house. My bathroom has a window
18 looking out to the side of the house that (Alston) walked to, so I ran
19 in there really quick and looked out to see what he was doing. At
20 first, he was checking out my moped that I have parked back there.
21 Then, he approached the bathroom window. I ran out of the
22 bathroom and entered the kitchen.

23 The kitchen is on the other side of the back porch, which is attached
24 to the bathroom. So from the kitchen, you can't see the bathroom
25 unless you poke your head out into the porch area. That's what I
26 did. I didn't want (Alsto) seeing me, and I was scared, so I was sort
27 of hiding in the kitchen while poking my head out to see what he
28 was doing. I had a clear view of the bathroom window (Alston)
had approached. I'm not good at distance, so I couldn't say how far
away I was from the window, but I know what I saw. He
approached the window and tried to get inside. First he ripped off
the screen. Then, he tried squeezing his head in through the
window.

My bathroom window only opens about half-way, so (Alston)
wasn't able to squeeze his head through. I saw him reach his hands
in to see what was blocking the window from opening all the way,
but he wasn't able to open it any further.

(ECF No. 32 at 68-69.)

1 Hitchcock identified People’s Exhibit 28 as a photograph showing the window he had been
2 advised that petitioner had tried to enter. (Id. at 293.) Therefore, Officer Hitchcock identified the
3 bathroom window as the window petitioner tried to break in to.

4 While Officer Lopez’s report states that Ortiz reported that petitioner tried to break into a
5 bedroom window, as opposed to the bathroom window, it is fairly clear from the record that this
6 was a mistake. All other evidence and statements by Ortiz indicated that she reported petitioner
7 trying to break into her bathroom window. Based on this record, the undersigned does not find
8 that Ortiz committed perjury when she testified that petitioner tried to break into her bathroom
9 window.

10 *Conclusion—Prejudice Regarding Claim 3*

11 For the reasons discussed above, the undersigned finds that petitioner has not
12 demonstrated that Ortiz committed perjury. While Ortiz’s testimony was, at times, confusing and
13 inconsistent, it did not amount to perjury.

14 The undersigned observes that in the reply, petitioner further argues that the jury
15 suspected that Ortiz may have perjured herself. (ECF No. 32 at 28.) Petitioner argues that during
16 deliberations, the jury submitted the following question:

17 Is it possible that the District Attorney educated Sandra Ortiz on the
18 law regarding first degree residential burglary before her testimony
to the jury? If so, did she?

19 (CT at 186.)

20 The trial court responded to this question as follows:

21 In response to Question No. 2: The evidence phase of the trial is
22 over; therefore, no additional evidence can be presented to the jury.
23 The only evidence in the record regarding communications between
24 the District Attorney and Sandra Ortiz is in the testimony of Ms.
Ortiz. Please advise the Court if you want any portion or all of Ms.
Ortiz’s testimony read back to the jury.

25 (Id. at 187.)

26 The jury’s question suggests that it had some question regarding whether Ortiz had been
27 coached on the law regarding first degree residential burglary. However, the undersigned finds
28 no evidence that Ortiz gave “false testimony concerning a material matter with the willful intent

1 to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”
2 United States v. Dunnigan, 507 U.S. at 94. Instead, the consistencies in Ortiz’s testimony were
3 for the jury to resolve, and did not establish that she committed perjury, or that the prosecutor
4 knowingly used false testimony. Geston, 299 F.3d at 1135. Accordingly, petitioner has not
5 demonstrated prejudice with respect to this procedurally defaulted claim.

6 *Miscarriage of Justice*

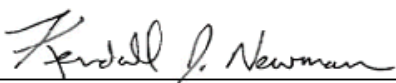
7 Finally, the undersigned finds that petitioner has not demonstrated that failure to consider
8 defaulted claims 2, 3, and 4 will result in a fundamental miscarriage of justice. Coleman v.
9 Thompson, 501 U.S. 722, 750 (1991).

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

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
17 he shall also address whether a certificate of appealability should issue and, if so, why and as to
18 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
19 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
20 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after
21 service of the objections. The parties are advised that failure to file objections within the
22 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
23 F.2d 1153 (9th Cir. 1991).

24 Dated: October 13, 2016

25
26 A11500.157

27
28

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE