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

OBEA S. HAYES,

Petitioner,

v.

MATTHEW FRANK, Secretary,
Wisconsin Department of Corrections,

Respondent.[1]

REPORT AND
RECOMMENDATION

05-C-329-C

REPORT

Before the court for report and recommendation is Obea S. Hayes's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Hayes challenges his September 13, 2000, conviction for second degree sexual assault in the Circuit Court for Rock County. Hayes was convicted at the same trial of other serious crimes but he does not challenge the lawfulness of those convictions. Hayes contends that he is in custody in violation of the Fourteenth Amendment to the Constitution of the United States because the evidence at his trial did not sufficiently establish the element of force or violence required to support a conviction of second degree sexual assault.[2]

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[1] Hayes recently was released on parole, which still satisfies the "in custody" requirement of 28 U.S.C. § 2254(a), *see Jones v. Cunningham*, 371 U.S. 236, 242 (1963), but requires changing the respondent, *see* Advisory Committee Notes to Rule 2, Rules Governing Section 2254 Cases.

[2] In his petition, Hayes also raised other unexhausted challenges to his conviction. Upon learning that he either had to proceed solely on his exhausted claims or have his mixed petition dismissed without prejudice, Hayes opted to proceed on this exhausted claim and drop the rest. *See* dkt. 3.

Hayes presented this claim to the state court of appeals and state supreme court. Both courts applied the rule set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979) to conclude that the evidence was sufficient to support Hayes's conviction. These conclusions were not unreasonable; therefore I am recommending that this court deny the petition.

FACTS

In March 2000, in Rock County, petitioner Obea Hayes's ex-girlfriend (M.M.) reported that on March 24, 2000, Hayes had burst into her apartment and attacked her. On March 27, 2000, the state filed a seven count criminal complaint against Hayes, including as Count 1 a charge of second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(a). The elements of second-degree sexual assault are:

> (1) The defendant had sexual contact with the victim;
>
> (2) The victim did not consent to the sexual contact; and
>
> (3) The defendant had sexual contact with the victim by use or threat of force or violence.

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During pretrial proceedings four charges were dismissed, severed or pled out, and Hayes went to trial on the charges of second degree sexual assault, substantial battery and criminal trespass.

At trial, M.M. testified that she is 4' 11" and 95 pounds. She testified that she and Hayes previously had lived together in her apartment and had had a sexual relationship.

M.M. stated that she ended the relationship in October 1999 after Hayes had come to the apartment and kicked in the door.

M.M. testified that on the date of the attack, she lived alone and had not renewed her relationship with Hayes. During direct examination, she testified that on March 24, 2000, Hayes barged into her apartment uninvited, and accused her of "messin' around." Hayes told her that he was going to have sex with her because that was his "thing," and told her that he was going to throw her down on the floor and have sex with her. She said Hayes then touched her breasts, buttocks and vaginal area. At some point during the encounter, she and Hayes struggled: M.M. testified that Hayes choked her, shoved her against the bathroom wall, and grabbed her hand, breaking her finger in the process. On cross-examination, M.M. testified that the breast-grabbing "went on for quite awhile, because I kept on wrassling with him, and all of that kind of stuff, to try to get him away from me."

In contrast, Hayes testified that he had never grabbed M.M.'s breasts or buttocks, never attempted to fondle her vaginal area, and never tried to harm her by choking her or twisting her finger. He claimed that he and M.M. actually had resumed their relationship and he was living in M.M.'s apartment off-and-on.

The jury found Hayes guilty of all three charges. The court sentenced Hayes to ten years in prison on the sexual assault conviction, plus lower sentences on the other charges.

On appeal, Hayes contended that the evidence was insufficient to support the conviction. He conceded that the evidence was sufficient to prove beyond a reasonable

doubt that he had had sexual contact with M.M. without her consent, but contended that the record failed to establish that he had done so by use or threat of force or violence. He argued that it was unclear from M.M.'s testimony whether his alleged use of force occurred before or after the sexual contact; if it was afterwards, then he could not be guilty of second-degree sexual assault.

After rejecting the state's contention that Hayes had waived his right to challenge the sufficiency of the evidence by failing to raise the issue during the trial, the court of appeals concluded that the evidence was sufficient to support the conviction. *State v. Hayes*, 2003 WI App 99, ¶¶ 2-5, 264 Wis. 2d 377, 663 N.W. 2d 351.

Hayes sought and obtained review from the Wisconsin Supreme Court. Like the court of appeals, the state supreme court concluded that Hayes had not waived his right to a review of the sufficiency of the evidence by failing to raise the issue during the trial. *State v. Hayes*, 2004 WI 80, ¶¶ 5-54, 273 Wis. 2d 1, 681 N.W. 2d 203.[3] The supreme court then found that the evidence adduced at trial had been sufficient to show that Hayes used force to achieve nonconsensual contact with M.M. *Id*. at ¶¶ 55-65.

