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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER J. HIGHTOWER,

Petitioner - Appellant,

v.

ROSANNE CAMPBELL; et al.,

Respondents - Appellees.

No. 08-56396

D.C. No. 3:06-cv-01405-DMS-  
AJB

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Dana M. Sabraw, District Judge, Presiding

Submitted August 4, 2009\*\*  
Pasadena, California

Before: CANBY, WARDLAW and CALLAHAN, Circuit Judges.

Christopher J. Hightower (“Hightower”) appeals the district court’s denial of his petition for a writ of habeas corpus, which challenges his conviction for rape in violation of California Penal Code § 261(a)(2) and forcible oral copulation in

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violation of California Penal Code § 288a.<sup>1</sup> Because the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs this case, we may grant relief only if the last reasoned decision of the state court dismissing Hightower’s petition was “contrary to, or involved an unreasonable application of, clearly established Federal law,” or “was based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d); *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). We review the district court’s order de novo, *Harris v. Carter*, 515 F.3d 1051, 1054 (9th Cir. 2008), and we affirm.

Hightower contends that alleged prosecutorial misconduct violated his due process right to a fair trial, arguing specifically that the prosecutor (1) improperly prepared witnesses in a joint session, (2) failed to inform him of this joint preparation and thereby withheld impeaching evidence necessary to his defense, and (3) misled the jury in closing argument by stating that the two witnesses did not know each other.<sup>2</sup>

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<sup>1</sup> Because the parties are familiar with the facts of this case, we repeat them here only as necessary to the disposition of this case.

<sup>2</sup> We assume without deciding that Hightower exhausted his claim concerning the prosecutor’s statements in closing argument, and therefore do not reach respondents’ contentions regarding waiver.

The California Court of Appeal's determination that Hightower's due process rights were not violated by the prosecutor's conduct was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). First, Hightower has not cited, nor could we find, any Supreme Court case establishing that it is improper, let alone a violation of a defendant's constitutional rights, to jointly prepare government witnesses. Moreover, even assuming that the joint preparation of the witnesses was improper, we cannot say that it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Both witnesses testified prior to the trial and their meeting with the prosecutor, and Hightower cites no inconsistencies between their earlier statements and their trial testimony.

Second, Hightower has not shown that clearly established federal law required the prosecutor to disclose her joint preparation, or that such disclosure constituted "impeaching evidence" subject to the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). In any event, the record shows that even without knowledge of the joint preparation, Hightower's trial counsel was able to cross-examine Martin effectively and put forth the theory that she had consciously

tailored her testimony to emulate Duszik's. Thus, even assuming some obligation on the part of the prosecutor to disclose the fact of the joint preparation, the record demonstrates no prejudice. *See Brecht*, 507 U.S. at 631; *see also United States v. Bagley*, 473 U.S. 667, 677-78 (1985).

Finally, we conclude that the prosecutor's statements in closing did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The prosecutor simply stated that the two witnesses did not "know each other," commenting on the unlikelihood that two witnesses who did not know each other at the time of their respective assaults would relay such similar stories. Although the witnesses had met during the preparation, they had not met or known each other at the time each accused Hightower of rape. Accordingly, read in context, the statements are accurate and cannot be viewed as a violation of Hightower's due process rights.

**AFFIRMED.**