

X

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

NO. 82226-3

2008 OCT 10 P 3:02

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

FILED
OCT 10 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
CR

NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Appellant/Petitioner.

STATEMENT OF SUPPLEMENTAL AUTHORITY

Sheryl Gordon McCloud
WSBA No. 16709
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Petitioner,
Daniel Marshall Aguirre

Petitioner Daniel Marshall Aguirre hereby informs this Court pursuant to RAP 10.8 of the following supplemental authority, which is relevant to the claim that the appellate court's preclusion of cross-examination of Jimmy Aguirre conflicted with substantial Supreme Court authority on the right to present a defense and the right to cross-examine: Slovik v. Yates, __ F.3d __, 2008 WL 4459083 (October 6, 2008) (No. 06-55867).

DATED this 9th day of October, 2008.

Respectfully submitted,



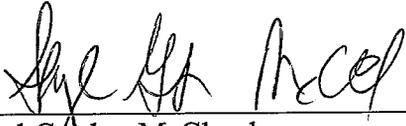
Sheryl Gordon McCloud
Attorney for Appellant,
Daniel Marshall Aguirre

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of October, 2008, a copy of the foregoing STATEMENT OF SUPPLEMENTAL AUTHORITY was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Carol LaVerne, DPA
George Oscar Darkenwald, Special DPA
Thurston County Prosecutor
2000 Lakeridge Dr. SW, Bldg 2
Olympia, WA 98502-6090

Daniel Aguirre
DOC # 303570
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520



Sheryl Gordon McCloud

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SLOVIK, <i>Petitioner-Appellant,</i> v. JAMES A. YATES, Warden, <i>Respondent-Appellee.</i>

No. 06-55867
D.C. No.
CV-05-00193-BEN/
NLS
OPINION

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted
April 9, 2008—Pasadena, California

Filed October 6, 2008

Before: William C. Canby, Jr., Andrew J. Kleinfeld, and
Jay S. Bybee, Circuit Judges.

Opinion by Judge Bybee

COUNSEL

Kurt David Hermansen, Law Office of Kurt David Hermansen, San Diego, California, for the petitioner-appellant.

Garrett Beaumont, Deputy Attorney General of the State of California, San Diego, California, for the respondent-appellee.

OPINION

BYBEE, Circuit Judge:

California prisoner Michael D. Slovik petitions for a writ of habeas corpus, contending that his confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated when a California trial court prevented him from asking questions on cross-examination

that would establish that one of the prosecution's key witnesses had likely lied under oath. The district court denied the petition. For the reasons explained below, we agree that Slovik was denied his confrontation rights and that the right was clearly established; accordingly, we reverse.

I. FACTS AND PROCEEDINGS

This case arises out of a billiard ball fight—not a billiard *hall* fight, although it certainly was that as well—but a fight involving billiard balls. On the evening of November 20, 1998, Slovik was drinking at a bar named Gusser's Carousel. It is clear that a bar fight occurred that night, and that Slovik was one of the main belligerents in that fight. After that, the details get kind of hazy. The various witnesses and participants—as the State points out, indisputably not picked from a Sunday school choir—offered conflicting testimony.¹

The prosecution relied largely on the eyewitness testimony of the bartender, Katherine Buckley-Stoffel, and bar patrons Mark Featherstone, Marilyn Woods, and Zachary Johnson. The defense relied on the eyewitness testimony of bar patron Bridgett Lewis. The trial error that is the subject of this appeal occurred during Featherstone's testimony. We are going to relate the story as each of the witnesses recounted it.

Buckley-Stoffel testified that at approximately 1:00 a.m. she stopped serving Slovik alcohol because he was intoxicated and antagonistic. In response, Slovik threw a tip at Buckley-Stoffel, yelled obscenities, and threatened to kill her as he was escorted outside. After Slovik was removed from the bar, Buckley-Stoffel attempted to shut and lock the door, but Slovik grabbed it, pushed her back inside, and then

¹Our recitation of the facts is drawn from the findings of fact in the opinion of the California Court of Appeal, whose findings are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Neither Slovik nor the State has challenged these findings.

shoved her and punched her in the shoulder. She testified that Slovik grabbed pool balls² and threw one toward Lewis and one toward her, which came within six inches of her head and broke the Plexiglas wall covering behind her. Buckley-Stoffel saw Slovik on the floor with Featherstone standing over him and then saw Slovik chasing Featherstone.