Using the standard set forth in *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W. 2d 752 (1990), the court asked whether "the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting

[3] Most of the court's opinion is devoted to the waiver issue. Although the justices' competing analyses are interesting, the discussion is irrelevant to Hayes's §2254 petition.

reasonably, could have found guilt beyond a reasonable doubt." *Hayes*, 2004 WI 80, at ¶56. After noting that the use of force element of the statute was satisfied "whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission," *id.*, at ¶59, the court rejected Hayes's claim. Although the court agreed with the court of appeals that M.M.'s testimony "did not follow a chronological order," it found that

> [a] reasonable factfinder could, however, draw the inference that the defendant verbally threatened to have retaliatory sex with M.M. and that the sexual contact occurred while he was wrestling and struggling with her to overcome her resistance. Wrestling, struggling, verbally threatening unwanted sex, tearing the victim's clothes, and breaking her finger are a sufficient use or threat of force or violence to support a conviction under Wis. Stat. § 940.225(2)(a) . . . We cannot conclude that the evidence in support of the defendant's conviction is so lacking in probative value and force that it can be said, as a matter of law, that no reasonable trier of fact could have drawn the inference that force or the threat of force or violence was used prior to or during the sexual contact to compel the victim's submission.

Id. at ¶¶ 64-65.

ANALYSIS

In his federal petition Hayes has reasserted his sufficiency-of-the-evidence claim. Pursuant to 28 U.S.C. § 2254(d), this court may grant habeas relief only if the state courts' adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or if it 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.

As a starting point, when the state court applies a rule that is the same as the governing law set forth in Supreme Court cases, it does not act "contrary to" Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The test applied by the state supreme court to petitioner's sufficiency-of-the-evidence claim was whether "the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt," *Hayes*, 2004 WI 80, at ¶56, citing *State v. Poellinger*, 153 Wis.2d at 507). This test conformed with clearly established federal law, as set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979):

> When reviewing a challenge to the sufficiency of the evidence, courts look to see whether the evidence, viewed in the light most favorable to the prosecution, permits *any* reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt.

Thus, the only question for this court is whether the state court's application of the rule to petitioner's claim was unreasonable. In a case involving a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). A decision that is at least

minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

A defendant's challenge to the sufficiency of the evidence poses a "nearly insurmountable hurdle" because of the deference courts must pay to jury verdicts. *United States v. Frazier*, 213 F.3d 409, 416 (7th Cir. 2000). This hurdle is made even higher by § 2254(d), which requires this court to defer even to incorrect-but-not-unreasonable state court decisions.[4] As a result of this double-deference, it would be a rare case in which a state prisoner could obtain federal habeas relief on his challenge to a state court decision denying his claim of insufficient evidence.

This is not one of those rare cases. Hayes's claim is very narrow: he contends that M.M.'s testimony did not sufficiently establish that he made sexual contact with M.M. "through the means of" use or threat of force. He argues that M.M.'s narrative left unclear whether their struggle occurred before or after the sexual contact. If it was afterwards, argues petitioner, then he could not be guilty of nonconsensual contact "by use or threat of force."

The fairest way to analyze this claim is to review M.M.'s relevant testimony in its entirety. Appendix A to this report contains that testimony. Despite M.M.'s occasional lack of precision, her testimony was clear enough to support the jury's finding that Hayes achieved nonconsensual sexual contact with her by use of force or threats of force. As both

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[4] *See Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003) for a primer on distinguishing "reasonably erroneous" from "unreasonably erroneous" applications of Supreme Court precedent.

state courts noted, although M.M.'s testimony did not follow a chronological order, the jury nonetheless could conclude from it that Hayes used force or the threat of force to compel M.M.'s submission to Hayes's sexual contact.

M.M. testified that Hayes kept grabbing her breasts while she was wrestling with him and trying to get away; he told her he wanted to have sex with her as he was tearing at her clothes; and he told her he wanted to throw her on the floor and have sex with her before he began groping at her. I agree with the state courts that, read in its totality, M.M.'s testimony was sufficient to allow the jury to reasonably conclude that Hayes's sexual contact with M.M. occurred while he wrestled with her to overcome her resistance. Because the state courts reasonably applied the standard set forth in *Jackson* when they rejected Hayes's claim, the petition must be denied.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Obea Hayes for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be DENIED.

Entered this 4th day of November, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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U.S. Magistrate Judge

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November 4, 2005

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Re: Hayes v. Frank
Case No. 05-C-329-C

Dear Mr. Hayes and Ms. Moeller:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before November 21, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 21, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge