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

CHARLES ALAN DYER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-16-941-C
	)	
JIM FARRIS, Warden,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, Charles Alan Dyer, appearing pro se, filed a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Pet.) [Doc. No. 1] and Brief in Support (Brief) [Doc. No. 2], challenging his state court conviction in Case No. CF-2010-17, District Court of Stephens County, State of Oklahoma. United States District Judge Robin J. Cauthron has referred the matter for proposed findings and recommendations consistent with 28 U.S.C. § 636(b)(1)(B) and (C). Respondent has filed a Response (Resp.) [Doc. No. 20] and the State Court Records [Doc. Nos. 22, 32],[1] and Petitioner has filed a Reply [Doc. No. 25]. For the reasons set forth below it is recommended that the Court DENY the Petition.

I. Relevant Procedural History

The State charged Petitioner with one count of child sexual abuse and one count of concealing stolen property. Or. at 50-52.[2] The State agreed to try Petitioner first on the child sexual abuse charge, *id.* at 165, and the subsequent April 2011 trial ended in a mistrial. *Id.* at 220.

[1] The state court records include the Felony Motions Transcript held on April 4 & 8, 2011, hereinafter "Felony Mot. Tr.," Transcript of Jury Trial Proceedings held on April 16-19, 2012, hereinafter "Tr. Day ___," and the Original Record, hereinafter "Or.___."

[2] Citations to the jury trial transcripts and original records refer to the original pagination in those documents. Citations for all other documents refer to this Court's CM/ECF pagination.

Petitioner's first retrial, in January 2012, also ended in a mistrial. *Id.* at 345-46. Finally, at Petitioner's April 2012 trial, the jury convicted Petitioner. *Id.* at 408. Per the jury's recommendation, the trial court sentenced Petitioner to thirty years' imprisonment. *Id.* at 408, 439. The State subsequently dismissed the concealing stolen property charge. *Id.* at 454.

After his sentencing, Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA). *See* Brief of Appellant [Doc. No. 20-Ex. 1]. The state appellate court affirmed the conviction. *See* OCCA Summary Opinion [Doc. No. 20-Ex. 3]. Then, Petitioner filed an application for post-conviction relief. *See* Petitioner's Application for Post-Conviction Relief (Application) [Doc. No. 32-Ex. 1]. The state district court denied relief, *see* Order of Summary Disposition [Doc. No. 20-Ex. 5, at 34-45], Petitioner appealed [Doc. No. 20-Ex. 5], and the OCCA reversed and remanded for further proceedings on grounds that the trial court should have allowed Petitioner to file his exhibits. *See* Order [Doc. No. 20-Ex. 5, at 47]. On remand, the state district court filed and considered Petitioner's exhibits and again denied relief. *See id.* at 47-49. The OCCA affirmed the district court's order in Petitioner's subsequent appeal. *See* Order Affirming Denial of Post-Conviction Relief (OCCA Order) [Doc. No. 20-Ex. 6].

The present action timely followed.

II. Grounds for Federal Habeas Corpus Relief

Petitioner alleges in Ground One that his appellate counsel was ineffective for failing to argue:

(1) the insufficiency of the evidence;

(2) ineffective assistance of trial counsel based on his failure to:

(Fact 1)[3] object to prejudicial hearsay statements,

[3] For continuity, the Court has used Petitioner's numbering system.

(Fact 2) object to prosecutorial misconduct during closing arguments,

(Fact 3) call various witness,

(Fact 4) file a motion so he could use testimony from Dr. Ray Hand,

(Fact 5) object to improper attacks on Petitioner's character,

(Fact 6) investigate testifying witnesses for purposes of impeachment, investigate "critical evidence," and ask Petitioner's requested questions,

(Fact 7) object to sleeping jurors,

(Fact 8) request proper jury instructions,

(Fact 9) present "readily available evidence" to overcome the State's motion in limine, and

(Fact 10) fully advise Petitioner of the trial strategy when discussing the State's plea offer;

(3) the fatal infection of the trial with false testimony;

(4) the trial court's failure to "require election of a crime;"

(5) prosecutorial misconduct;

(6) the admission of improper hearsay; and

(7) the trial court's refusal to grant Petitioner's demurrer.

Pet. at 3-40.

In Ground Two, Petitioner claims his trial was rendered fundamentally unfair through "a plethora of inadmissible evidence" intended to prove only that Petitioner was "a bad person." *Id.* at 41-42.

On direct appeal, Petitioner raised, in part, his claim that trial counsel was ineffective for failing to call certain witnesses (Ground One (2)(Fact 3)) and his assertion that evidence of bad character rendered his trial fundamentally unfair (Ground Two). *See* Brief of Appellant, *passim*.

Petitioner raised his remaining allegations in his application for post-conviction relief, blaming appellate counsel for their omission on direct appeal. *See* Application, *passim*.[4]

III. Standard of Review

The standard of review turns on whether the OCCA adjudicated Petitioner's claims on their merits. Petitioner argues that, in large part, it did not and asks this Court to review his claims "[*d*]*e* [*n*]*ovo*." Brief at 16-19. Petitioner primarily bases this argument on the OCCA's "conclusory" orders and its "silence as to Petitioner's specific factual assertions supporting any of his claims." *Id.* at 16.[5]

"When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits . . . ." *Johnson v. Williams*, 568 U.S. 289, 301 (2013). Petitioner has not overcome that presumption. That is, Petitioner raised the majority of his claims in his application for post-conviction relief and claimed that appellate counsel was ineffective for failing to assert the claims on direct appeal. *See supra* at 3-4. The trial court found that appellate counsel was not ineffective, and in doing so, specifically stated that it had undertaken "its own examination and analysis of the merits of each of the claims Petitioner complains appellate counsel omitted" and found them "meritless." Order

[4] Respondent argues that Petitioner never raised his claim that appellate counsel erred by not challenging trial counsel's alleged failure to fully advise Petitioner of the trial strategy when discussing the State's plea offer (Ground One (2)(Fact 10)) and asks the Court to apply an anticipatory procedural bar. *See* Resp. at 2. However, as Petitioner points out, *see* Reply at 4 & n. 8, he raised this claim in his application for post-conviction relief. *See* Application at 100, 111-13.

[5] Petitioner also claims that "[t]he Court" incorrectly rejected his ineffective assistance of trial counsel claim as "*res judicata*." Brief at 17. However, the trial court was ruling on Petitioner's *independent* ineffective assistance of trial counsel claim. *See* Order of Summary Disposition at 3, 6. The OCCA ruled on Petitioner's overarching ineffective assistance of appellate counsel claim, which necessarily included looking at the merits of the underlying trial counsel claims. *See* OCCA Order at 5-6; *see also infra* at 5.

of Summary Disposition at 11. Thereafter, the OCCA also held that appellate counsel was not ineffective, *see* OCCA Order at 5-6, necessarily considering the merits of the underlying allegations. *See Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013) ("In reviewing a claim of ineffective assistance of appellate counsel . . . , a court must look to the merits of the issue(s) that appellate counsel failed to raise."). So, this Court construes the OCCA's decision as having considered the merits of Petitioner's underlying allegations. *See Smith v. Duckworth*, 824 F.3d 1233, 1242 & n.6 (10th Cir. 2016) ("[B]ecause the OCCA considered the merits of [plaintiff's underlying claim] in considering whether ineffective assistance excused his procedural default, we must apply . . . deference to the OCCA's evaluation of that [underlying] claim.").

Further, the OCCA's "silence" on the specifics of the underlying claims "does not change [the Court's] deference." *Williams v. Trammell*, 782 F.3d 1184, 1999 (10th Cir. 2015). This Court's role is "still to evaluate the reasonableness of the OCCA's application of [federal law], considering the reasonableness of the theories that 'could have supported' the OCCA's decision." *Id.* (quotation omitted).

Because the OCCA adjudicated Petitioner's claims on their merits, they are governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pursuant to the AEDPA, this Court may grant habeas relief only if the state court's adjudication "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 "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) and (2).

A state-court decision is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) if it "applies a rule that contradicts the governing law set forth in Supreme Court cases

or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016) (internal quotation marks omitted). "A state-court decision is an 'unreasonable application' of Supreme Court precedent if the decision 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Fairchild v. Trammell*, 784 F.3d 702, 711 (10th Cir. 2015) (*quoting Williams v. Taylor*, 529 U.S. 362, 407-08 (2000)).

"Review of a state court's factual findings under § 2254(d)(2) is similarly narrow." *Smith*, 824 F.3d at 1241. Factual findings are not unreasonable merely because on habeas review the court "would have reached a different conclusion in the first instance." *Brumfield v. Cain*, -- U.S. -- 135 S. Ct. 2269, 2277 (2015) (citation omitted). Instead, the court must defer to the state court's factual determinations so long as "reasonable minds reviewing the record might disagree about the finding in question." *Id*. "Accordingly, a state court's factual findings are presumed correct, and the petitioner bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Smith*, 824 F.3d at 1241 (*citing* 28 U.S.C. § 2254(e)(1)).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Woods v. Etherton*, -- U.S. --, 136 S. Ct. 1149, 1151 (2016) (internal quotation marks and citation omitted). "The state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. (internal quotation marks and citation omitted).

IV. Relevant Trial Court Evidence

Sometime in early January 2010, H.D., then age seven, returned home from visiting Petitioner, her father. Tr. Day 2 at 72. H.D. was upset, and while her mother drew her a bath, H.D. announced that her "bo-bo" hurt. *Id.* at 73-74. According to H.D.'s mother, Valerie Dyer (Petitioner's ex-wife), H.D. was referring to her vagina. *Id.* at 74. H.D. began crying and telling her mother that she did not want to talk about it because she was "afraid of what Dad might do" and did not "want him to find out." *Id.* at 74-75. Then, when H.D. sat down in the bathtub, Ms. Dyer was able to see H.D.'s vaginal area. *Id.* at 75. Ms. Dyer described it as "really red and swollen and open[.]" *Id.* at 75-76. H.D. kept repeating "[d]on't tell Daddy," and after Ms. Dyer "pinky promised" that she would not tell Petitioner, H.D. said "Mommy, he touches my bo-bo." *Id.* at 76, 79. After H.D. got out of the bath, she repeatedly reminded Ms. Dyer that she had "pinky promised" not to tell anyone what H.D. had disclosed. *Id.* at 83-84.

Ms. Dyer nevertheless contacted law enforcement and reported what H.D. had told her. *Id.* at 84. Several days later, H.D. underwent a forensic interview, and a few days after that, H.D. had a physical examination. *Id.* at 86-88.

Jessica Taylor, the forensic interviewer, conducted H.D.'s interview. Tr. Day 3 at 5, 33. In that interview, H.D. identified her "bo-bo" as her vagina. *Id.* at 41. During the "touch inquiry" portion of the interview, Ms. Taylor and H.D. "talked about kisses and who [H.D.] gets kisses from and where she gets kisses on her body and if those kisses where okay with her or not okay." *Id.* at 42. Then, when Ms. Taylor asked if "someone [had] given [H.D.] kisses that were not okay," H.D. responded "yes" and "stated that her [D]ad kisses her bo-bo and that's not okay." *Id.* at 42-43. H.D. said that it happened on more than one occasion, and that in particular, it had happened on Petitioner's bed at his house. *Id.* at 43-44. According to Ms. Taylor, H.D. eventually told her:

> [Petitioner] . . . would take his clothes off and he would also take [H.D.'s] clothes off because she would be too scared. She would lay down on the bed and then he would proceed to get on top of her and he would start with kissing her bo-bo. After he was finished with that then he would place his . . . weiner . . . inside her bo-bo and that he would push really hard and that would cause her to hurt.

Id. at 44. H.D. then described other sexual encounters with Petitioner, telling Ms. Taylor that "her [D]ad puts his weiner inside of her mouth" and that "while that was happening her [D]ad was telling her that he was almost finished and then she would feel something squirt into her mouth and that it tasted yucky." *Id.* at 45. Afterwards, H.D. would "go into the bathroom and she would spit . . . it out into the toilet." *Id.* H.D. told Ms. Taylor that Petitioner's penis was "hard … whenever it was inside her mouth" and said Petitioner "would take spit from his mouth and rub it onto his weiner before putting it inside of her bo-bo." *Id.* at 47-48. Ms. Taylor testified that she was familiar "with coaching of children" and did not "learn any information to make [her] believe" that H.D. "had been coached in any way." *Id.* at 32-33. After Ms. Taylor's testimony, the jury watched her interview with H.D. and viewed H.D. making these statements and recreating the same sexual acts with anatomical dolls. *Id.* at 89-91 (publishing State's Ex. 3).

At trial, H.D., then age nine, did not want to tell the jury what had happened because she did not "like talking about it;" however, she testified that everything she told Ms. Taylor "really happen[ed]" and that it was Petitioner who had done "those things." *Id.* at 97, 99. H.D. admitted that, during her interview, she sometimes told Ms. Taylor that "I don't know" and "I don't remember" but told the jury that she said that because "I was embarrassed to say it." *Id.* at 97-98. H.D. testified that the first person she told about the abuse was Ms. Dyer and did so while they were in the bathroom at her mother's house. *Id.* at 98. Finally, H.D. testified that no one else had ever touched her body "in a way that is not okay" and denied that her mother or anyone else had asked her to lie. *Id.* at 97.

Dr. Preston Waters, M.D. conducted H.D.'s physical exam. *Id.* at 115, 122. Dr. Waters testified that he did not do a "rape kit" or attempt to collect DNA because the alleged abuse had occurred outside the relevant 72-hour time frame. *Id.* at 124. On inspection, Dr. Waters discovered that H.D. had "a complete absence of hymen posteriorly," which is "highly suspicious for an abusive penetrating sort of injury" and "not something like straddle injury." *Id.* at 130, 141. Dr. Waters also testified that H.D.'s vaginal opening was "large for her age." *Id.* at 134. The physician's impression was "that [H.D.] had been abused." *Id.* at 135-36.

Petitioner's theory at trial was that, while "[p]hysically, yes, somebody did something to [H.D.],"[6] the only reason H.D. was accusing Petitioner was because Ms. Dyer had manipulated her. Tr. Day 2 at 12-18; Tr. Day 4 at 191-210. To that end, Petitioner testified, denying that he ever touched H.D. inappropriately. Tr. Day 4 at 136, 138, 147-48. However, he told the jury that "I believe in my heart that my daughter is a victim of sexual abuse," because not only does the medical evidence support it, but because of "things that she says that she should not know." *Id.* at 159. In particular, Petitioner agreed that H.D. should not know "how semen tastes" and said, "I'm not sure that even Valerie would have it in her to talk that into our daughter." *Id.*

V. Petitioner's Ground One

In Ground One, Petitioner alleges that his appellate attorney was ineffective for failing to challenge: (1) the sufficiency of the evidence; (2) ineffective assistance of trial counsel (on multiple grounds); (3) fatal infection of the trial with false testimony; (4) the trial court's failure to "require election of a crime;" (5) prosecutorial misconduct; (6) the admission of improper hearsay; and (7) the trial court's refusal to grant Petitioner's demurrer. Pet. at 3-40. The OCCA

[6] Tr. Day 4 at 202.

rejected the claim on its merits, OCCA Order at 5-6, and this Court should find the OCCA's decision was a reasonable application of federal law.

A. Clearly Established Law

To succeed on his claims, Petitioner must demonstrate that his counsel's performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 688, 690-91 (1984).[7] A court will only consider a performance "deficient" if it falls "outside the wide range of professionally competent assistance." *Id.* at 690. "[P]rejudice" involves "a reasonable probability that, but for counsel's unprofessional errors, the result of the [direct appeal] would have been different." *Id.* at 694. Notably, a court reviews an ineffective assistance of counsel claim from the perspective of counsel at the time he or she rendered the legal services, not in hindsight. *See id.* at 680.

"Surmounting *Strickland's* high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks and citation omitted). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult [as] [t]he standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so." *Id.* (internal quotations marks and citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

[7] Petitioner relies on *Evitts v. Lucy*, 469 U.S. 387 (1985) as the clearly established law. *See* Pet. at 3. However, *Evitts* simply applied the *Strickland* standard to appellate counsel. *See Neill v. Gibson*, 263 F.3d 1184, 1200 (10th Cir. 2001) (citing *Evitts* for the proposition that "[t]he Sixth Amendment requires that criminal defendants receive effective assistance of counsel both at trial and during a direct appeal as of right" and then holding "[c]laims of ineffective assistance of appellate counsel are reviewed under the test in *Strickland* . . . .").

