

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

PATRICK OWEN MADSEN,

Petitioner,

Case No. 3:14-cv-00573-MMD-WGC

v.

ORDER

RENEE BAKER, *et al.*,

Respondents.

This *pro se* habeas proceeding comes before the Court for consideration of the remaining claim in petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. (ECF No. 6.) Respondents have answered (ECF No. 28), and petitioner has replied (ECF No. 29). Following an order of the Court, respondents have filed a supplemental answer (ECF No. 42), and petitioner has filed a supplemental reply (ECF No. 43).

I. BACKGROUND

Petitioner herein challenges his convictions on two counts of lewdness with a child under the age of 14. (ECF No. 6.) The convictions arose out of incidents that took place between petitioner and 13-year-old A.A. on two separate dates in late May 2006, when petitioner was temporarily living with A.A.'s family. (ECF No. 12-17 at 57-60, 70; ECF No. 12-20 at 8.) In the first incident, A.A. testified that petitioner kissed her on the neck, licked her vagina, and then forced her to have sexual intercourse with him. (ECF No. 12-17 at 57-59.) In the second incident, A.A. testified that petitioner grabbed and licked her breasts

1 and then forced her to have sex with him again. (*Id.* at 59-60.) A.A. did not immediately
2 tell anyone about the incidents. (*Id.* at 60.)

3 In late July 2006, A.A.'s mother was cleaning A.A.'s room and bathroom and found
4 razors, scissors, a box that had been stabbed repeatedly, cigarette butts, and condoms.
5 (*Id.* at 60-64, 68.) She asked A.A. about the box and the other things she found, and A.A.
6 told her about the incidents with petitioner. (*Id.* at 60, 68-69.) A.A.'s mother confronted
7 petitioner and then contacted police. (*Id.* at 69.)

8 Officer Maribah Cowley interviewed A.A., A.A.'s mother, and petitioner. (ECF No.
9 12-20 at 6; ECF No. 12-17 at 60-61.) At trial, Cowley testified that petitioner told her he
10 did not know where, when or how the incidents could have happened but that he drinks
11 heavily; that when he drinks he goes to sleep and is done and can't be woken up; and
12 that he did not know what happened and never intended to have sex with A.A. (ECF No.
13 12-20 at 7.) Cowley also testified that petitioner said "apparently he did have sex with
14 [A.A.]. He does not deny that. He does not remember it." (*Id.*)

15 On December 20, 2006, petitioner was charged by way of criminal complaint with
16 two counts of sexual assault with a minor under fourteen years of age and two counts of
17 lewdness with a child under the age of fourteen. (ECF No. 9-1.) After a two-day trial, a
18 jury found petitioner guilty on all four counts. (ECF Nos. 10-5, 10-6.) Following
19 sentencing and entry of judgment, petitioner appealed. (ECF No. 10-15.)

20 On December 14, 2009, the Nevada Supreme Court reversed and remanded.
21 (ECF No. 11-17.) In relevant part, the court held that Cowley's statements about what
22 A.A. had told her, including things A.A. said petitioner had said, had been erroneously
23 admitted because in the context of the case those statements were hearsay and double
24 hearsay. (*Id.* at 3-6.) The court noted specifically, however, that petitioner's statements
25 to Cowley were properly admitted. (*Id.* at 4 n.2.)

26 After a second trial, the jury again found petitioner guilty on all four counts. (ECF
27 Nos. 12-20, 12-21.) Petitioner was sentenced to life with the possibility of parole after
28

1 twenty years on the sexual assault counts, and to life with the possibility of parole after
2 ten years on the lewdness counts—all counts to run concurrent. (ECF No. 13-3.) The
3 judgment of conviction was issued on October 7, 2010. (ECF No. 13-4.)

