

United States District Court
For the Northern District of California

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

STEPHEN W. GREEL,
Petitioner,
v.
MICHAEL MARTEL, Warden,
Respondent.

No. 08-04474 CW
ORDER
DENYING PETITION
FOR WRIT OF
HABEAS CORPUS

INTRODUCTION

Petitioner Stephen W. Greel is a state prisoner incarcerated at Mule Creek State Prison. On September 24, 2008, he filed his original pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a conviction and sentence imposed by the Contra Costa County Superior Court. Petitioner claims that there was insufficient evidence to support his conviction for kidnapping to commit rape, and that the introduction of certain evidence inflamed the passions of the jury, thus depriving him of his constitutional right to a fair trial. On the same day, Petitioner filed a motion for appointment of counsel, which the Court granted on February 26, 2009. On July 21, 2009, Respondent filed an answer. Petitioner, represented by counsel, timely filed a traverse. Having considered all of the papers filed by the

1 parties, the Court DENIES the petition.

2 PROCEDURAL BACKGROUND

3 On April 29, 2004, the district attorney filed an information
4 charging Petitioner with attempted murder (Count One; Cal. Penal
5 Code, §§ 187, 664);¹ kidnapping to commit rape (Count Two;
6 § 209(b)), assault with a firearm (Count Three; § 245(a)(2));
7 assault to commit rape (Count Four; § 220); and assault with a stun
8 gun (Count Five; § 244.5(b)). The information also alleged
9 sentencing enhancements for inflicting great bodily injury within
10 the meaning of section 12022.7 as to Counts One and Three, and for
11 personal discharge of a firearm causing great bodily injury within
12 the meaning of section 12022.53(d), as to Counts One, Two, and
13 Four.

14 On August 2, 2005, a jury found Petitioner guilty on all
15 counts. The jury also found the alleged sentencing enhancements
16 true, except for the firearm discharge as to Count Four, assault
17 with intent to rape.

18 On March 2, 2005, the trial court denied probation and imposed
19 an aggregate sentence of thirty-four years and eight months to
20 life.² Petitioner timely appealed his convictions. The California
21 court of appeal, in an unpublished opinion, reversed Petitioner's
22 conviction for assault with a stun gun for insufficiency of

23 _____
24 ¹All further statutory references are to the California Penal
Code, unless otherwise noted.

25
26 ²Both the parties contend the sentence was forty-one years to
27 life, but the California court of appeal found the sentencing
documents to support a thirty-four year and eight month sentence.
28 Resp's Ex. 2, at 4 fn. 3.

1 evidence, but otherwise affirmed the judgment. Resp's Ex. 2;
2 People v. Greel, No. A111307 (Cal. App. April 25, 2007).
3 Petitioner filed a petition for review with the California Supreme
4 Court, which was summarily denied on July 11, 2007.

5
6 FACTUAL BACKGROUND

6 The factual background of Petitioner's conviction is
7 summarized based on the court of appeal opinion, unless otherwise
8 stated.

9 On April 26, 2004, Petitioner, nineteen years old at the time,
10 picked up a woman who was hitchhiking. When she tried to exit the
11 vehicle, Petitioner grabbed a stun gun and attempted to
12 incapacitate the woman with it. The stun gun had no effect, and
13 the woman escaped from the car by jumping through the passenger-
14 side window, because the inside passenger-side door handle was
15 broken. At the time, the vehicle was moving at about five miles
16 per hour, and had just crossed a bridge. The woman sustained minor
17 injuries jumping from the car, but was able to stand up and run.
18 As the woman ran away, Petitioner shot eight rounds from a .22
19 caliber handgun at her from a distance of approximately twenty
20 feet. One bullet hit the woman, causing serious injury. As
21 Petitioner tried to throw the gun off the bridge, the barrel broke
22 off in his hand and fell to the ground, and the remainder of the
23 gun landed on a sand bar below. Petitioner then fled the scene.

24 Later that day, after consulting with his mother, Petitioner
25 turned himself in at the Garberville sheriff's office. Resp's Ex.
26 5, 1 Reporter's Transcript (RT) at 157. A consensual search of
27 Petitioner's car revealed a stun gun behind the passenger seat, and
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1 a passenger-side door with no handle. Resp's Ex. 5, 2 RT at 277.
2 Petitioner waived his rights under Miranda v. Arizona, 384 U.S. 436
3 (1966). He told Detective Dennis Young, who arrived at the station
4 to interview him, that he had picked up a hitchhiker, attempted to
5 use a stun gun on her, and shot her when she tried to escape.
6 Resp's Ex. 5, 1 RT at 250, 254-255. Petitioner said he planned to
7 rape the woman but then he wavered after speaking with her about
8 her family. Pet'r's Ex. A, at 20-21. He said he was glad she had
9 gotten away because he probably would have raped her and maybe
10 would have even killed her. Pet'r's Ex. A, at 31.

11 At trial, two types of evidence were introduced over
12 Petitioner's objections. First, copies of two pornographic
13 stories, recovered from Petitioner's bedroom and apparently
14 downloaded from the internet and printed out, were introduced to
15 demonstrate Petitioner's intent to rape and kill the woman. The
16 first story described the rape and murder of an eight-year-old
17 girl, and the second a son's rape of his mother. The prosecutor
18 made reference to the stories at least five times in his closing
19 argument to the jurors, and urged them to examine the stories for
20 themselves. Resp's Ex. 5, 2 RT at 431-432, 440, 446, 473-474.

21 The second type of evidence introduced over Petitioner's
22 objection was testimony from a sheriff's sergeant. The sheriff's
23 sergeant testified that, when Petitioner was fifteen years old, she
24 investigated a complaint that he had molested his five-year-old
25 niece. At that time, Petitioner admitted to engaging in sodomy,
26 oral copulation, fondling, and masturbation in front of the child.
27 Petitioner also admitted to having molested his niece in his

1 statement to Detective Young, which was played for the jury.
2 Resp's Ex. 5, 2 RT at 318.

3 In his closing argument to the jury, the prosecutor conceded
4 that Count Five, assault with a stun gun (§ 244.5(b)), was
5 unsupported by the evidence because it could not be shown that the
6 stun gun was capable of incapacitating a person, a required element
7 of the offense. Resp's Ex. 5, RT at 430. Accordingly, the
8 prosecutor urged the jury to convict instead on the lesser included
9 offense of assault (§ 240). Resp's Ex. 5, RT at 479.

10 DISCUSSION

11 I. Standard of Review

12 Under the Antiterrorism and Effective Death Penalty Act
13 (AEDPA), a federal writ of habeas corpus may not be granted with
14 respect to any claim that was adjudicated on the merits in state
15 court unless the state court's adjudication of the claims:

16 "(1) resulted in a decision that was contrary to, or involved an
17 unreasonable application of, clearly established Federal law, as
18 determined by the Supreme Court of the United States; or
19 (2) resulted in a decision that was based on an unreasonable
20 determination of the facts in light of the evidence presented in
21 the state court proceeding." 28 U.S.C. § 2254(d).

22 "Under the 'contrary to' clause, a federal habeas court may
23 grant the writ if the state court arrives at a conclusion opposite
24 to that reached by [the Supreme] Court on a question of law or if
25 the state court decides a case differently than [the Supreme] Court
26 has on a set of materially indistinguishable facts." William v.
27 Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable
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1 application' clause, a federal habeas court may grant the writ if
2 the state court identifies the correct governing legal principle
3 from the [Supreme] Court's decision but unreasonably applies that
4 principle to the facts of the prisoner's case." Id. at 413. The
5 only definitive source of clearly established federal law under 28
6 U.S.C. § 2254(d) is in the holdings of the Supreme Court as of the
7 time of the relevant state court decision. Id. at 412.

8 If the state court considered only state law, the federal
9 court must ask whether state law, as explained by the state court,
10 is "contrary to" clearly established governing federal law.
11 Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001). If the
12 state court, relying on state law, correctly identified the
13 governing federal legal rules, the federal court must ask whether
14 the state court applied them unreasonably to the facts. Id. at
15 1232.

16 If constitutional error is found, habeas relief is warranted
17 only if the error had a "'substantial and injurious effect or
18 influence in determining the jury's verdict.'" Penry v. Johnson,
19 532 U.S. 782, 795 (2001)(quoting Brecht v. Abrahamson, 507 U.S.
20 619, 638 (1993)).

21 In determining whether the state court's decision is contrary
22 to, or involved an unreasonable application of, clearly established
23 federal law, a federal court looks to the decision of the highest
24 state court to address the merits of a petitioner's claim in a
25 reasoned decision. Lajoie v. Thompson, 217 F.3d 663, 669 n.7 (9th
26 Cir. 2000). Here, the highest state court to issue a reasoned
27 opinion is the California court of appeal.

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1 II. Sufficiency of the Evidence of Kidnapping with Intent to Rape

2 Petitioner asserts that there is insufficient evidence to
3 support his conviction for kidnapping with intent to rape in
4 violation of section 209(b) because his forced movement of the
5 victim was merely incidental, and that his conviction thereby
6 violates his due process rights under the federal Constitution.

7 The Due Process Clause "protects the accused against
8 conviction except upon proof beyond a reasonable doubt of every
9 fact necessary to constitute the crime with which he is charged."
10 In re Winship, 397 U.S. 358, 364 (1970). A state prisoner who
11 alleges that the evidence in support of his conviction cannot be
12 fairly characterized as sufficient to have led a rational trier of
13 fact to find guilt beyond a reasonable doubt therefore states a
14 constitutional claim, which, if proven, entitles him to federal
15 habeas relief. See Jackson v. Virginia, 443 U.S. 307, 321-324
16 (1979).

17 The kidnapping with intent to commit rape statute, section
18 209(b), provides:

- 19
- 20 (1) Any person who kidnaps or carries away any
21 individual to commit robbery, rape, spousal rape, oral
22 copulation, sodomy, or any violation of Section 254.1,
23 288, or 289, shall be punished by imprisonment in the
24 state prison for life with the possibility of parole.
25 (2) This subdivision shall only apply if the movement
26 of the victim is beyond that merely incidental to the
27 commission of, and increases the risk of harm to the
28 victim over and above that necessarily present in, the
intended underlying offense.

25 In determining whether a forced movement was merely incidental, the
26 jury must consider such factors as "whether the movement decreases
27 the likelihood of detection, increases the danger inherent in a

1 victim's foreseeable attempts to escape, or enhances the attacker's
2 opportunity to commit additional crimes." People v. Dominguez, 39
3 Cal. 4th 1141, 1152 (2006).

4 In reviewing claims of insufficient evidence, California
5 courts use the Jackson standard. See People v. Cuevas, 12 Cal. 4th
6 252, 260-262 (1995); People v. Johnson, 26 Cal. 3d 557, 578 (1980).

7 In the California court of appeal, Petitioner argued that no
8 rational trier of fact could have found him guilty of kidnapping
9 with intent to rape because he moved the victim only a short
10 distance, several hundred feet across a bridge, before she escaped
11 from the car. Therefore, he argued that the movement was merely
12 incidental to the intended rape, and did not either decrease the
13 risk of detection or increase the risk of harm to the victim. The
14 court rejected this argument. Resp's Ex 2 at 8-9. It noted that
15 Petitioner could have raped his victim at any time; movement across
16 the bridge was not required, and thus a reasonable jury could have
17 concluded that the forced movement, while brief, was undertaken for
18 a non-incidental purpose. Id. at 7.

19 Furthermore, the court acknowledged that there was no evidence
20 that there was a lesser risk of detection at the far end of the
21 bridge, where the forced movement ended, but noted that
22 "transporting a victim by car '[gives] rise to dangers, not
23 inherent in [an underlying crime], that an auto accident might
24 occur or that the victim might attempt to escape from the moving
25 car or be pushed therefrom . . ." Id. at 8 (quoting In Re Earley,
26 14 Cal. 3d 122, 132 (1975)). The court explained that the victim
27 did attempt to escape in this case, jumping from the moving
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1 vehicle. Id. Although her injuries were slight, the court
2 reasoned that even at only five miles an hour, she could have
3 easily been seriously injured. Id. That she was not seriously
4 injured did not alter the fact that the forced movement created the
5 risk that she might have been. Id.

6 Petitioner counters that jumping from a vehicle moving at five
7 miles an hour is no more dangerous than jumping from a stationary
8 location, and therefore that no reasonable person could convict him
9 of kidnapping with intent to rape based on his forced movement of
10 the victim. The court of appeal's rejection of this argument is
11 not contrary to or an unreasonable application of Supreme Court
12 precedent. A reasonable jury could have found that Petitioner's
13 forced movement of the victim, while not far in distance, was not
14 merely incidental because it substantially increased the risk of
15 injury to the victim. Accordingly, habeas relief on this claim is
16 unwarranted.

17 III. Admission of Prejudicial Evidence

18 Petitioner asserts that the introduction of pornographic
19 stories in his possession, and evidence of his prior sexual
20 misconduct, was so prejudicial as to render his trial fundamentally
21 unfair in violation of his federal due process rights.

22 The admission of evidence is not subject to federal habeas
23 review unless a specific constitutional guarantee is violated or
24 the error is of such magnitude that the result is a denial of the
25 fundamentally fair trial guaranteed by due process. Henry v.
26 Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). The Supreme Court
27 "has not yet made a clear ruling that admission of irrelevant or
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1 overtly prejudicial evidence constitutes a due process violation
2 sufficient to warrant issuance of the writ." Holley v. Yarborough,
3 568 F.3d 1091, 1101 (9th Cir. 2009) (finding that trial court's
4 admission of irrelevant pornographic materials was "fundamentally
5 unfair" under Ninth Circuit precedent but not contrary to, or an
6 unreasonable application of, clearly established federal law).

7 Failure to comply with state rules of evidence is neither a
8 necessary nor a sufficient basis for granting federal habeas relief
9 on due process grounds. Henry, 197 F.3d at 1031; Jammal v. Van de
10 Kamp, 926 F.2d 918, 919 (9th Cir. 1991). The due process inquiry
11 in federal habeas review is whether the admission of evidence was
12 arbitrary or so prejudicial that it rendered the trial
13 fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th
14 Cir. 1995). Only if there are no permissible inferences that the
15 jury may draw from the evidence can its admission violate due
16 process. Jammal, 926 F.2d at 920.

17 A. Pornographic Stories

18 Petitioner asserts that the trial court improperly weighed the
19 probative value and prejudicial effect of the violent pornographic
20 stories in Petitioner's possession that it admitted into evidence
21 to show intent to kill and rape the victim.

22 The court of appeal held that the stories were properly
23 admitted, because they were relevant and the likely prejudicial
24 effect of their admission was "not great." Resp's Ex. 2, at 11.
25 The court noted that, although the stories themselves were shocking
26 and disturbing, there was "no contention that the defendant was the
27 author of the stories and was responsible for their content," and
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1 thus the jury was unlikely to be unduly prejudiced by viewing them.
2 Id. On that basis, the court held that the trial court's admission
3 of the stories was not an abuse of discretion. Id. The court also
4 noted that, even if the stories were improperly admitted, the error
5 would have been harmless, given the extensive evidence of
6 Petitioner's guilt: he confessed to the crime to both his mother
7 and the police, his account matched that of the victim, and
8 physical evidence recovered from the scene was consistent with
9 Petitioner's confession. Id.

10 Because there is no clear Supreme Court precedent holding that
11 admission of prejudicial and irrelevant evidence can be an
12 appropriate basis for habeas relief, Petitioner would not be
13 entitled to habeas relief on this ground even if he could show that
14 admission of the stories unfairly biased the jury against him. See
15 Holley v. Yarborough, 568 F.3d 1091 at 1101 (holding that even
16 though admission of irrelevant prejudicial evidence was grounds for
17 reversal of petitioner's conviction under Ninth Circuit case law,
18 the lack of clear Supreme Court precedent meant that habeas relief
19 was inappropriate on that ground).

20 Furthermore, even under the Ninth Circuit's Jammal standard,
21 the state court was not unreasonable in finding that admission of
22 the stories did not render Petitioner's trial fundamentally unfair.
23 The evidence was introduced for the purpose of corroborating
24 Petitioner's self-admitted fantasies about killing and raping a
25 woman and to show his intent to act on those fantasies. See
26 Pet'r's Ex. A, 20-21, 31. Although the evidence arguably had
27 little probative value because of Petitioner's own admissions to
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1 the same effect, it was offered to counter the defense's suggestion
2 at trial that Petitioner's admissions had been bravado on the part
3 of a person with low self-esteem, and that there was no sexual
4 element to the crimes committed. Resp's Ex 5, 1 RT 129, 2 RT 459.
5 The jury could have permissibly inferred from this evidence that
6 Petitioner's admissions were not simply bravado and that his
7 interest in raping and killing a woman was real. The state court
8 was not unreasonable in finding that, because there was a
9 legitimate inference the jury could have drawn from the evidence,
10 its introduction did not result in a fundamentally unfair trial.
11 See Jammal, 926 F.2d at 920. Therefore, the court of appeal's
12 determination was not contrary to or an unreasonable application of
13 Supreme Court precedent, and Petitioner is not entitled to habeas
14 relief on this ground.