"[I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, [a court] look[s] to the merits of the omitted issue[.]" *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003) (citations and internal quotation marks omitted). "[O]f course, if the issue is meritless, its omission will not constitute deficient performance." *Id.* Absent a "reasonable probability" that the omitted claim would have resulted in relief, there is no ineffective assistance of appellate counsel. *Neill*, 278 F.3d at 1057 & n.5.

B. Denial of Habeas Relief Based on the OCCA's Holding

"[T]his Court has repeatedly held that when 'the OCCA addresses an ineffective assistance of appellate counsel claim on the merits, and concludes, in essence, that it would not have reached a different outcome had the appellate counsel raised the omitted claims on direct appeal, the Court can already be assured that appellate counsel's conduct was not prejudicial under *Strickland*.'" *Christian v. Farris*, No. CIV-13-1325-C, 2017 WL 1088371, at *10 (W.D. Okla. Jan. 13, 2017) (unpublished report and recommendation) (citation omitted), *adopted*, 2017 WL 1082473 (unpublished district court order), *certificate of appealability denied*, 701 F. App'x 717 (10th Cir. 2017). Based on that theory alone, this Court has denied habeas relief on ineffective assistance of appellate counsel claims, *see id.*, and the Tenth Circuit has concluded "that reasonable jurists wouldn't debate the . . . assessment[.]" *Christian*, 701 F. App'x at 721. So, on this basis, the Court may find that the OCCA's *Strickland* analysis was a reasonable application of federal law and deny habeas relief on Petitioner's Ground One. *See also Pradia v. McCollum*, No. CIV-13-385-D, 2016 WL 3512034, at *12 (W.D. Okla. May 10, 2016) (unpublished report and recommendation), *adopted*, 2016 WL 3512264 (W.D. Okla. June 22, 2016) (unpublished district court order); *Jackson v. Martin*, No. CIV-12-702-W, 2013 WL 5656105, at *1, *4 (W.D. Okla. Oct. 15, 2013) (unpublished district court order) (collecting cases where this Court has held that a

petitioner cannot establish appellate counsel's ineffectiveness where the OCCA has announced already that "the outcome of the state appeal would not have changed had appellate counsel raised the relevant claim" (citation omitted)), *certificate of appealability denied*, 572 F. App'x 597 (10th Cir. 2014).

C. Denial of Habeas Based on the OCCA's Otherwise Reasonable Application of *Strickland*

The Court may alternatively look at each individual claim and deny habeas relief on grounds that the OCCA reasonably applied *Strickland* in finding that appellate counsel's conduct was not ineffective.

1. Petitioner's Underlying Claim Involving Insufficiency of the Evidence – Ground One (1)

According to Petitioner, his appellate attorney should have raised a claim on direct appeal alleging that the evidence was insufficient to convict him because:

- H.D.'s testimony was "inconsistent, unclear, and improbable;"
- there is evidence that H.D. was coached;
- the State failed to offer evidence to corroborate H.D.'s testimony;
- Petitioner presented corroborated evidence to disprove the State's case;
- Ms. Dyer said she would "do or say anything" to prevent Petitioner from having custody, engaged in malicious prosecution and perjury, and gave inconsistent testimony surrounding H.D.'s disclosure; and
- the jury was not presented with probative evidence, including DNA results, computer reports regarding Ms. Dyer's internet searches (suggesting that Ms. Dyer searched the internet for pornography and instructions on how to terminate parental rights), and evidence suggesting that H.D. may have been exposed to a registered sex offender.

Pet. at 4-16.

To succeed on an insufficiency of the evidence claim on direct appeal, Petitioner's attorney would have had to prove that after "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). *Jackson*'s standard for evidence sufficiency would have been "applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. So, Petitioner's appellate attorney would have had to show that the evidence was insufficient to prove that Petitioner (1) willfully or maliciously engaged in, (2) the rape, incest, lewd/indecent acts, or other sexual abuse, (3) of H.D., a child under the age of eighteen. *See* Okla. Stat. tit. 21, § 843.5(E); OUJI CR 4–39.

With this standard, the Court finds that the OCCA reasonably applied *Jackson* and *Strickland* to find no prejudice in the appellate attorney's failure to raise these arguments on direct appeal.[8]

First, the focus of a *Jackson* inquiry is not on what evidence is missing from the record, but whether the evidence in the record, viewed in the light most favorable to the prosecution, is sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt. *See Jackson*, 443 U.S at 319; *Matthews v. Workman*, 577 F.3d 1175, 1185 (10th Cir. 2009). So, the OCCA reasonably applied both *Jackson* and *Strickland* in finding that there is not a reasonable probability that the results of Petitioner's direct appeal would have been different had appellate

[8] In his brief, Petitioner alleges that the OCCA barred his insufficiency claim and thus did not make a *Jackson* review. *See* Brief at 14. This might be true of Petitioner's *independent* sufficiency claim raised in his application for post-conviction relief; however, as discussed above, the OCCA nevertheless reviewed the merits of Petitioner's claim to determine if appellate counsel was ineffective for failing to raise the claim on direct appeal. *See supra* at 4-5.

counsel argued insufficiency of the evidence based on the absence of DNA results,[9] computer reports regarding Ms. Dyer's internet searches (suggesting that Ms. Dyer searched the internet for pornography and instructions on how to terminate parental rights), and evidence suggesting that H.D. may have been exposed to a registered sex offender. *See Matthews*, 577 F.3d at 1185 (rejecting petitioner's insufficiency of the evidence claim which was based in part on testimony the jury did not hear and holding: "[I]t makes no sense for us, in reviewing whether a jury's verdict was based on sufficient evidence, to consider facts the jury never heard.").

Second, the jury heard H.D.'s testimony, watched H.D.'s forensic interview, and heard testimony from Ms. Taylor and Ms. Dyer. The jury also heard testimony from Petitioner's girlfriend, Amanda Monsalve, and Petitioner. Throughout trial, Petitioner's attorney asked questions focusing on the inconsistencies in H.D.'s account, possible bias in the interview, and Ms. Dyer's alleged motives and potential for coaching, including her internet searches, and inconsistencies in her statements and timeline. Tr. Day 2, at 93-154; Tr. Day 3, at 50-77, 84-87, 100-113; Tr. Day 4, at 4-78, 82-160. In other words, the jury was well-aware of the witnesses' inconsistencies, but nevertheless credited their testimony and found Petitioner guilty. And, the OCCA would not have been "obligated to second guess the jury's credibility" findings in assessing a sufficiency of the evidence claim on direct review. *See Glossip v. Trammell*, 530 F. App'x. 708, 742-43 (10th Cir. 2013) (rejecting petitioner's argument the OCCA "was obligated to second guess the jury's credibility" in finding the evidence sufficient under *Jackson*).

Third, and finally, a review of Oklahoma law establishes that the OCCA would not have required corroboration in this case. That is, Oklahoma law requires corroboration of a rape

[9] According to Petitioner, officials did not find H.D.'s DNA on Petitioner's bedding and did not find any fluids from Petitioner on H.D.'s dirty garments taken from Petitioner's home. *See* Pet. at 12 & Attach. H.

victim's testimony in two relevant circumstances. First, corroboration is required "where the testimony is so unsubstantial and incredible as to be unworthy of belief." *Gilmore v. State*, 855 P.2d 143, 145 (Okla. Crim. App. 1993). However, "conflicting testimony, even sharply conflicting testimony [does not] trigger the need for corroboration." *Id.* Instead, "[t]he testimony must be of such contradictory and unsatisfactory nature, or the witness must be so thoroughly impeached, that the reviewing court must say that such testimony is clearly unworthy of belief and insufficient as a matter of law to sustain a conviction." *Gamble v. State*, 576 P.2d 1184, 1186 (Okla. Crim. App. 1978). Here, H.D. certainly testified in a manner one would expect of a young child, occasionally contradicting herself and failing to give precise dates and descriptions. However, she clearly described sexual acts, including the giving and receiving of oral sex, and she used anatomical dolls in a manner clearly mirroring sexual activity. *See* State's Ex. 3. Even Petitioner admitted that he "believe[d] in [his] heart that [H.D.] [had been] a victim of sexual abuse," based both on the medical evidence and H.D.'s own testimony describing sexual details "that she should not know." Tr. Day 4 at 159. Accordingly, the OCCA presumably found that H.D.'s testimony was not so incredible as to be unworthy of belief.

Corroboration may also be required when the trial court allows the jury to hear a child's out of court statements regarding sexual abuse *and* the child is unavailable to testify. *See* Okla. Stat. tit. 12, § 2803.1(A)(2)(b); *see also infra* at 41. But contrary to Petitioner's assertion otherwise, *see* Pet. at 4, H.D. *was not* deemed "unavailable"[10] and did in fact, testify at trial. Tr.

[10] In a summary paragraph in his insufficiency of the evidence claim, Petitioner argues that the trial court's ruling that H.D. was unavailable to testify violated his right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). *See* Pet. at 5. The Court declines to construe this one-sentence, undeveloped argument as an independent ground for habeas relief. *See Moore v. Gibson*, 195 F.3d 1152, 1180 n.17 (10th Cir. 1999) ("We do not consider unsupported and undeveloped issues."). Moreover, any such claim would be meritless, as H.D. testified at trial and Petitioner's attorney had an opportunity to cross-examine her. Tr. Day 3 at 95-113; *see California*

Day 3 at 95-113; *see also* Felony Mot. Tr. at 167-68 (trial court's ruling that there was sufficient indicia of reliability under § 2803.1(A)(1) and that the court need not yet decide whether § 2803.1(A)(2) (corroboration) would need to be addressed); Tr. Day 1 at 7 (trial court noting that it would not need to conduct a second *in camera* hearing to address § 2803.1(A)(2)(b)).

Finally, even if the OCCA *had* required corroboration, they would have found it in the testimony of Ms. Taylor, Ms. Dyer, Dr. Waters,[11] and in H.D.'s description of the sexual acts. *See Drake v. State*, 761 P.2d 879, 882 (Okla. Crim. 1988) ("We first note that there is ample corroboration to the young girl's testimony. Medical testimony was offered that, if believed by the jury, tended to prove that an act of rape was committed on the day in question. The testimony of the girl's grandmother also corroborates [the victim's] account . . . ."); *Edwards v. McCullum*, No. CIV-16-1423-M, 2018 WL 833603, at *6 (W.D. Okla. Feb. 12, 2018) (unpublished district court order) (holding the OCCA reasonably found no due process violation in the admission of a child victim's recorded interview because the child's detailed descriptions of the sexual acts, her

v. Green, 399 U.S. 149, 158 (1970) ("[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.").

[11] According to Petitioner, state law prohibits medical testimony "from being considered corroborative." Reply at 2-3; *see also* Pet. at 7 ("According to state law, Dr. Water's testimony cannot corroborate the crime."). In part, Petitioner relies on *De Armond v. State*, 285 P.2d 236 (Okla. Crim. App. 1955), where the OCCA found that the doctor's testimony did not sufficiently corroborate the accuser's testimony. *See* Reply at 6. But contrary to Petitioner's argument, that case did not hold that medical testimony may not be corroborated absent definite proof of sexual abuse. Instead, the court held that the testimony *in that case*, which was based on a four-month old examination and showed no hymen damage, did not corroborate the accuser's testimony. *See De Armond*, 285 P.2d at 248. Further, the OCCA interpreted § 2803.1(A)(2)(b) to mean that the hearsay statement of a child must be corroborated by both evidence that the act of physical or sexual abuse occurred and evidence that the act was committed by the accused. *See Matter of A.S.*, 790 P.2d 539, 542 (Okla. Civ. App. 1989). So, while Dr. Waters' testimony could not corroborate *who* committed the act, it could corroborate that the act *occurred*.

statements to her mother and a medical personnel, and her "reenactment of the sexual abuse with her dolls" was corroborating evidence).

In sum, there is not a reasonable likelihood that the outcome of Petitioner's direct appeal would have been different had his appellate attorney challenged the sufficiency of the evidence based on missing evidence, the inconsistences in the testimony, Ms. Dyer's alleged improper motives, Petitioner's case-in-chief, or the alleged lack of corroboration for H.D.'s testimony. Accordingly, the OCCA reasonably found that Petitioner's sufficiency of the evidence claim lacked merit under *Jackson,* and appellate counsel's failure to raise the issue did not constitute ineffective assistance of counsel under *Strickland*.

2. Petitioner's Underlying Claims Involving Ineffective Assistance of Trial Counsel – Ground One (2)(Fact 1)-(Fact 10)

Petitioner's appellate counsel raised an ineffective assistance of trial counsel claim on direct appeal, but Petitioner argues that the argument omitted numerous other instances of trial counsel's ineffectiveness. Particularly, Petitioner claims his appellate counsel should have argued that trial counsel was ineffective for his failure to:

- (Fact 1) object to prejudicial hearsay statements;
- (Fact 2) object to prosecutorial misconduct during closing arguments;
- (Fact 3) call various witness;
- (Fact 4) file a motion so he could use testimony from Dr. Ray Hand;
- (Fact 5) object to improper attacks on Petitioner's character;
- (Fact 6) investigate testifying witnesses for purposes of impeachment, investigate "critical evidence," and ask Petitioner's requested questions;
- (Fact 7) object to sleeping jurors;
- (Fact 8) request proper jury instructions;

- (Fact 9) present "readily available evidence" to overcome the State's motion in limine; and,

- (Fact 10) fully advise Petitioner of the trial strategy when discussing the State's plea offer.

Pet. at 16-27.

As discussed above, to have been successful on direct appeal, Petitioner's appellate attorney would have had to show that trial counsel's conduct was both deficient *and* prejudicial. *See supra* at 10. Because the OCCA reasonably found that trial counsel's performance did not meet that standard, it also reasonably applied *Strickland* in finding no deficiency and/or prejudice in the appellate attorney's failure to raise these arguments on direct appeal.

a. Grounds One (2)(Fact 1), (Fact 5)

In Ground One (2)(Fact 1) and (Fact 5), Petitioner argues that his trial attorney failed to object to Ms. Dyer's prejudicial and perjured hearsay statements which constituted improper attacks on Petitioner's character. *See* Pet. at 16-17, 21-22. Petitioner's appellate attorney did not raise this claim on direct review but did raise an independent argument that improper character evidence denied Petitioner a fair trial. *See* Brief of Appellant at 31-37. The OCCA denied the claim, holding, in relevant part:

> We find . . . that the trial court did not abuse its discretion in allowing [Ms.] Dyer's testimony about their marriage and details of [Petitioner's] relationship with the child victim, H.D.
>
> In *Coates* [*v. State*, 773 P.2d 1281 (Okla. Crim. App. 1989)] the Court concluded the admission of an abundance of highly inflammatory evidence of other crimes or bad acts required reversal. The analogy is not apt. While the evidence of bad acts in *Coates* had no relevance to the charges, [Ms. Dyer's] testimony had some relevance to the issues at trial. Defense counsel elicited some of this evidence through cross-examination of [Ms. Dyer], and through his own witnesses, including [Petitioner] himself. The entirety of [Ms. Dyer's] testimony about her history with [Petitioner], and [Petitioner's] history with H.D., seems to support [Petitioner's] defense. [Petitioner] claimed he did not commit the crimes, and that [Ms. Dyer] coached H.D. to accuse [Petitioner] because she was angry with him.

OCCA Summary Opinion at 5.

As discussed below, Petitioner has not established that Ms. Dyer's testimony constituted perjury. *See infra* at 32-34. And, the OCCA held that the trial court did not abuse its discretion in allowing Ms. Dyer's testimony based on any prejudicial effect. So, any objection at trial to Ms. Dyer's testimony – whether based on prejudice or alleged perjury – would have been meritless, and a trial attorney has no duty to make meritless objections and arguments at trial. *See, e.g.*, *Williams*, 782 F.3d at 1202-1206 (finding that where evidence was properly admitted at trial, the OCCA reasonably applied *Strickland* to find no deficient performance in the trial attorney's failure to object to the evidence); *see also Monroe v. Franklin*, No. 08-CV-434-TCK-TLW, 2012 WL 983940, at *6 (N.D. Okla. Mar. 22, 2012) (unpublished order) (holding "counsel did not perform deficiently in failing to lodge a meritless objection"), *appeal dismissed*, 475 F. App'x 707 (10th Cir. 2012). Finally, as the OCCA noted, Petitioner's attorney was able to use Ms. Dyer's negative portrayal of Petitioner to suggest that she was vindictive and motivated to coach H.D. into naming Petitioner as her molester. Tr. Day 4 at 191-98, 202-205. Thus, counsel's decision not to object to helpful testimony would fall within the range of sound trial strategy. Accordingly, the OCCA reasonably found that trial counsel's conduct was not deficient, and in turn reasonably applied *Strickland* in holding that appellate counsel had no obligation to raise the claim on direct appeal.