4 Petitioner appealed. (ECF No. 13-6.) On July 14, 2011, the Nevada Supreme
5 Court affirmed in part, reversed in part, and remanded. (ECF No. 13-15.) The court
6 affirmed the lewdness convictions but vacated the sexual assault convictions. (*Id.* at 3-
7 4.) In so doing, the court rejected petitioner’s assertion that there was insufficient
8 evidence to support the convictions but found that the trial court’s failure to give an
9 instruction on reasonable mistaken consent required reversal of the sexual assault
10 convictions. (*Id.* at 2-4.) On remand, the trial court granted a motion by the State to
11 dismiss the criminal information as to the sexual assault charges. (ECF Nos. 13-18, 13-
12 21.)

13 On July 20, 2012, petitioner filed a post-conviction habeas petition in the state
14 district court. (ECF No. 14-5.) On December 3, 2012, petitioner filed an amended habeas
15 petition in the state district court. (ECF No. 14-9.) The state district court denied the
16 amended petition by order filed October 8, 2013. (ECF No. 14-10.)

17 Petitioner appealed the denial of his post-conviction habeas petition. (ECF No.
18 14-11.) On May 13, 2014, the Nevada Supreme Court affirmed. (ECF No. 14-18.)
19 Remittitur issued on June 9, 2014. (ECF No. 14-19.)

20 On November 4, 2014, petitioner dispatched the instant federal habeas petition to
21 this Court. (ECF No. 6 at 1.) Respondents moved to dismiss the petition (ECF No. 8),
22 and the Court found that Grounds 1, 2, and 3 were unexhausted (ECF No. 22). Petitioner
23 thereafter abandoned his unexhausted claims. (ECF No. 23.) Thus, the only ground
24 remaining for the Court’s consideration is Ground 4.

25 **II. LEGAL STANDARD**

26 28 U.S.C. § 2254(d) provides the legal standards for this court’s consideration of
27 the merits of the petition in this case:

1 An application for a writ of habeas corpus on behalf of a person in custody pursuant
2 to the judgment of a State court shall not be granted with respect to any claim that
3 was adjudicated on the merits in State court proceedings unless the adjudication
4 of the claim –

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

11 AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in
12 order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are
13 given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002).
14 This court’s ability to grant a writ is limited to cases where “there is no possibility
15 fairminded jurists could disagree that the state court’s decision conflicts with [Supreme
16 Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court
17 has emphasized “that even a strong case for relief does not mean the state court’s
18 contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75
19 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA
20 standard as “a difficult to meet and highly deferential standard for evaluating state-court
21 rulings, which demands that state-court decisions be given the benefit of the doubt”)
22 (internal quotation marks and citations omitted.)

23 A state court decision is contrary to clearly established Supreme Court precedent,
24 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts
25 the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts
26 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]
27 and nevertheless arrives at a result different from [the Supreme Court’s] precedent.”
28 *Andrade*, 538 U.S. 63 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing
Bell v. Cone, 535 U.S. 685, 694 (2002)).

1 A state court decision is an unreasonable application of clearly established
2 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
3 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
4 unreasonably applies that principle to the facts of the prisoner’s case.” *Andrade*, 538 U.S.
5 at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires
6 the state court decision to be more than incorrect or erroneous; the state court’s
7 application of clearly established law must be objectively unreasonable. *Id.* (quoting
8 *Williams*, 529 U.S. at 409).

9 To the extent that the state court’s factual findings are challenged, the
10 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas
11 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires
12 that the federal courts “must be particularly deferential” to state court factual
13 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
14 state court finding was “clearly erroneous.” *Id.* at 973. Rather, AEDPA requires
15 substantially more deference:

16 [I]n concluding that a state-court finding is unsupported by substantial
17 evidence in the state-court record, it is not enough that we would reverse in
18 similar circumstances if this were an appeal from a district court decision.
19 Rather, we must be convinced that an appellate panel, applying the normal
standards of appellate review, could not reasonably conclude that the
finding is supported by the record.

20 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

21 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
22 correct unless rebutted by clear and convincing evidence. The petitioner bears the
23 burden of proving by a preponderance of the evidence that he is entitled to habeas relief.
24 *Cullen*, 563 U.S. at 181.

25 As the state courts reached the merits of petitioner’s claims, their decisions are
26 entitled to deference under AEDPA and may not be disturbed unless they were ones “with
27 which no fairminded jurist could agree.” *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015).

1 **III. ANALYSIS**

2 Ground 4 of the petition asserts that petitioner's due process rights were violated
3 because the Nevada Supreme Court erroneously found sufficient evidence to support his
4 convictions "based on their opinion" that petitioner "also admitted to the police that he had
5 sex with the victim." (ECF No. 6 at 10.)

6 Petitioner raised this claim as Ground 21 of his state post-conviction habeas
7 petition. He asserted:

8 Nevada Supreme Court reversed in part (see order attached) stating
9 Petitioner had made a confession to police, and thus affirmed a lewdness
10 conviction, based upon this confession of having sex (alleged). State
11 dismissed S/A convictions with prejudice immediately after. State's witness
12 A.A. testified to rape, not consensual sex. Lewdness is not sex
[penetration]. Therefore Petitioner was not given opportunity to face
accuser for 3rd trial and force States' burden to prove original indictment
charges beyond a reasonable doubt at a fair trial.

13 (ECF No. 14-9 at 13.) On direct appeal, the Nevada Supreme Court held as follows:

14 First, Madsen contends that insufficient evidence was produced at trial to
15 support the charges against him. We disagree. The victim testified that
16 Madsen forced her to engage in sexual intercourse twice, fondled and licked
17 her breasts, and put his mouth on her vagina. This evidence alone was
18 sufficient to support the convictions. *See Mejia v. State*, 122 Nev. 487, 493
19 n.15, 134 P.3d 722, 725 n.15 (2006) ("[T]his court has 'repeatedly held that
20 the testimony of a sexual assault victim alone is sufficient to uphold a
21 conviction' so long as the victim testifies with 'some particularity regarding
22 the incident.'" (quoting *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56,
23 58 (1992))). While he contends that some of the victim's testimony
24 contradicted her prior statements, it was for the jury to determine the weight
and credibility to give the conflicting testimony. *Bolden v. State*, 97 Nev. 71,
73, 624 P.2d 20, 20 (1981). In addition, both Madsen's semen and the
victim's DNA were recovered from stains on the sofa on which the victim
indicated the abuse occurred. Madsen also admitted to the police that he
had sex with the victim. We conclude that this evidence was sufficient for a
rational juror to find beyond a reasonable doubt that Madsen was guilty of
lewdness with a child under the age of 14 and sexual assault of a child
under the age of 14. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979);
McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS
201.230(1); NRS 200.366(1), (3)(c).

25 (ECF No. 13-15 at 2-3.)

26 The trial court rejected Ground 21 of petitioner's state habeas petition as follows:
27
28

1 Even if the Nevada Supreme Court erroneously believed Madsen
2 confessed, the evidence was still sufficient to convict (victim testimony and
3 DNA evidence). Madsen seems to claim the right to be retried on all
charges because the sexual assault convictions were reversed. This claim
ignores the fact that even if the State re-tried Madsen on the sexual assault
charges, the lewdness counts were affirmed.

4 (ECF No. 14-10 at 14.) The trial court also referred to Ground 15 of the petition, which it
5 had rejected in part on the grounds that “[i]n any event Maribah Cowley did testify that
6 Madsen said he apparently did have sex with the victim.” (*Id.* at 12.) The Nevada
7 Supreme Court affirmed the trial court’s decision without addressing this specific claim.
8 (See ECF No. 14-18.) Accordingly, as the trial court’s decision is the last reasoned
9 decision of the state courts, the Court looks to that decision in evaluating petitioner’s
10 claim. See *Murray v. Schriro*, 882 F.3d 778, 801 (9th Cir. 2018).

11 The trial court’s rejection of petitioner’s claim was not contrary to, or an
12 unreasonable application of, clearly established federal law. Petitioner stated that he
13 “apparently did have sex with [A.A.]. He does not deny that. He does not remember it.”
14 (ECF No. 12-20 at 7.) The Court recognizes that whether this actually amounted to a
15 confession *is* debatable as petitioner’s statement was somewhat equivocal. But while the
16 fact of the confession is debatable, it cannot be said that *no* reasonable jurist could have
17 concluded that petitioner confessed. Furthermore, the trial court concluded that even if
18 the Nevada Supreme Court was wrong that petitioner had confessed to having sex with
19 A.A., there was still sufficient evidence to support the lewdness convictions even without
20 the confession.¹ This conclusion was not objectively unreasonable.

21
22
23 ¹The Court notes that, given the consolidated discussion of the evidence for all
24 four counts, it is not at all clear that the Nevada Supreme Court relied on petitioner’s
25 admission in concluding there was sufficient evidence on the lewdness counts as
26 opposed to the sexual assault counts. The factual predicate for the lewdness charges
27 were the acts involving the breasts and the vagina; the factual predicates for the sexual
28 assault charges were the acts of sexual intercourse. It is thus possible that the Nevada
Supreme Court did not understand the admission that petitioner had sex with A.A. to
relate to the lewdness charges. However, for the purposes of addressing petitioner’s
petition, the Court will presume that it did.

1 A federal court collaterally reviewing a state court conviction for sufficiency of the
2 evidence does not determine whether it is satisfied that the evidence established guilt
3 beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir.1992). Rather,
4 “the relevant question is whether, after viewing the evidence in the light most favorable to
5 the prosecution, any rational trier of fact could have found the essential elements of the
6 crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)
7 (emphasis in original). The *Jackson* standard “looks to whether there is sufficient
8 evidence which, if credited, could support the conviction.” *Schlup v. Delo*, 513 U.S. 298,
9 330 (1995). That is, “faced with a record of historical facts that supports conflicting
10 inferences” the court “must presume—even if it does not affirmatively appear in the
11 record—that the trier of fact resolved any such conflicts in favor of the prosecution, and
12 must defer to that resolution.” *McDaniel v. Brown*, 558 U.S. 120, 133 (2010).

13 A.A. testified that, when she was 13 years old, petitioner licked her vagina and
14 grabbed and licked her breasts before having sex with her. Petitioner was over 18 years
15 old at the time. (ECF No. 12-17 at 57-60.) A rational trier of fact, crediting A.A.’s
16 testimony, could find beyond a reasonable doubt that petitioner willfully committed two
17 lewd or lascivious acts on the body of A.A., a child under the age of 14, with the intent of
18 “arousing, appealing to, or gratifying the lusts or passions” of A.A. See NRS § 201.230.
19 Sufficient evidence therefore supports petitioner’s lewdness convictions. The Nevada
20 Supreme Court’s conclusion that this evidence alone was sufficient was not contrary to,
21 or an unreasonable application of, clearly established federal law.

22 Petitioner makes several unavailing arguments in an attempt to demonstrate that
23 the state courts’ decisions were wrong.

24 Petitioner argues that he could not have been convicted of lewdness based on his
25 admission of having sex with A.A. because lewdness cannot be committed through sex;
26 it is an act of touching against the will of the victim. He suggests that even if lewdness
27 can be committed by sexual intercourse, there was no evidence of consensual sex, only
28

1 sexual assault. As just noted, petitioner's lewdness convictions did not depend on a
2 finding that petitioner had sex with A.A., consensual or not. The convictions were
3 supported by A.A.'s testimony that petitioner licked her vagina and grabbed and licked
4 her breasts. Thus, whether lewdness can be committed through an act of sexual
5 intercourse is irrelevant. The argument is, at any rate, without merit, as under state law,
6 lewdness may be committed through consensual sex. *State v. Koseck*, 936 P.2d 836,
7 838 (1997). The Nevada courts did not, therefore, "ignore[] their own law" in affirming
8 petitioner's conviction. (See ECF No. 6 at 10.)

9 Petitioner asserts in his reply that A.A.'s testimony could not support the
10 convictions because she was not a "victim" as defined in NRS § 200.364. (See ECF No.
11 29 at 3-4). This contention is without merit. Whether A.A. was a victim under Chapter 20
12 of the Nevada Revised Statutes—the sexual assault chapter—has no bearing on whether
13 her testimony could support petitioner's lewdness convictions.