15 B. Evidence of Petitioner's Past Sexual Misconduct

16 Petitioner argues that introduction of evidence that he had
17 molested his five year old niece four years prior to the charged
18 conduct was also so prejudicial as to render his trial
19 fundamentally unfair.

20 In general, character evidence, including specific instances
21 of past conduct, is inadmissible under California law when
22 introduced to show a criminal defendant acted in conformity with
23 his or her character. See Cal. Evid. Code. § 1101. In the case of
24 prosecutions for sexual crimes, however, California Evidence Code
25 section 1108 removes this prohibition in regard to evidence of
26 other sex offenses committed by the defendant. Cal. Evid. Code.
27 § 1108. Accordingly, admission of this sort of evidence is limited
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1 only by California Evidence Code section 352's balancing test,
2 which weighs probative value against prejudicial effect. Cal.
3 Evid. Code. § 352; see People v. Falsetta, 21 Cal. 4th 903, 916
4 (1999) (holding that, in the case of evidence of prior sexual
5 conduct, in deciding whether to admit the evidence the trial court
6 must weigh such factors as the nature, relevance, degree of
7 certainty and remoteness of the offense, the likelihood of
8 confusing or distracting the jury, the likely prejudicial effect,
9 and the possibility of less prejudicial alternatives).

10 The court of appeal held that the introduction of evidence of
11 Petitioner's past sexual misconduct presented "a close call" under
12 California Evidence Code section 352, but it did not find the
13 admission an abuse of discretion. Resp's Ex. 2, at 13. The court
14 also held that, even if the evidence was improperly admitted, any
15 error was harmless, given the strength of the case against
16 Petitioner. Id.

17 As mentioned above, the lack of clear Supreme Court precedent
18 on this issue forecloses relief to Petitioner even if the admission
19 did render his trial fundamentally unfair under Ninth Circuit
20 precedent. See Holley, 568 F.3d at 1101.

21 Pursuant to Federal Rules of Evidence 413, 414, and 415,
22 evidence of prior sexual misconduct is explicitly recognized as
23 admissible in sex offense cases, subject to considerations of
24 prejudice and probative value. United States v. LeMay, 260 F.3d
25 1018, 1026-27 (9th Cir. 2001). Admission of such evidence in
26 federal court is subject to the balancing test of Federal Rule of
27 Evidence 403, but the rule recognizes that there is legitimate
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1 probative value to be balanced against prejudicial effect.
2 The court of appeal was not unreasonable in finding that the
3 probative value of the evidence outweighed its prejudicial effect,
4 and that any error was harmless because the case against Petitioner
5 was strong. Even if the court did err, the strong evidence
6 presented by the prosecution, including the matching confession,
7 testimony of the victim and physical evidence, ensured that the
8 evidence of sexual misconduct had no "substantial and injurious
9 effect or influence in determining the jury's verdict." See
10 Brecht, 507 U.S. at 638. The California court of appeal's
11 rejection of Petitioner's arguments was not contrary to or an
12 unreasonable application of Supreme Court authority, and he is not
13 entitled to habeas relief on this ground.

14 CONCLUSION

15 For the foregoing reasons, the petition for a writ of habeas
16 corpus is DENIED. The Court will issue a certificate of
17 appealability for this case should Petitioner wish to pursue an
18 appeal. See Rule 11(a) of the Rules Governing § 2254 Cases, 28
19 U.S.C. foll. § 2254 (requiring district court to rule on
20 certificate of appealability in same order that denies petition).
21 A certificate of appealability should be granted "only if the
22 applicant has made a substantial showing of the denial of a
23 constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of
24 appealability must indicate which issue or issues satisfy the
25 showing required by § 2253(c)(2). 28 U.S.C. § 2253(c)(3). The
26 Court finds that Petitioner has made a sufficient showing of the
27 denial of a constitutional right on his claims based on the

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1 admission of prejudicial evidence. Petitioner has not made a
2 showing sufficient to justify a certificate of appealability on his
3 claim based on the insufficiency of the evidence supporting his
4 kidnapping conviction. The Clerk of the Court shall enter
5 judgment, terminate all pending motions, and close the file.
6

7 IT IS SO ORDERED.

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9 Dated: July 23, 2010

Claudia Wilken

10 CLAUDIA WILKEN
United States District Judge