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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RYAN JUDSON MOORE,
Petitioner,

v.

SCOTT FRAUENHEIM,
Respondent.

No. 2:19-cv-155-WBS-EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a California state prisoner who, proceeding with counsel, brings an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He was convicted in the Solano County Superior Court of second degree murder (Pen. Code § 187, subd. (a)) and firearm enhancements (§§ 12022.53 (b)-(d)). The instant habeas petition raises three claims. First, petitioner argues that the state court erred when it concluded that his constitutional rights were not violated in light of a juror's prejudicial statements during deliberations. Second, he argues that the state court of appeal unreasonably concluded that the jury's discussions regarding his failure to testify did not amount to federal constitutional error. Third, petitioner argues that the state court of appeal unreasonably concluded that the instructions on involuntary manslaughter did not relieve the prosecution of its burden of proof on the issue of malice.

For the reasons stated below, it is recommended that the petition be denied.

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1 FACTUAL BACKGROUND

2 Both petitioner and the respondent accept¹ (and reproduce in their briefs) the state court of
3 appeal's summation of the facts. ECF No. 1 at 16; ECF No. 19-1 at 9. The court has reviewed
4 the record and, having done so, finds nothing therein that clearly and convincingly rebuts the
5 summation. *See Moses v. Payne*, 555 F.3d 742, 746 n. 1 (9th Cir. 2009) ("Because this initial
6 statement of facts is drawn from the state appellate court's decision, it is afforded a presumption
7 of correctness that may be rebutted only by clear and convincing evidence."). Thus, the
8 summation is reproduced here:

9 *Prosecution Case*

10 On October 23, 2012, at around 7:00 or 8:00 p.m., Moore invited his
11 friend, Timothy W., over to play a video game. Timothy walked to
12 Moore's house in Suisun City. When Timothy arrived at Moore's
13 house, he walked in through the open front door, used the restroom,
14 then returned to the living room and sat down in a tan recliner. Moore
was standing by a blue recliner. Brown, who was a friend of Moore's
and the girlfriend of Timothy's uncle, was sitting on the couch.²
Brown and Moore were acting friendly.

15 Moore asked Brown to make him a burrito. She agreed and went to
16 the kitchen. Meanwhile, Moore received a text message from his ex-
17 girlfriend, which he showed to Timothy. Immediately thereafter,
18 Moore looked "sad" and "down." Timothy asked, "can we play the
19 game now[?]" Brown returned from the kitchen, handed Moore a
20 plate with the burrito, and sat down again on the couch. Moore put
21 the plate down and picked up a bottle of tequila, which he guzzled
22 "like it was water." Moore's sister called and asked to borrow a tool.
23 After Moore refused, his sister hung up. Moore said, "my family
24 hates me" and guzzled more tequila, still appearing sad.

25 ¹ Petitioner offers the qualification that he "accepts the Court of Appeal's summary of
26 procedural and general evidentiary facts except to the extent it is inconsistent with the express or
27 implied factual averments and/or legal arguments set forth below." ECF No. 1 at 16. Having
28 reviewed the petition, the court concludes that nothing therein contradicts the summation.
Petitioner does offer additional background discussing why the state's own evidence militated in
favor of an involuntary manslaughter verdict (*id.* at 20-22), but this additional context/argument
does not contradict or otherwise invalidate the state court's summation.

² [footnote in original text] Moore was letting Brown stay at the house for a few days
because Timothy's uncle had obtained a restraining order against her.

1 While remaining seated in the recliner, Moore began playing with a
2 butterfly knife. Timothy told Moore, who was two or three feet from
3 him, not to play with the knife because it could “fly out of his hand
4 and cut one of us.” Brown said, “he’s not going to cut me.” The
5 knife fell out of Moore’s hand and dropped to the floor. Moore stood
6 up and went to a corner of the room, where he picked up a rifle
7 without saying anything.³ Moore held the rifle with two hands and
8 banged the barrel of the rifle against his head twice.

9 Timothy, who was still seated in the tan recliner, told Moore, “put
10 the gun down.” Moore did not and, while standing about one foot
11 away from Brown, aimed it at Brown’s front left side. Moore was
12 still using both hands to hold the rifle—one hand was on the front of
13 the gun and the other was on the trigger. Timothy told Moore to take
14 his finger off the trigger. Brown said, “he’s not going to shoot me.”
15 Moore “fired the gun.”⁴

16 Timothy asked Moore: “Did you shoot her? Did you shoot her? Like
17 are you playing? Are you playing?” After being shot, Brown stood
18 up and said, “this mother fucker shot me.” She slumped and held
19 her side. Moore dropped the rifle, went to Brown, and attempted to
20 stop the bleeding and give her cardiopulmonary resuscitation.
21 Fearing for his own life, Timothy ran to his uncle’s house a few
22 blocks away. Because Timothy did not have a cell phone, he called
23 911 from his uncle’s home, telling the dispatcher he witnessed “a
24 white guy” shoot “a black female.” After calling 911, Timothy called
25 his mother and asked her to drive him back to Moore’s house. There,
26 Timothy told police he witnessed the shooting.⁵

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19 ³ [footnote in original text] Moore’s brother-in-law lived with Moore and was not at home
20 on the evening of the shooting. He testified that the rifle belonged to Moore; Moore initially kept
21 the rifle in his bedroom; and, more recently, had kept the rifle in the living room.