Featherstone testified that Buckley-Stoffel took Slovik's drink after Slovik did backflips through the bar. According to Featherstone, when Buckley-Stoffel asked Slovik to leave, Slovik yelled, cursed and shoved her. Buckley-Stoffel screamed for Featherstone to call 911. Featherstone further testified that as he attempted to shut the door, Slovik grabbed it and reentered the bar, shoving both Featherstone and Buckley-Stoffel against the wall. Slovik chased Lewis, and then slipped on pool sticks he had knocked down earlier. Featherstone denied touching Slovik, but claimed that Slovik chased him around the pool table, and threw two pool balls at his face. When Featherstone ducked, the balls hit the wall, and Slovik then threw a third ball.

The incident that is the basis for Slovik's habeas petition occurred during Featherstone's cross-examination. Featherstone was asked whether he was currently on probation. He answered "no." Slovik's counsel apparently had a form establishing that Featherstone had been placed on five-years' pro-

²At oral argument, counsel for both sides indicated that cue balls were thrown. We are fairly confident that not everyone was throwing cue balls, although the record doesn't reveal whether one side was stripes and the other solids. Given that there seems to have been only one pool table at the bar, there would only have been a single cue ball. Therefore, if Slovik threw multiple balls they must have been pool balls and not cue balls. In addition to the difference in color (the cue ball is, of course, white), on coin-operated tables the owners use slightly larger and heavier cue balls, or occasionally magnetic cue balls in order to ensure that the cue ball is returned to the game after a scratch. See EWA MATAYA LAURANCE & THOMAS C. SHAW, *THE COMPLETE IDIOT'S GUIDE TO POOL & BILLIARDS* 90 (1998).

bation for driving under the influence of alcohol, and he wished to impeach Featherstone with this evidence. After an unreported side-bar discussion, the trial court apparently sustained a prosecution objection under California Evidence Code § 352 to any further questioning of Featherstone about his probationary status, ruling the inquiry would be too time consuming. Although, due to the unrecorded side-bar, the written record is ambiguous as to what exactly Slovik's counsel was attempting to introduce, at oral argument the State conceded that Slovik's counsel was not permitted to show Featherstone the document and ask him an "isn't it true that" question.

Woods testified that Johnson jumped on Slovik and they began scuffling. Woods also testified that after Johnson and Slovik scuffled, others unsuccessfully tried to remove Slovik from the bar. Featherstone called 911 and Johnson ran out the back door. Woods confirmed that Slovik shoved Buckley-Stoffel and hit Buckley-Stoffel's arm. She testified that while Featherstone was on the other side of the pool table egging him on, Slovik grabbed two pool balls and threw one of them.

Johnson testified that he went to assist in the effort to remove Slovik from the bar. According to Johnson, Slovik swung at Buckley-Stoffel and missed, and when Johnson stepped in the way, Slovik swung at him instead, and they began fighting. Johnson hit Slovik twice in the back of the head and they fell.

The defense relied principally on the testimony of Lewis, another customer at the bar that night. According to Lewis, Slovik was intoxicated and belligerent and refused to leave until Buckley-Stoffel accompanied him to the door. When Lewis heard a disturbance, she went outside and witnessed Johnson holding Slovik in a chokehold against a car, as Johnson's sister screamed to "let him go!" Lewis testified that Slovik followed Johnson back into the bar, and when Lewis and Buckley-Stoffel attempted to shut the door, Slovik pushed

Buckley-Stoffel aside and entered the bar. Lewis then kicked Slovik; he threatened her, and she ran outside. Lewis witnessed Featherstone pushing Slovik, and then kicking and pushing him back down when he tried to get up. Lewis testified that after Slovik got up he angrily threw pool balls in an erratic fashion "not to pinpoint anybody out. He was just throwing them to throw them." On cross-examination Lewis testified that she was unsure what he was trying to hit: "I guess people. I don't know how." She further testified that as Slovik moved toward the door, Featherstone threw a ball in that direction.³

As a result of the bar fight, Slovik was charged with assault with a deadly weapon (the pool balls) and by means of force likely to produce great bodily injury upon Buckley-Stoffel (count one), and upon Featherstone (count two) in violation of California Penal Code § 245(a)(1); and battery upon Featherstone (count three) and Buckley-Stoffel (count four) in violation of California Penal Code § 242. A jury found Slovik guilty of counts two and four as charged, guilty of the lesser included offense of simple assault for count one, and not guilty of count three. On June 28, 1999, the trial court sentenced Slovik to 40 years to life as a result of the California three-strikes law and other sentencing enhancements.

³Lewis testified that when the police asked them to write statements, they discussed the events among themselves, and Featherstone indicated that they should not mention that he had pushed or kicked Slovik. Although she wrote that Slovik *hit* Buckley-Stoffel, she testified that she meant that he *pushed* Buckley-Stoffel when being escorted out of the bar. She explained that she did not mention the parking lot fight in her statement because the police told them to write about the incident in the bar. Lewis also failed to note in her written statement that Featherstone had thrown a pool ball, but she testified that she decided to tell the truth when she learned that Slovik would receive a long sentence.

A defense investigator testified that when he interviewed Lewis she never mentioned anyone besides Slovik throwing pool balls, but she did state that Featherstone pushed Slovik to the ground and then kicked him, and that Buckley-Stoffel and Featherstone did not plan to inform the police about either that or the parking lot fight.

Slovik appealed his conviction on numerous grounds. The California Court of Appeal affirmed Slovik's conviction on the merits, but struck some of the sentencing enhancements in an unpublished decision. The California Supreme Court denied Slovik's petition for review. In September 2001, Slovik was resentenced to 35 years to life, which the California Court of Appeal affirmed in another unpublished decision. Slovik then filed a state habeas corpus petition, which was denied by the Superior Court, the state appellate court, and the California Supreme Court.

In February 2005, Slovik filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in federal district court. Magistrate Judge Stiven recommended that the habeas petition be denied, and Judge Benitez adopted that recommendation and denied the petition on May 1, 2006. Slovik timely appealed.

II. DISCUSSION

This case is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, we may not grant Slovik habeas relief unless the last reasoned state court adjudication, here the California Court of Appeal's first unpublished decision addressing the merits of his case, "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We review de novo a district court's decision to deny a habeas petition. *Campbell v. Rice*, 408 F.3d 1166, 1169 (9th Cir. 2005) (en banc).

We granted a certificate of appealability on two questions: (1) whether Slovik's constitutional rights were violated by the trial court's exclusion of evidence that would have impeached

Featherstone; and (2) whether Slovik's right to present a defense was violated by the assault instruction given to the jury. Because we find the limitation on use of impeachment evidence for cross-examination adequate to grant the petition, we do not reach the jury instruction issue.

A. *Confrontation Clause Violation*

[1] The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has explained that the right of confrontation "means more than being allowed to confront the witness physically," but rather "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (internal quotation marks and citation omitted). The Confrontation Clause does not prevent a trial judge from imposing "reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Nevertheless, the Court has held that a defendant's Confrontation Clause rights have been violated when he is "prohibited from engaging in otherwise appropriate cross-examination . . . and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Id.* at 680 (quoting *Davis*, 415 U.S. at 318). "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* Accordingly, the defendant has met his burden when he has shown that "[a] reasonable jury might have received a significantly different impression of [a witness'] credibility had . . . counsel been permitted to pursue his proposed line of cross-examination." *Id.*

[2] Slovik's Sixth Amendment right to be confronted with the witnesses against him was violated because a reasonable jury might have received a "significantly different impression" of Featherstone's credibility had Slovik been permitted to confront Featherstone with the record of probation and cross-examine him concerning his apparent lie under oath. *See id.* During his cross-examination of Featherstone, Slovik's counsel asked "You're currently on probation right now?" to which Featherstone responded "No." When, during cross-examination, Slovik's counsel attempted to approach Featherstone with evidence that Featherstone was in fact on probation, the trial court denied permission to approach the witness with that evidence. Had Slovik's counsel been permitted to ask Featherstone something along the lines of "isn't it true that you are currently on probation for driving under the influence of alcohol?" Slovik might have shown that Featherstone's prior statement, made under oath, that he was not on probation was a lie.⁴

[3] The evidence that Featherstone was placed on five-years' probation for driving under the influence was not being proffered to establish that Featherstone was unreliable because he was on probation, but rather to establish that Featherstone was unreliable because he had lied about being on probation. It is clear to us that the jurors might have formed a significantly different impression of Featherstone's credibility if they had heard cross-examination showing that Featherstone was willing to lie under oath.⁵ Therefore, the trial

⁴At oral argument the State suggested that Featherstone was not necessarily lying because he may not have known that he was on probation. Whether Featherstone might have been innocently mistaken in telling what he thought to be the truth when he spoke falsely was a question to be argued by counsel and resolved by the jury.