b. Ground One (2)(Fact 2)

Next, Petitioner alleges that his trial attorney failed to object to prosecutorial misconduct during closing arguments. *See* Pet. at 17-18. Specifically, Petitioner alleges that the State misstated evidence, allowed witnesses to commit perjury, made comments of personal belief, told the jury that Petitioner did not love his family, and invoked sympathy for H.D. *Id.*

As discussed below, the OCCA reasonably held that prosecutorial misconduct had not fatally infected his trial. *See infra* at 35-40. Consequently, Petitioner cannot demonstrate that the OCCA unreasonably applied *Strickland* when it found, implicitly, that the trial attorney's failure to object was neither deficient nor prejudicial to the outcome of his trial. Logically then, the Court finds that the OCCA reasonably applied *Strickland* in holding that appellate counsel's failure to raise this meritless claim on direct appeal did not constitute constitutional ineffectiveness.

c. Ground One (2)(Fact 3), (Fact 6)

In Ground One (2)(Fact 3), (Fact 6), Petitioner challenges his appellate attorney's decision not to raise a claim on direct appeal regarding trial attorney's failure to call various witnesses, impeach witnesses, and ask Petitioner's requested questions to witnesses. *See* Pet. at 17-21, 22-24. The Court finds that the OCCA reasonably rejected this claim under *Strickland*.

i. Failure to Call Witnesses

According to Petitioner, his trial attorney should have called:

> (1) Deputy Seeley, to testify that Ms. Dyer waited five days to report H.D.'s disclosure, thus discrediting Ms. Dyer, and to testify regarding Petitioner's bedding, contradicting H.D.'s description of the bedding;
>
> (2) Deputy Lemons, to testify that H.D.'s clothing was removed from a dirty laundry hamper, thus corroborating Ms. Monsalve's testimony, and to testify that Ms. Dyer tried to have Petitioner arrested following an incident in September 2010, thus discrediting Ms. Dyer's testimony;
>
> (3) Martin Dutton, to testify that Ms. Dyer's computer was used to access information about how to terminate a parent's rights and report sexual abuse;
>
> (4) Donald Raines, to testify that Ms. Dyer's computer was used to access pornography, which showed images "identical" to what H.D. described, information about terminating parental rights, and Ms. Monsalve's "MySpace" page;
>
> (5) Sara Ferrero, to testify that Petitioner's DNA was not found on H.D.'s underwear and H.D.'s skin cells were not found on Petitioner's bed;

> (6) Officer Dan Fletcher, to testify that Ms. Dyer made false complaints about Petitioner in the past, thus discrediting Ms. Dyer's denial of such;
>
> (7) Duncan Police Officer Corchoran, to testify that Petitioner had to call police in July 2009 following a screaming incident with Ms. Dyer, thus discrediting Ms. Dyer's denial of such;
>
> (8) Lory Crosby, to testify that she never viewed pornography on Ms. Dyer's computer;
>
> (9) a custodian from Duncan schools, to testify that H.D. was in school from January 4-7, 2010, thus discrediting Ms. Dyer's testimony and suggesting she waited four days after H.D.'s disclosure to report the abuse; and,
>
> (10) an expert to rebut Dr. Waters' medical findings.

Pet. at 18-21.

Notably, appellate counsel *did* challenge trial counsel's decision not to call Deputy Seely, Deputy Lemons, Sarah Ferrero, Marvin Dutton, Donald Rains, and a custodian from Duncan schools, for the same reasons Petitioner now presents. *See* Brief of Appellant at 19-30. The OCCA held:

> [Petitioner] changed defense attorneys between the first and second mistrials, and the same attorney represented him in his second mistrial and this trial. Original counsel called several witnesses which current defense counsel chose not to call. The record shows that this was a strategic decision on counsel's part. Upon reviewing the prior testimony of those witnesses, we will not second-guess that decision. The record shows that (a) the majority of the evidence to which they testified was admitted through other witnesses in this trial; (b) some of the evidence had little or no relevance to the issues at trial; and (c) [Petitioner] cannot show he was prejudiced by the omission of any of these witnesses. As he cannot show prejudice, we will not find counsel ineffective.

OCCA Summary Opinion at 3.

Because the appellate attorney raised the underlying claim as to Deputy Seely, Deputy Lemons, Sarah Ferrero, Marvin Dutton, Donald Rains, and a custodian from Duncan schools, the OCCA reasonably applied *Strickland* in finding no deficiency in this area.

The OCCA also reasonably applied *Strickland* when rejecting Petitioner's argument related to the remaining witnesses. For instances, the Court "begin[s] with the presumption that [Petitioner's attorney] had a sound trial strategy when he decided not to call [these witnesses]." *Hanson v. Sherrod*, 797 F.3d 810, 828 (10th Cir. 2015). Moreover, "[t]rial counsel does not act unreasonably in failing to call every conceivable witness that might testify on a defendant's behalf." *Hooks v. Workman*, 689 F.3d 1148, 1190 (10th Cir. 2012). Indeed, an attorney's failure to call cumulative witnesses is not sufficient to establish deficient performance or prejudice under *Strickland*. *See Matthews*, 577 F.3d at 1193.

