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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 SEAN P. STOLL,

CASE NO. C17-5158 BHS

9 Petitioner,

ORDER ADOPTING REPORT  
AND RECOMMENDATION

10 v.

11 JAMES KEY,

12 Respondent.

13 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 19), and  
14  
15 Petitioner’s objections to the R&R (Dkt. 20).

16 On February 21, 2017, Petitioner filed his petition for writ of habeas corpus. Dkt. 1. On April 20, 2017, Respondent answered. Dkt. 13. On June 28, 2017, Petitioner  
17  
18 replied. Dkt. 18. Petitioner raised four grounds for relief:

19 1. The State presented insufficient evidence for a reasonable jury to convict  
20 him.

21 2. The trial court erred when it provided a jury instruction misinforming the  
22 jury of the definition of reasonable doubt.

1           3.       The trial court erred when it did not instruct the jury that each count must  
2 be based on separate and distinct acts.

3           4.       The trial court violated Petitioner's right to confront the witnesses against  
4 him when it admitted a videotape of a police interview of the victim. *See* Dkt. 1.

5           On August 31, 2017, Judge Creatura entered the R&R, recommending that the  
6 petition be denied. Dkt. 19. On September 11, 2017, Petitioner objected to the R&R. Dkt.  
7 20. On September 19, 2017, Respondent filed a response to the objections. Dkt. 21.

8           The district judge must determine de novo any part of the magistrate judge's  
9 disposition that has been properly objected to. The district judge may accept, reject, or  
10 modify the recommended disposition; receive further evidence; or return the matter to the  
11 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

12           Petitioner first objects to the R&R's disposition that Petitioner failed to establish  
13 that his conviction was supported by insufficient evidence. Dkt. 20 at 1–4. While  
14 Petitioner objects to the R&R's disposition, he fails to articulate any argument that was  
15 not addressed by the R&R, nor does he assign any particular error to the R&R's analysis.  
16 *See id.* The Court agrees with the R&R's analysis on this ground for relief and therefore  
17 adopts it.

18           Petitioner next argues that the R&R erroneously determined that his arguments  
19 regarding the admission of a videotaped interview were procedurally barred. To support  
20 his objection, Petitioner argues that his failure to exhaust and any procedural bars may be  
21 overcome on the basis that (1) he can show cause for the procedural default, and (2)  
22 failure to review the claims will result in a fundamental miscarriage of justice. Dkt. 20 at

1 4. Specifically, Petitioner claims that he can establish cause on the basis that he received  
2 ineffective assistance of trial and appellate counsel. *Id.* at 4–7. However, in making this  
3 argument, Petitioner advances new claims asserting ineffective assistance of trial and  
4 appellate counsel, claims that are likewise unexhausted and procedurally barred. *See* Exs.  
5 15, 17. Petitioner has made no showing that his failure to appropriately pursue his newly  
6 asserted claims for ineffective assistance of counsel can themselves be excused for “cause  
7 and prejudice.” *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (“[A]n ineffective-  
8 assistance-of-counsel claim asserted as cause for the procedural default of another claim  
9 can itself be procedurally defaulted [but may] be excused if the prisoner can satisfy the  
10 cause-and-prejudice standard with respect to *that* claim.”) (emphasis added).

11 Accordingly, Petitioner’s present arguments regarding ineffective assistance of counsel  
12 cannot be used to establish cause for the procedural default of his claim pertaining to the  
13 admission of the videotaped interview, and the Court will adopt the analysis set forth in  
14 the R&R.

15 Finally, the Court finds that Petitioner has failed to demonstrate “that jurists of  
16 reason could disagree with the district court’s resolution of his constitutional claims or  
17 that jurists could conclude the issues presented are adequate to deserve encouragement to  
18 proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citation omitted).

19 Accordingly, the Court declines to issue a certificate of appealability because Petitioner  
20 has not made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C.  
21 § 2253(c)(2).  
22

1 The Court having considered the R&R, Petitioner's objections, and the remaining  
2 record, does hereby find and order as follows:

- 3 (1) The R&R is **ADOPTED**;  
4 (2) This action is **DISMISSED**; and  
5 (3) A certificate of appealability is **DENIED**.

6 Dated this 23rd day of October, 2017.

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8   
9 BENJAMIN H. SETTLE  
United States District Judge