⁵Slovik also argues that if Featherstone was on probation, he would have had an added motive for lying about whether he attacked Slovik first, because an assault or battery charge would have violated the terms of his probation. The State argues in response that Slovik never advised the trial

court's refusal to allow Slovik to present such evidence violated Slovik's constitutional rights under the Sixth Amendment, so clearly set forth in *Van Arsdall* and *Davis*.

The State concedes that the exclusion of the proffered impeachment cross-examination would violate Slovik's Sixth Amendment confrontation rights if the excluded testimony would have produced a significantly different impression of the witness' credibility, but it contends that exclusion of cross-examination with the record of Featherstone's probation did not significantly alter the jurors' impression of Featherstone's credibility. Inexplicably, the State argues that "[j]urors could reasonably infer from defense counsel's cross-examination question and Featherstone's answer that Featherstone committed an offense resulting in a prior placement on probation." The entire exchange proceeded as follows: Slovik's counsel asked Featherstone, "You're currently on probation right now?" to which Featherstone responded "No." It is baffling how jurors could reasonably infer from this exchange that Featherstone committed an offense resulting in a prior placement on probation. The only conclusion that a juror could reasonably draw is that Slovik's counsel was attempting to impeach Featherstone's credibility, but failed. Indeed, because use of the evidence was prohibited, it would have been improper for the jurors to read anything else into

court, pursuant to California Evidence Code § 354(a), that he intended to pursue evidence of Featherstone's current probation status to show Featherstone had a motive for testifying falsely. Although California evidentiary law is irrelevant to the determination of whether Slovik's constitutional rights were violated, the State's position may be construed as an argument that Slovik forfeited the motive argument by failing to exhaust it before the California Court of Appeal. See *Picard v. Connor*, 404 U.S. 270, 276 (1971) (explaining that a state prisoner seeking habeas review is required "to present the state courts with the same claim he urges upon the federal courts.") We need not decide whether Slovik's motive argument is exhausted because the excluded cross-examination is crucial to establish that Featherstone had lied under oath regardless of whether it also establishes a motive for Featherstone to lie.

the exchange. The State has not offered any reason why the jury would suspect that Featherstone was lying when he answered "No." The jurors were left to assume that Slovik's counsel was fishing and that Featherstone testified honestly.

The State also contends that the trial court's ruling did not significantly alter the jury's impression of Featherstone's credibility because Slovik's trial counsel had already established that some of the prosecution's witnesses were regular bar patrons, and some were on probation, and that this "sufficed to dispel any lingering illusions that the prosecutor picked his witnesses from a Sunday school choir." This argument fails to recognize the effect that cross-examination might have had on the jurors' perception of the individual witness. Although we will consider this argument again in our harmless error analysis, the fact that defense counsel impeached other witnesses bears no relevance in the confrontation right analysis, which asks whether impeaching Featherstone would have produced a significantly different impression of Featherstone's credibility. Featherstone was an important witness. He was in the middle of the dust-up and, if his testimony was believed, was a victim of Slovik's billiard-ball assault. The Supreme Court has emphasized that "the focus of the Confrontation Clause is on individual witnesses" and thus "the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." *Van Arsdall*, 475 U.S. at 680. That defense counsel was able to impeach other witnesses is irrelevant to whether the trial court's limit on Slovik's ability to cross-examine Featherstone violated the Confrontation Clause.

[4] The California Court of Appeal analyzed Slovik's claim as an evidentiary issue governed by state law, rather than a confrontation question governed by the Sixth Amendment. The California Court of Appeal approved the trial court's ruling under California Evidence Code § 352, which states:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Applying a California evidentiary standard of review, the Court of Appeal concluded that “[a]bsent a clear showing of abuse, the trial court’s exercise of discretion under this section will not be reversed.” *See People v. Avila*, 133 P.3d 1076, 1137 (Cal. 2006) (“We review for abuse of discretion a trial court’s rulings on relevance and the exclusion of evidence under Evidence Code section 352.”). AEDPA gives us no basis here for questioning a California court’s decision applying its own evidentiary rules. By treating the issue exclusively as an evidentiary question, rather than a constitutional question, however, the Court of Appeal simply applied the wrong standard; had the Court of Appeal applied *Van Arsdall* and *Davis*, we believe it would have come to a different conclusion. In this regard, the California Court of Appeal’s decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedent regarding the Confrontation Clause.

B. *Harmless Error Analysis*

[5] Confrontation Clause errors are subject to harmless-error analysis. “The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.” *Van Arsdall*, 475 U.S. at 684. In any particular case the relevant factors include “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent

of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

Applying these factors, we cannot say that the trial court's limit on Slovik's ability to cross-examine Featherstone was harmless beyond a reasonable doubt. Assuming, as we must, that the damaging potential of Featherstone's cross-examination was fully realized, the jury could have concluded that Featherstone was willing to lie under oath and could have discounted his testimony.

[6] The conviction at issue in Slovik's habeas petition is count two, assault with a deadly weapon, for throwing pool balls at Featherstone. Featherstone's testimony is critical to that conviction because Featherstone testified plainly that Slovik threw one or more pool balls at him. The only other witness who testified that Slovik may have thrown a pool ball at Featherstone is Woods. According to the California Court of Appeal, Woods testified that "while Featherstone was on the other side of the pool table egging him on, [Slovik] threw one of the balls." Given that Slovik's defense was based on self defense, and he argued that Featherstone was the aggressor, it is far from clear beyond a reasonable doubt that Woods' testimony—that Slovik "threw one of the balls" while Featherstone was egging him on—would suffice for a jury to convict Slovik of assault with a deadly weapon. Woods' testimony did not even indicate that Slovik was aiming at Featherstone, as opposed to just throwing a ball aimlessly. Moreover, Woods only testified that Slovik threw one ball and does not indicate the target of that ball, whereas Featherstone contended that Slovik threw three balls at him. Other witnesses testified either that Slovik threw pool balls haphazardly, or that he threw them at others. Lewis, for example, testified that Slovik "was just throwing [pool balls] to throw them" and was not trying "to pinpoint anybody." Featherstone's testimony thus appears crucial to the prosecution's case and is not cumulative. We cannot conclude that the prosecution's case was so strong that the trial court's decision to exclude cross-

examination on evidence discrediting Featherstone was harmless error beyond a reasonable doubt.

The State does not attempt to argue that its case was particularly strong, or that Featherstone was inconsequential to its conviction. Rather, the State alleges that even if the state court committed constitutional error, “the state court trial jurors knew that none of the trial witnesses led a purely law-abiding life.” We are not sure what we should take from this admission. This argument is presumably an attempt to show that the testimony was cumulative, but it merely serves to emphasize that the State’s case rested on the testimony of shaky witnesses and reminds us that if these witnesses were further contradicted, the jury might not have returned a conviction.

[7] The California Court of Appeal found “harmless error in the court’s excluding evidence a witness was on probation when the witness testified to the contrary.” *People v. Slovik*, No. SCE193584, at 2 (Cal. Ct. App. filed Mar. 2, 2001). The court provided no reasoning to support that statement. The court’s analysis is limited to another conclusory statement that “there is no reasonable probability of a different result had the court allowed questioning of Featherstone’s probationary status.” *Id.* at 13. The court fails to explain why there is no reasonable probability of a different result, in light of any of the factors provided by the Supreme Court to guide the harmless error inquiry. Instead, the court just concludes for a third time that “[t]he fact [that] the defense was not allowed to question Featherstone further about whether he was on probation did not result in a miscarriage of justice.” *Id.* Although it is unclear whether the California Court of Appeal simply failed to conduct a harmless error analysis, or whether it misapplied that analysis, its conclusion that the trial court’s exclusion of the evidence of Featherstone’s probation was harmless error either contradicted or unreasonably applied established federal law as determined by Supreme Court precedent. *See Van Arsdall*, 475 U.S. at 684.

III. CONCLUSION

[8] We reverse the denial of the petition, and direct the district court to issue an order stating that a writ of habeas corpus will be issued with regard to Slovik's assault conviction unless he is retried or resentenced within a reasonable period of time to be determined by the district court.

REVERSED AND REMANDED.