22 ⁴ [footnote in original text] The prosecutor asked Timothy if Moore said anything before
23 firing the gun. Timothy answered, “No.” Timothy was then asked if he remembered testifying at
24 the preliminary hearing that, before firing the gun, Moore said, “I’m going to shoot her.” After
25 reviewing the preliminary hearing transcript and a statement he gave to a police officer on the
26 night of the shooting, Timothy still could not recall stating as much. Timothy was asked, “Do
27 you remember [Moore] saying ‘I’m going to shoot her then’ that evening before he fired the
28 gun?” Timothy answered: “I don’t recall. I think so.” Finally, when asked if on the night of the
incident he related to police the statement, “I’m going to shoot her then,” Timothy recalled having
done so. On redirect examination, Timothy again stated he could not currently remember what
Moore said on the night of the shooting.

⁵ [footnote in original text] On cross-examination, Timothy denied ever touching the gun.

Police Investigation

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2 At 8:19 p.m., Moore called 911, telling the operator he killed
3 someone by “accident” and had tried to give her cardiopulmonary
4 resuscitation, but she was going to die. The dispatcher could not
understand Moore and hung up after 30 seconds. Moore called back
a minute later.

5 When Suisun City Police Department Officers James Sousa and
6 David O’Brien arrived at the scene, Moore was standing in the
7 doorway, smoking a cigarette, and talking on a phone. Moore was
8 “frantic, confused, crying,” and had blood on his hands. On the living
9 room floor, Sousa and O’Brien found Brown’s unresponsive body.
Brown had been shot in the chest above her left breast. A video game
controller was found on the tan recliner and a bottle of tequila was
found nearby.

10 The police officers searched “[e]verywhere” for a firearm—inside
11 the house, inside the garage, and outside. It was dark, but Sousa used
12 a flashlight to search the front yard, the backyard, as well as the side
yard between Moore’s house and a neighbor’s house to the east.
O’Brien searched the side yard on the west side of the house. No
weapon was located.

13 Later that night, while in a holding cell at the police station, Moore
14 banged on his cell door and spontaneously told a police officer, “I
15 killed her. I did it. He ain’t got nothing to do with it.” Moore
16 repeatedly said it was an accident and he did not mean for it to
17 happen. Later, when the same officer transported Moore to county
jail, Moore again said the shooting was an accident. Moore, who
appeared to be under the influence of alcohol, also said he was going
to jail for a long time “because that’s what happens when you kill
someone.”

18 Forensic pathologist, Susan Hogan, M.D., determined Brown died
19 from a gunshot wound to the chest. Hogan did not observe any soot
20 or stippling on Brown’s clothing or body, which she would expect to
see if the gun was fired within three feet of the victim.

Defense Case

21 Moore’s next door neighbor came home from his night shift early in
22 the morning on October 24, 2012. Using a flashlight, he looked over
23 Moore’s front yard for five minutes but did not see a gun. Around
24 noon, the neighbor went back outside and saw a rifle in Moore’s front
25 yard. Police collected the weapon. No latent fingerprints were found
26 on the weapon, a .22-caliber rifle. The rifle had water spots on it that
could have been produced by someone cleaning it. Low level DNA
mixtures were found on the rifle, but the samples were insufficient
for interpretation.

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1 On the night of the shooting, both Moore and Timothy were tested
2 for the presence of gunshot residue.⁶ The results were positive for
3 each. As gunshot residue can be found on a person's hands after
4 firing a weapon or being in the vicinity of a fired weapon, the
5 shooter's identity could not be determined. A blood sample was also
6 taken from Moore at around 10:50 p.m. on October 23. The sample
7 showed Moore had a 0.33 percent blood alcohol concentration
8 (BAC).

9 The defense firearms expert, criminalist Peter Barnett, examined the
10 rifle and observed it had an intermittent problem where the trigger
11 could be cocked simply by rotating the bolt, rather than pulling it
12 back.⁷ Barnett's test of the rifle's trigger pull showed it requires three
13 pounds of pressure to pull the trigger, which is somewhat lighter than
14 in similar weapons. Barnett opined that if a person were to hold the
15 rifle in the standard way with his finger on the trigger, and another
16 person yanked it out of his hands with a sudden motion, that action
17 could cause sufficient force for the gun to discharge.

18 Psychiatrist Randall Solomon, M.D., testified as an expert regarding
19 the effects of alcohol on the brain and memory. Solomon testified
20 alcohol can impact memory after as little as two drinks, but the more
21 a person drinks, the more likely it will cause memory problems, such
22 as a "blackout"—a type of amnesia that happens when short-term
23 memories do not get encoded as long-term memories. Short-term
24 memory is not affected by alcohol. A person can still function during
25 a blackout and observers might not know it is happening. Fragmentary
26 blackout is the most common type. It creates holes in
27 memory that a person might not be aware of until asked about
28 something he cannot remember. A complete blackout is a period of
no memory at all.

At 0.3 percent BAC, Solomon opined there would be a greater than
50 percent chance of a blackout. Not everyone would experience
blackout at that BAC, but drinking very rapidly would also increase
the probability. If BAC was at that level three hours after a person
stopped drinking, his or her BAC necessarily would have declined to
that level from an earlier, higher BAC. If someone was able to
remember details an hour or three hours later then he would not have
been in a complete blackout, unless he had been rehearsing these
details in his short term memory the entire time.

23 ⁶ [footnote in original text] Timothy, who had been arrested before, later hired an attorney
24 because he felt the police were pressuring him to "say something [he] had nothing to do with."

25 ⁷ [footnote in original text] On cross-examination Barnett acknowledged that even though
26 the rifle had an intermittent issue, the rifle would not be capable of firing unless the cartridge was
27 inserted into the chamber. He also acknowledged that, in order to chamber a round, the bolt must
28 be pulled up into the open position and pulled down all the way back, then pushed forward. The
rifle is a single-action weapon, meaning the hammer has to be cocked and ready to fire before you
press the trigger. in addition, before it can be fired, the safety has to be off.

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