IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THAO LOR,

Petitioner,

v.

PHIL KINGSTON, Warden,
Jackson Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

00-C-500-C

REPORT

Petitioner Thao Lor, a prisoner at the Jackson Correctional Institution in Black River Falls, Wisconsin, has applied for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges a 1997 judgment of conviction entered by the Circuit Court for Milwaukee County after a jury convicted him of three counts of second-degree sexual assault of a child, three counts of child enticement, three counts of soliciting a child for prostitution and one count of first-degree sexual assault, as a party to the crime.

Petitioner raises three grounds for relief: 1) the trial court violated petitioner's due process rights when it erroneously admitted at trial evidence of other bad acts; 2) the evidence at trial was insufficient to support petitioner's convictions on the three charges of soliciting a child for prostitution; and 3) the evidence at trial was insufficient to support petitioner's

convictions of sexually assaulting Amber L. Petitioner has exhausted his state court remedies by presenting each of these claims on direct appeal to the Wisconsin Court of Appeals and in a petition for review with the Wisconsin Supreme Court. Because petitioner cannot show that he was denied a fundamentally fair trial or that the court of appeals determined the facts or applied clearly established federal law in an unreasonable manner as required by 28 U.S.C. § 2254(d), this court should deny the petition.

Facts

I. Background Facts

In an unpublished opinion, the Wisconsin Court of Appeals adduced these facts: On or about March 26, 1996, Mang T. and Amber L., two fourteen year old girls, along with their friend Tara, a fifteen year old girl, ran away from a group home in Sheboygan. The girls got a ride with a friend to Milwaukee, where they eventually began spending time with petitioner. Mang knew petitioner from an encounter with him about a month earlier, when he had sexually assaulted her.

At petitioner's insistence, the girls began engaging in prostitution for him. Petitioner would drive the girls to clubs and taverns, where he would order them to wait in the car while he invited men to come outside and look at them. Petitioner would then transport the girls to

various motels where he would order them to have sex with the various customers who arrived. This scenario occurred several times over the course of a three-week period.

During this time, petitioner provided the girls with alcohol and marijuana but he did not give them any money. However, petitioner told Mang more than once that he made good money from the girls' work. Petitioner also told Tara on at least one occasion that he was going to get money from two men if she and Mang had sex with them.

When the girls resisted having sex with his customers, petitioner would threaten to "ditch" them on an isolated highway. Also, petitioner had a gun, which he threatened to use on one occasion if the girls didn't do what he said. *State v. Lor*, 226 Wis. 2d 159, 594 N.W. 2d 418 (Ct. App. 1999) (unpublished opinion), attached to Answer, dkt. #7, Exh. D.

II. Petitioner's Trial

In the Circuit Court for Milwaukee County the state charged petitioner with three counts of second degree sexual assault, three counts of child enticement, three counts of soliciting a child for prostitution, and one count of first-degree sexual assault, as a party to the crime. The charges arose from petitioner's activities with the girls on two dates, March 29 and 30, 1996, involving three Milwaukee-area hotels: the EconoLodge, the Park Motel and the Safari Motel.

Before trial, the state moved in limine for an order allowing it to introduce evidence of other bad acts that were not charged in the information. Specifically, the state sought to allow the victims to describe the entire chain of events that occurred during the three weeks they spent with petitioner even though it included criminal behavior by petitioner beyond the discreet acts alleged in the information. Some of this "other acts" evidence included evidence that petitioner took the girls to Cicero, Illinois on at least two occasions where he made them have sex with other men. At a pretrial motion hearing, petitioner objected to the state's motion, contending that allowing the jury to hear evidence of other acts not charged in the information would unduly prejudice him. The trial court ruled that the state would be required to make an offer of proof before the witnesses testified as to the extent to which the other acts evidence was required for context and continuity, at which time the court would consider the prejudicial effect of the proffered testimony.

Petitioner's trial started on May 5, 1997. At trial, the state presented the testimony of Mang and Tara, who described numerous instances in which they and Amber had sex with men whom petitioner had solicited from bars and clubs, including incidents at the Park Motel on March 29, 1996 and at the Econolodge on March 30, 1996. Mang and Tara testified that on March 29, 1996, petitioner drove them to the Club 29 and ordered them to wait in the car while he went in; when he returned, there were several men with him. Eventually, after

switching vehicles and shuttling between motels, Mang and Tara were taken to the Park Motel, where they had sex with two men, Lue Thao and Goo Vang.

Mang and Tara testified that sometime the following evening, they were driven to an Econolodge in Milwaukee. When they got there, they met up with Amber, petitioner, and some other Asian men. Later on, about four or five Asian men came to the hotel room and had sex with Mang, Tara and Amber. Mang and Tara testified that when Mang refused to have sex with Louie, petitioner and two other men held her down so that Louie could have sex with her. Tara testified that during the night at the Econolodge, petitioner had sex with her and with Amber. Mang testified that Amber was fourteen years old when they met in March 1996.

The state also presented the testimony of Michelle W., who was a friend of Amber's and who was with Amber on the night of March 29, 1996. Michelle described a sordid scene at the Safari Motel in which Amber had sex with several Asian men in succession while others, including Michelle and petitioner, were in the room. Michelle testified that when Amber at first resisted, one of the men pulled a gun and threatened to shoot her if she did not cooperate. Among the men whom petitioner observed Amber having sex with was petitioner. Michelle testified that later that evening, petitioner took her and Amber to another hotel where Amber had intercourse with two other Asian men.

The state also presented the testimony of three of petitioner's former customers, Goo Vang, Sa Vang and Tong Vang. Goo Vang testified that he went to a bar with his friend, Lue

Thao, on March 29, 1996, where they met up with petitioner. Goo Vang testified that he gave Lue Thao forty dollars to give to petitioner so he could take Mang and Tara to a motel to have sex with them. According to Goo Vang, he and Lue Thao ended up at the Park Motel with Mang and Tara. When the girls refused to have sex with them, Vang and Lue Thao took the girls back to petitioner's motel so they could get their money back. According to Vang's testimony, petitioner refused to refund the money but sent Amber and Michelle with him instead. Vang testified that he and Lue Thao each had sex with Amber and then Thao brought Amber and Michelle back to the Safari. At about three or four in the morning, petitioner came to the Park Motel with Mang and Tara, and Vang and Lue Thao proceeded to have sex with both girls.

Sa Vang testified that petitioner came to his house one night and asked Vang to come with him because petitioner had some girls. Sa Vang testified that after a brief stop at the Club 29, petitioner drove him to the Econolodge where Amber, Tara, Mang and a man nicknamed Buddha were present. According to Sa Vang, he saw Buddha have sex with Tara; Vang then had sex with Tara later in the bathroom. Vang testified that over the course of the evening, eight or nine Asian men came into the motel room and had sex with Tara and Amber, while Mang had gone to another motel room with a customer who rented his own room because he did not want spectators. Petitioner told Vang that he was making money from the girls.

Tong Vang testified that he saw his cousin, Sa Vang, with petitioner outside the Club 29 one night in early March 1996. Sa Vang and petitioner told Tong Vang that they were going to have fun with some girls in a motel. Tong Vang went with petitioner and Sa Vang to a motel where he saw Amber, Tara and Mang. Tong Vang eventually had sex with Tara that night. Tong Vang testified that he understood that petitioner was taking the girls to hotels to have sex with other men for money, and that petitioner told him that "whoever want to have sex with those girls, they have to pay money."

During Mang's testimony, petitioner's lawyer objected when she began to testify about similar events in Cicero. The court overruled the objection without explanation and without requiring an offer of proof from the state. As a result, the jury heard about two times when petitioner took the girls to Cicero and coerced them into having sex with other Asian males. They also heard the girls testify about a trip they took to Cicero with an individual named T.K. that occurred before the girls started engaging in prostitution for petitioner.

Petitioner did not present any evidence at trial. His lawyer argued that the evidence presented by the state showed that the three girls were not working for petitioner but were having sex with numerous men on their own accord because they found it exciting. The jury found petitioner guilty of all 10 counts charged in the information.

III. Petitioner's Appeal

Petitioner appealed his conviction to the Wisconsin Court of Appeals. Petitioner argued that the trial court had exercised its discretion erroneously by allowing "other acts" evidence concerning the girls' activities in Cicero without considering first, whether the evidence fit within an exception under Wis. Stat. § 904.04(2), and second, whether the evidence was more prejudicial than probative, as required by Wis. Stat. § 904.03. Agreeing that the trial court had not explained its reasoning for allowing the state to present the Cicero evidence, the court of appeals reviewed the record independently to determine whether there was a basis to sustain the trial court's decision. *See State v. Lor*, dkt. 7, Exh. D. Applying Wisconsin law, the court determined that the trial court had properly admitted the evidence because it was necessary for a full presentation of the state's case and to rebut the defense's attacks on the girls' credibility. Also, the court agreed with the state that the evidence concerning acts of prostitution in Illinois was admissible as substantive evidence against petitioner on the offense of soliciting a child for prostitution in violation of Wis. Stat. § 948.08. *See* Court of Appeals' Opinion, dkt. #7, Exh. D at 4-6.

Next, the court rejected petitioner's contention that the evidence adduced at trial was insufficient to support his conviction for three counts of soliciting a child for prostitution because none of the witnesses testified that he or she saw petitioner receive money. After setting out the familiar legal standard for challenges to sufficiency of the evidence, the court recounted the various pieces of evidence that established petitioner's guilt as follows:

> Lor's own words, and those of his customers, established that he was prostituting the girls for money. Lor's friend, Tong Vang, testified that Lor told him directly that whoever wanted to have sex with the girls had to pay him (Lor). In addition, Sa Vang testified that Lor came to his house, told him that he had some girls and invited him to come along for a ride. Sa Vang then described how Lor first took them to Club 29, and then to the EconoLodge, where he saw Lor escort Amber, Tara, Mang, and four or five men into the motel. Sa Vang testified that when he asked Lor what all the other men were doing there, Lor told him that he was making money from the girls. Lor argues that Sa Vang's testimony was incredible because he entered into a plea agreement with the State. We reject his argument, however, because he asks us to determine the weight of the evidence and credibility of the witnesses, which are determinations to be made by the trier of fact.

Id., at 7-9.

Finally, the court rejected petitioner's argument that the state failed to prove the charge of second-degree sexual assault of Amber because the state did not introduce either a certified birth certificate or a stipulation to Amber's age. Noting that all that was required was evidence of the victim's age at the time, the court found it sufficient that Mang had testified that Amber was fourteen years old when they met in March 1996. *Id.*, at 9.

The Wisconsin Supreme Court denied petitioner's petition for review on June 7, 1999. On August 11, 2000, petitioner filed his habeas petition with this court.

Analysis

I. Standard of Review

Each of the claims that petitioner raises in his habeas petition was reviewed on its merits by the Wisconsin Court of Appeals. In order to show that he is entitled to habeas relief, petitioner must demonstrate that the state court's adjudication of his claims

> (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).

Under the "contrary to" clause of § 2254(d)(1), federal habeas relief may be granted only if the state court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decided a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 120 S. Ct. 1495, 1523 (2000). Under the "unreasonable application" clause, federal habeas relief may be granted only if the state, after having identified the correct governing legal principle from the Supreme Court's decisions, then unreasonably applied that principle to the facts of petitioner's case. *Id.*

II. Petitioner's Claims

A. Admission of Other Bad Acts Evidence

Petitioner first contends that the trial court's admission of other bad acts evidence "and other acts of sexual assault and prostitution committed by third parties that has nothing to do with the defendant" violated his rights to due process. I presume that petitioner is referring to the Cicero evidence. If petitioner is claiming that there is additional evidence of other bad acts that was admitted erroneously, he has procedurally defaulted this claim by failing to raise it in the state court of appeals. *See Kurzawa v. Jordan*, 146 F.3d 435, 440 (7th Cir. 1998) (to avoid default, petitioner must not only show that he exhausted all available state remedies on his claim, but also that he adequately raised his claims during the course of the state proceedings).

Moreover, in order to avoid defaulting his evidentiary claim, petitioner must have framed it in federal constitutional terms when he presented it to the state courts. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). As the Supreme Court stated in *Duncan*,

> [i]f state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Id. For instance, a petitioner cannot simply claim that the prejudicial effect of admitted evidence outweighed its probative value; the petitioner must at least claim that the evidence was so inflammatory that it prevented a fair trial. *Id.* at 366.

It is a close call whether petitioner adequately presented his due process claim to the Wisconsin court of appeals. Petitioner never used the phrase "due process" in his brief. However, he did argue that the admitted evidence concerning the events in Cicero was so prejudicial that it unfairly affected the outcome of the trial. *See* dkt. # 7, Exh. B at 15-16. Additionally, petitioner cited the due process clause in his petition for review with the Wisconsin Supreme Court. *See id.,* Exh. E at 1. Although it is difficult to conclude from these oblique references that the state courts were fairly alerted to petitioner's due process claim, I will give the petitioner the benefit of the doubt and consider his claim on the merits.

Because the admissibility of evidence is generally a matter of state law, a federal court can issue a writ of habeas corpus on the basis of a state court evidentiary ruling only when the probative value of the evidence was so greatly outweighed by its prejudice that its admission violated the defendant's right to due process by denying him a fundamentally fair trial. *See Milone v. Camp,* 22 F.3d 693, 702 (7th Cir. 1994). This means that the error must have produced a significant likelihood that an innocent person has been convicted. *Howard v. O'Sullivan*, 185 F.3d 721, 723-24 (7th Cir. 1999) (internal citations omitted).

To prove that petitioner was guilty of soliciting a child for prostitution, the state had to prove beyond a reasonable doubt that he had intentionally "command[ed], encourage[d], or request[ed]" the girls to "engage in sexual intercourse or other sexual acts for (money) on an ongoing basis." *See* Wis. JI-Criminal 2136 (1997). To prove the child enticement counts, the

state had to prove that petitioner had caused or attempted to cause the girls to go into any vehicle, building, room, or secluded place and that petitioner did so with the intent to cause the girls to engage in prostitution. *See* Wis. Stat. § 948.07; Wis. JI-Criminal 2134. To prove the second degree sexual assault charges, the state had to prove that petitioner had sexual intercourse with each of the girls and that the girls were under 16 years of age at the time. *See* Wis. JI-Criminal 2104. Finally, to prove the first degree sexual assault charge, the state had to prove that someone had sexual intercourse with Mang, without her consent, by the use or threat of use of violence, and that petitioner aided and abetted that person. *See* Wis. Stat. § 940.225(1).

The trial court's admission of the Illinois evidence did not deprive petitioner of a fair trial. The other evidence against petitioner was overwhelming. The Illinois evidence was but a drop in the evidentiary bucket; whatever its potentially prejudicial effect, it could not have altered the jury's verdict to petitioner's detriment. The properly admissible evidence included Mang and Tara's corroborative descriptions of the events at the Park Motel and the EconoLodge and their testimony that petitioner was being paid for their activities; Michelle's testimony regarding Amber's activities at the Safari while petitioner looked on; the testimony of Sa Vang, who testified that he observed the girls having sex with various Asian men at the EconoLodge in Milwaukee and that petitioner told him he was making money from the girls; the testimony of Goo Vang, who described how he gave forty dollars to his friend Lue Thao,

who in turn gave the money to petitioner, so that he could go to a motel to have sex with the girls; and the testimony of Tong Vang, who testified that petitioner told him that whoever wanted to have sex with the girls would have to pay him money. Proof of petitioner's role in the first degree sexual assault was established by Mang, who testified that after she balked at having sex with a customer named Louie at the EconoLodge, petitioner held her down while Louie had sex with her. As for the three counts of second degree sexual assault, Mang and Tara each testified that petitioner had sex with them, and they also observed him have sex with Amber at the EconoLodge in Milwaukee. Michelle and Tara also testified that they observed petitioner have sex with Amber.

In short, the evidence showed that petitioner had established a pattern in Milwaukee of offering the girls up to his friends and other men for money; the Cicero evidence was just more of the same. Because there is no doubt that petitioner would have been convicted even in the absence of that evidence, he is not entitled to habeas relief on this claim.

B. Sufficiency of the Evidence: Soliciting a Child for Prostitution

Petitioner next contends that there was insufficient evidence to support the jury's guilty verdict on the soliciting a child for prostitution. Under the due process clause of the Fourteenth Amendment, a defendant may not be convicted of a criminal offense unless there is evidence sufficient to convince the trier of fact beyond a reasonable doubt of the existence of every

element of the offense. *See In re Winship*, 397 U.S. 358, 364 (1970). Applying this standard to convictions obtained after a trial, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

When applying this standard to state court convictions, federal courts must apply the state law defining the offense in question. *Id.*, 443 U.S. at 324; *see also Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (federal court conducting habeas review is limited to determining whether conviction violated Constitution, laws or treaties of United States and may not review matters of state law). Additionally, under § 2254(d), a federal court conducting habeas review must defer to the findings made by the state courts.

Petitioner contends that the evidence adduced at trial was insufficient to support his convictions for soliciting a child for prostitution because none of the witnesses saw him receive any money. He also contends that the witnesses who testified that money was involved in the crimes were incredible because they were testifying pursuant to a plea agreement with the state. The court of appeals squarely rejected these arguments, finding it sufficient that two of petitioner's friends, Sa Vang and Tong Vang, testified that petitioner told them that he was making money from the girls and it was the jury's prerogative whether or not to believe the witnesses. Having reviewed the trial transcript, I conclude that the court of appeals reasonably

determined the facts and reasonably applied the law to these facts. Because petitioner cannot make the showing that is required under § 2254(d), habeas relief is not available to him on this claim.

C. Sufficiency of the Evidence of Second Degree Sexual Assault of Amber

Lastly, petitioner contends that the evidence adduced at trial was insufficient to support his conviction of second degree sexual assault of Amber L. because Amber did not testify. This contention merits little discussion. Insofar as petitioner is raising the same argument that he made in the court of appeals, that is, that the evidence was insufficient to prove Amber's age, the court of appeals properly rejected the argument, finding that Amber's age was established through Mang's testimony. Petitioner has not shown how this conclusion involved either an unreasonable determination of the facts adduced at trial or an unreasonable application of federal law.

Insofar as petitioner is contending that the jury could not find him guilty of the other elements of second degree sexual assault without Amber's testimony, he has procedurally defaulted this argument by failing to present it to the Wisconsin Court of Appeals. Even if he had not defaulted this claim, it would have gone nowhere: Mang and Tara both testified that they saw petitioner have sex with Amber at the EconoLodge. This was not hearsay, as petitioner contends, but was firsthand eyewitness testimony upon which the jury could

reasonably have found that petitioner had sex with Amber. Petition is not entitled to habeas relief on this claim.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I respectfully recommend that petitioner Thao Lor's petition for a writ of habeas corpus be dismissed.

Entered this 20th day of December.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge