

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 HECTOR MIGUEL GONZALEZ,

Case No.: 2:15-cv-00618-RFB-DJA

4 Petitioner

Order

5 v.

6 BRIAN WILLIAMS, et al.,

7 Respondents.
8

9 This case is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Hector
10 Miguel Gonzalez, a Nevada prisoner. This case is before the Court for adjudication of the merits
11 of Gonzalez’s remaining grounds for relief. The Court denies Gonzalez’s petition, denies a
12 certificate of appealability, and directs the Clerk of the Court to enter judgment accordingly.

13 **I. BACKGROUND**

14 Gonzalez’s convictions are the result of events that occurred on January 21, 2009, in Clark
15 County, Nevada. (ECF No. 14-7). In its order affirming Gonzalez’s convictions, the Nevada
16 Supreme Court described the crimes, as revealed by the evidence at Gonzalez’s trial, as follows:

17 Hector Gonzalez broke into the house where his wife Ana Gonzalez lived, and
18 attacked Ana and his sister-in-law Elsie Serpas with a knife. Hector stabbed Ana in
19 the neck and Elsie in the hand. He threatened more violence if they called the police
20 but later allowed Elsie to call 911, telling her to only ask for an ambulance, not the
21 police. After Elsie called 911, Hector stayed at the scene until the police responded.
22 At the time of the attack, Ana had an extended protective order against Hector.

(ECF No. 16-5).

23 On May 7, 2010, a jury convicted Gonzalez of count 2: burglary while in possession of a
deadly weapon in violation of a court order; count 4: battery constituting domestic violence with

1 the use of a deadly weapon resulting in substantial bodily harm while in violation of a court order;
2 count 5: battery constituting domestic violence with the use of a deadly weapon in violation of a
3 court order; count 6: coercion with the use of a deadly weapon in violation of a court order; and
4 count 8: preventing or dissuading a victim or witness from reporting a crime, commencing a
5 prosecution, or causing an arrest. (ECF No. 15-5.) The state district court sentenced Gonzalez as
6 follows: count 2: 26 to 120 months, with a consecutive term of 12 to 60 months for the deadly
7 weapon enhancement; count 4: 48 to 120 months, with a consecutive term of 12 to 60 months for
8 the deadly weapon enhancement, concurrent with count 2; count 5: 24 to 72 months, with a
9 consecutive term of 12 to 60 months for the deadly weapon enhancement, consecutive to count 4;
10 count 6: 12 to 48 months, with a consecutive term of 12 to 48 months for the deadly weapon
11 enhancement, concurrent with count 5; and count 8: 12 to 38 months, concurrent with count 5.
12 (ECF No. 16-3). The Nevada Supreme Court affirmed Gonzalez's convictions on February 24,
13 2012. (ECF No. 16-5).

14 Gonzalez filed a petition for a writ of habeas corpus (post-conviction) in state district court.
15 (ECF No. 16-7). Gonzalez's counsel filed a supplemental points and authorities in support of the
16 petition. (ECF No. 16-9). An evidentiary hearing was held on Gonzalez's petition. (ECF No. 16-
17 13). The state district court denied the petition. (ECF No. 16-14.) The Nevada Supreme Court
18 affirmed the denial of Gonzalez's petition. (ECF No. 16-17.)

19 Gonzalez dispatched his federal habeas petition for filing on or about April 1, 2015. (ECF
20 No. 10). Gonzalez's petition asserts that his federal constitutional rights were violated due to the
21 following alleged violations:

- 22 1. The state district court failed to bifurcate the proceedings.
- 23 2. Double jeopardy and redundancy principles prohibit his multiple convictions arising from a single course of conduct.
3. The state district court erred by admitting hearsay evidence.

- 1 4. The State committed misconduct during closing argument.
- 2 5. The state district court erred by refusing to proffer a “reverse flight”
instruction.
- 3 6. There was insufficient evidence to convict him.
- 4 7. There were cumulative errors.
- 5 8. His trial counsel was ineffective:
 - 6 a. His trial counsel failed to do necessary investigations and to
consult necessary experts.
 - 7 b. His trial counsel failed to file numerous pretrial motions.
 - 8 c. His trial counsel failed to file a motion to dismiss the
indictment when the State violated *Marcum*.
 - 9 d. His trial counsel failed to file a motion to bifurcate the
sentence enhancement.
 - 10 e. His trial counsel failed to file a motion in limine to exclude
bad act evidence.
 - 11 f. His trial counsel failed to file a motion challenging the
voluntariness of his statement.
 - 12 g. His trial counsel failed to file a motion for psychiatric
examination of the victim.
- 13 9. His trial counsel failed to object to prosecutorial misconduct.
- 14 10. There were cumulative errors.

15 Id. The Respondents filed a motion to dismiss Gonzalez’s petition. (ECF No. 13). Gonzalez filed
16 a response. (ECF No. 19). On March 31, 2017, this Court granted the Respondents’ motion to
17 dismiss in part: it found that Grounds 5 and 9 were unexhausted and Grounds 3 and 10 were
18 dismissed. (ECF No. 20.). This court also granted Gonzalez’s previous request for the appointment
19 of counsel. Id. Gonzalez abandoned Grounds 5 and 9. (ECF No. 22). The Respondents filed an
20 answer to Gonzalez’s petition on August 22, 2017. (ECF No. 25). Gonzalez filed a reply on March
21 20, 2018. (ECF No. 32).

22 **II. STANDARD OF REVIEW**

23 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas
corpus cases under the Antiterrorism and Effective Death Penalty Act (“AEDPA”):

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

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

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

7 A state court decision is contrary to clearly established Supreme Court precedent, within the
8 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law
9 set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are
10 materially indistinguishable from a decision of [the Supreme] Court.” Lockyer v. Andrade, 538
11 U.S. 63, 73 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405-06 (2000), and citing Bell v.
12 Cone, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly
13 established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if the state
14 court identifies the correct governing legal principle from [the Supreme] Court’s decisions but
15 unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 75 (quoting
16 Williams, 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state court
17 decision to be more than incorrect or erroneous. The state court’s application of clearly
18 established law must be objectively unreasonable.” Id. (quoting Williams, 529 U.S. at 409-10)
19 (internal citation omitted).

20 The Supreme Court has instructed that “[a] state court’s determination that a claim lacks
21 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
22 correctness of the state court’s decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (citing
23 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a
strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” Id.
at 102 (citing Lockyer, 538 U.S. at 75); see also Cullen v. Pinholster, 563 U.S. 170, 181 (2011)

1 (describing the standard as a “difficult to meet” and “highly deferential standard for evaluating
2 state-court rulings, which demands that state-court decisions be given the benefit of the doubt”
3 (internal quotation marks and citations omitted)).

4 **III. DISCUSSION**

5 **A. Ground 1**

6 In Ground 1, Gonzalez claims that his federal constitutional rights were violated when the
7 state district court failed to bifurcate the sentencing enhancement issue, or, alternatively, failed to
8 give a limiting instruction. (ECF No. 10 at 3, 7.) Specifically, Gonzalez asserts that the admission
9 of the extended protective order allowed the jury to infer that he engaged in prior criminal
10 activities. Id. at 3-4. Gonzalez explains that the jurors should have been asked to return verdicts
11 on the underlying charges before adjudicating the issue of whether he committed the offenses in
12 violation of a court order. Id. at 5. In addition to allowing the jury to infer that he had a propensity
13 towards violence, Gonzalez argues that the extended protective order also allowed the jury to infer
14 that he had a drinking problem, as it mandated that when the children were in his care, no alcohol
15 was to be consumed. (ECF No. 32 at 18). The Respondents argue that the protective order was not
16 admitted to prove Gonzalez’s character; rather, it was evidence that helped prove an element of
17 the charged offenses. (ECF No. 25 at 7).

18 On Gonzalez’s direct appeal, the Nevada Supreme Court held:

19 Because Hector failed to request that the district court bifurcate the sentence
20 enhancement for violation of a court order, he failed to preserve this issue for
21 appellate review. See Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).
22 We review unpreserved issues for plain error. Id. Under a plain error review, we
23 will “consider whether error exists, if the error was plain or clear, and if the error
affected the defendant’s substantial rights.” Calvin v. State, 122 Nev. 1178, 1184,
147 P.3d 1097, 1101 (2006). The defendant must show actual prejudice. Id.

Hector is unable to show actual prejudice by the district court’s failure to
sua sponte bifurcate the proceedings. Hector argues that the protective order creates

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