14 Petitioner argues that there was no evidence of his confession other than "police
15 hearsay" and "prosecutorial vouching." Cowley's testimony as to petitioner's statements
16 did not constitute hearsay.² NRS § 51.035(3)(a). There was, therefore, evidence of
17 petitioner's confession. Petitioner moreover fails to explain how his confession was

18 ²To the extent petitioner challenges the admission of his confession by way of
19 Cowley's testimony, the statement was properly admitted under state law. As a general
20 rule, federal courts cannot review a trial court's evidentiary rulings. *Crane v. Kentucky*,
21 476 U.S. 683, 689 (1986). A state court's evidentiary ruling, even if erroneous, is grounds
22 for federal habeas relief only if it is so fundamentally unfair as to violate due process.
23 *Dillard v. Roe*, 244 F.3d 758, 766 (9th Cir. 2001); *see also Windham v. Merkle*, 163 F.3d
24 1092, 1103 (9th Cir. 1998) (The federal court's "role is limited to determining whether the
25 admission of evidence rendered the trial so fundamentally unfair as to violate due
26 process."). Habeas relief is thus available only if an evidentiary ruling or rule was
27 arbitrary, disproportionate to the end it was asserted to promote, or so prejudicial that it
28 rendered the trial fundamentally unfair. *See Holmes v. South Carolina*, 547 U.S. 319,
324 (2006); *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.1995). Petitioner's due
process rights were not violated by the admission of his statements to Cowley.
Petitioner's statements to Cowley were not hearsay under state law, and would not be
considered hearsay under federal law. See NRS § 51.035(3)(a); Fed. R. Evid. 801(d)(2)
(statement of party opponent is not hearsay). It cannot therefore be said that admission
of the statements was unfair.

1 introduced through “prosecutorial vouching.”³ Petitioner’s argument in this regard is
2 therefore without merit.

3 Petitioner argues that the Nevada Supreme Court “ignored . . . witnesses [sic] prior
4 testimony to gain an illegal conviction.” (ECF No. 6 at 10). He also asserts that the trial
5 court improperly excluded evidence that A.A. “previously consented.” (*Id.*) In his reply,
6 petitioner asserts that A.A. first told people that petitioner had threatened her but at the
7 preliminary hearing testified that he had not. (See ECF No. 29 at 5.) He identifies no
8 other evidence of consent that was “improperly excluded.”⁴ The Court therefore
9 presumes that A.A.’s preliminary hearing testimony is the “prior testimony” and evidence
10 of “previous[] consent[]” to which petitioner refers.

11 At the preliminary hearing, A.A. denied that petitioner had threatened her; at trial
12 she testified that petitioner had forced her to have sex. A.A.’s preliminary hearing
13 testimony was brought out on cross examination, and A.A. admitted that was what she
14 had said. (See ECF 12-17 at 57-60, 65-66.) Thus, the evidence petitioner believes shows
15 A.A. “previously consented” was introduced at trial. Insofar as petitioner asserts that the
16 fact A.A. made inconsistent statements compels a finding that the evidence was
17 insufficient to support his convictions, the argument is without merit. A.A.’s inconsistent
18 statements go to her credibility and not to the sufficiency of the evidence. It was for the
19 jury to determine A.A.’s credibility, and the “jury’s credibility determinations are . . . entitled
20 to near-total deference under *Jackson*.” *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir.
21 2004); see also *McDaniel v. Brown*, 558 U.S. 120, 131–34 (2010) (the reviewing federal
22

23 ³The only vouching claim in the petition relates to petitioner’s confession. The
24 reply asserts a number of other ways that the prosecutor allegedly engaged in improper
25 vouching (see ECF No. 29 at 7-8), but the Court will not consider these claims raised for
26 the first time in the reply. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citing
27 *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003)).

28 ⁴Petitioner does refer in his reply to an allegation that A.A. had been having sex
with another person. However, even if true, it would in no way establish that she
consented to have sex with petitioner.

1 court must presume that the trier of fact resolved all inconsistencies in favor of the
2 prosecution, and must defer to that resolution). To the extent A.A.'s testimony conflicted
3 with her preliminary hearing testimony, such does not provide a basis for finding the
4 evidence was insufficient to support petitioner's convictions.

5 Relatedly, petitioner argues that exclusion of evidence that A.A. "previously
6 consented" "shifted the[] burden of proof required to uphold a conviction." (ECF No. 6 at
7 10.) It is not clear what petitioner means by this. However, the Court would note that to
8 the extent petitioner is referring to A.A.'s testimony at the preliminary hearing that she
9 was not threatened, that evidence, as just discussed, was admitted at trial. In his reply,
10 petitioner takes issue with the prosecutor's closing argument in which he stated that
11 consent is not a defense to the sexual assault charges, thereby "shifting its burden."
12 However, the Nevada Supreme Court overturned petitioner's sexual assault convictions;
13 the argument as to those convictions is thus moot. To the extent petitioner argues that
14 this argument denied him a fair trial with respect to the lewdness convictions, the Nevada
15 Supreme Court rejected any such argument because consent is not a defense to
16 lewdness. (ECF No. 13-15 at 4 n.1.) Aside from being a matter of state law, which the
17 court cannot review, this conclusion was not objectively unreasonable.

18 Petitioner also argues that "the court rejected Madsen's jury instruction." (ECF No.
19 6 at 10.) Again, to the extent petitioner is arguing entitlement to relief based on the trial
20 court's rejection of his jury instruction on reasonable mistaken consent, the claim is moot
21 as to the sexual assault charges and without merit with respect to the lewdness charges
22 because consent is not a defense to lewdness.

23 In his reply, petitioner also cites to evidence he argues proves his innocence or
24 proves the witnesses were lying, some of which was presented at trial and some of which
25 was not. (ECF No. 29 at 5-6). Evidence that was not presented at trial may not be
26 considered in evaluating whether there was sufficient evidence to support a conviction.
27 *Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("[T]he sufficiency of the evidence review

1 authorized by *Jackson* is limited to ‘record evidence.’ *Jackson* does not extend to
2 nonrecord evidence.”). As to evidence that was presented, the Court cannot second
3 guess the determinations the jury made in “resolv[ing] conflicts in the testimony,
4 weigh[ing] the evidence, and draw[ing] reasonable inferences from basic facts to ultimate
5 facts.⁵ See *Jackson*, 443 U.S. at 319. Thus, to the extent petitioner asserts that the
6 conflicting evidence entitles him to relief, the assertion is without merit.

7 Finally, in Ground 4 petitioner states: “Madsen is entitled to his own statements.”
8 (ECF No. 6 at 10.) The reply and petitioner’s various other filings suggest this statement
9 intends to assert a claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by
10 failing to provide the defense with audio tape recordings of petitioner’s August 4, 2006,
11 interview with Officer Maribah Cowley.⁶ (See ECF Nos. 29, 34, 37 & 40.) Petitioner
12 raised this claim in Grounds 11 and 16 of his state post-conviction habeas petition. (See
13 ECF No. 14-9 at 10-11.) The Nevada Supreme Court did not address petitioner’s specific
14 claim in this regard, and therefore the state trial court’s decision is the last reasoned
15 opinion.

16 The trial court rejected petitioner’s *Brady* claim on the grounds that it was
17 conclusory and because “[n]o evidence in the record supports a claim that the State
18 withheld recordings of any witness.” (ECF No. 14-10 at 10, 12.) The state courts’
19 conclusion was not objectively unreasonable.

21 ⁵Petitioner’s reply suggests that the prosecutor knowingly introduced perjured
22 testimony in violation of *Napue v. Illinois*, 360 U.S. 264 (1959) but the petition contains
23 no such claim. To the extent the petition could be read to suggest a *Napue* claim based
24 on “prior witness[] testimony,” the claim fails because inconsistencies in a witness’
25 testimony are insufficient to establish a *Napue* violation. See *United States v. Williams*,
547 F.3d 1187, 1202 n.13 (9th Cir. 2008). The Court will not consider the petitioner’s
other *Napue* claims raised for the first time in reply. *Zamani*, 491 F.3d at 997.

26 ⁶Petitioner argues in his reply that the State also failed to turn over tape recordings
27 of A.A.’s and A.A.’s mother’s interviews with Cowley, but the petition contains no such
28 claim – directly or arguably – and the Court declines to consider this claim raised for the
first time in reply. *Zamani*, 491 F.3d at 997.

1 A *Brady* claim requires showing that the prosecution failed to turn over to the
2 defense material evidence favorable to an accused. *Strickler v. Greene*, 527 U.S. 263,
3 281 (1999). The record, however, supports a conclusion that the State disclosed the
4 recording to petitioner’s counsel, which defeats petitioner’s *Brady* claim. Specifically,
5 petitioner himself filed a *pro se* document on April 7, 2008—after his first trial but before
6 his second—indicating that his attorneys had never given him “three recordings listed in
7 discovery that the State provided.” (ECF No. 10-23 at 3; *see also* ECF No. 13-19 at 2
8 (petitioner’s *pro se* request seeking a court order directing the public defender’s office to
9 provide petitioner with “discovery recordings produced by Lincoln County Sheriffs [*sic*]
10 Office: Aton, Madsen, and Hudson, also Interview by M. Cowley”); ECF Nos. 14, 14-4.)
11 The record further reflects that on November 27, 2007—before petitioner’s first trial—the
12 public defender’s office issued a subpoena to the Sheriff’s office seeking specifically “a
13 copy of any and all audio and/or video interviews conducted in this case.” (See ECF No.
14 14.) Taken together, these documents suggest the audio recordings were turned over by
15 the State to defense counsel, as they were specifically sought by petitioner’s attorneys,
16 they were listed in discovery receipts viewed by petitioner, and petitioner sought court
17 orders directing his own attorneys to provide the recordings to him. Petitioner’s
18 supplemental reply does not provide any persuasive argument to the contrary. He argues
19 only the trial court’s issuance of three subpoenas after his trial shows that the recordings
20 were not produced until then. (ECF Nos. 12-25, 13, 13-1.) The subpoenas, which broadly
21 sought petitioner’s entire case file, do not support a conclusion that the recordings had
22 until that point been withheld, particularly in light of the other evidence on the record
23 specifically suggesting the contrary conclusion. The state courts’ conclusion that no
24 evidence supported petitioner’s *Brady* claim was therefore not an objectively
25 unreasonable determination of the facts.

26 **IV. CERTIFICATE OF APPEALABILITY**

1 In order to proceed with an appeal, petitioner must receive a certificate of
2 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
3 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236
4 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial
5 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*;
6 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner
7 must demonstrate that reasonable jurists would find the district court’s assessment of the
8 constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order
9 to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
10 issues are debatable among jurists of reason; that a court could resolve the issues
11 differently; or that the questions are adequate to deserve encouragement to proceed
12 further. *Id.*

13 This court has considered the issues raised by petitioner, with respect to whether
14 they satisfy the standard for issuance of a certificate of appealability, and determines that
15 none meet that standard. The Court will therefore deny petitioner a certificate of
16 appealability.

17 **V. CONCLUSION**

18 In accordance with the foregoing, it is order that the petition for writ of habeas
19 corpus (ECF No. 6) is denied and this action is hereby dismissed with prejudice.

20 It is further ordered that petitioner will be denied a certificate of appealability, as
21 reasonable jurists would not find the Court’s decision to be debatable or wrong, for the
22 reasons discussed herein.

23 The Clerk of Court shall enter final judgment accordingly, in favor of respondents
24 and against petitioner, dismissing this action with prejudice.

25 DATED THIS 11th day of April 2018.

26 

27

MIRANDA M. DU
28 UNITED STATES DISTRICT JUDGE