Petitioner believes that his attorney should have called Officer Dan Fletcher, Duncan Police Officer Corchoran, and Lory Crosby as witnesses. The first two would have allegedly testified that Petitioner once had to call the police following a July 2009 screaming incident with Ms. Dyer, and that Ms. Dyer tried to have Petitioner arrested following an unrelated court hearing. This testimony would have allegedly discredited Ms. Dyer's testimony. *See supra* at 21. But Ms. Dyer did not deny the July 2009 episode, she simply said she did not "recall" the incident. Tr. Day 2 at 93. Likewise, Ms. Dyer admitted that she filed a protective order against Petitioner following the unrelated courthouse incident. *Id.* at 147-48, 154-56.

As for Ms. Crosby, Petitioner believes she would have testified that she never viewed pornography on Ms. Dyer's computer, rebutting Ms. Dyer's testimony. *See supra* at 21. But Ms. Dyer did not implicate Ms. Crosby in the pornography viewing. Instead, Ms. Dyer said that Ms. Crosby may have been the one investigating termination of parental rights because she was going through her own divorce during that time. Tr. Day 2 at 121-22. Ms. Dyer stated that she did not know who looked up the pornography, but said multiple people had access to her computer. *Id.* Additionally, any focus on the pornography – and the suggestion that it was viewed so as to coach

H.D. into her allegations – would have been contradictory to Petitioner's theory at trial that H.D. *was* sexually assaulted, though not by Petitioner. Accordingly, the Court presumes Petitioner's trial attorney made a strategic decision not to call this witness at trial. *See Moomey v. Sirmons*, 202 F. App'x 325, 329 (10th Cir. 2006) (finding no ineffective assistance in trial counsel's failure to call a witness whose testimony "would have conflicted, at least partially" with the defense's theory).

The same is true for Petitioner's argument that his attorney should have called an expert to testify that Dr. Waters should have performed a "knee-chest position" examination to confirm his medical findings, because "sometimes the hymen can be difficult to see." Pet. at 20. Dr. Waters himself agreed that the "knee/chest" position is useful because in some children "you have difficulty seeing the posterior hymen," but said that he did not need to examine H.D. in that position because there "was just an absence of the hymen. It wasn't a matter of seeing it any better. It was just that it wasn't there." Tr. Day 3 at 135. Considering Dr. Waters' explanation, the OCCA presumably found that having an expert testify on the various examination positions – one who had not examined H.D. – would not have affected the outcome of the trial.

In sum, it is difficult "to see any plausible argument for how [these witnesses'] testimony could have made any difference." *Matthews*, 577 F.3d at 1191-92 (finding no ineffective assistance of counsel in the decision not to call witnesses who "would have done little to undermine [the other witness's] testimony"). Accordingly, the Court finds that the OCCA reasonably applied *Strickland* in finding no ineffective assistance from either trial or appellate counsel on this issue.

ii. Failure to Impeach Witnesses and ask Petitioner's Questions

Petitioner also complains that his attorney failed to aggressively impeach Ms. Dyer with her inconsistent statements and did not attempt to impeach H.D. In particular, Petitioner wanted his attorney to:

- call Ms. Dyer as a defense witness so to show that she "lied about a vast array of topics;"
- question Petitioner and Ms. Monsalve about the layout of the house so to impeach H.D.'s testimony that she was able to get dressed in a hurry when Ms. Monsalve returned;
- impeach H.D. to show her inconsistencies;
- use a chronological timeline to show that Ms. Dyer coached H.D.; and,
- question Dr. Waters about whether Ms. Dyer could have taken H.D. straight to the emergency room if she believed the child had just been raped.

Pet. at 22-24.

Notably, "the manner in which counsel cross-examines a particular witness is a strategic choice and therefore 'virtually unchallengeable.'" *Kessler v. Cline*, 335 F. App'x 768, 770 (10th Cir. 2009) (*citing Strickland*, 466 U.S. at 690). Against that backdrop, the Court should find that the OCCA reasonably applied *Strickland* in denying Petitioner's underlying ineffective assistance of trial counsel claim, and in turn, his related ineffective assistance of appellate attorney argument.

At its core, Petitioner's stance suggests that his attorney should have asked questions so to prove that Ms. Dyer coached H.D. and that the child's story was implausible. But as just noted, "counsel's decisions regarding how best to cross-examine witnesses presumptively arise from sound trial strategy." *Richie v. Mullin*, 417 F.3d 1117, 1124 (10th Cir. 2005); *see also United States v Dormer*, 440 F. App'x 639, 642 (10th Cir. 2011) ("[L]ike most trial decisions, [a] trial counsel's decision whether to cross-examine and what questions to ask [is] presumptively

reasonable."). Here, Ms. Monsalve testified extensively in an attempt to establish that Petitioner never had the opportunity to molest H.D. at their home, Tr. Day 4 at 4-49, 75-79, and the attorney questioned Ms. Monsalve about her and Petitioner's bedding, to show H.D.'s description was incorrect. *Id.* at 34-37. Further, H.D. was only nine-years-old at the time she testified at trial. Tr. Day 3 at 95. Trial counsel's decision not to aggressively challenge a young child was clearly sound strategy. Additionally, Petitioner's entire theory at trial was that H.D. *was* sexually assaulted, just not by him. *See supra* at 9. To that end, Petitioner's attorney spent extensive time questioning witnesses to establish that Ms. Dyer: (1) had a drug problem; (2) was untruthful and vindictive, (3) and had a motive to implicate Petitioner. Tr. Day 2 at 93-153 (cross-examining Ms. Dyer), Tr. Day 3 at 154-169 (questioning Petitioner's sister), 173-78 (questioning Petitioner's mother), Tr. Day 4 at 4-49, 75-79 (questioning Ms. Monsalve), 82-148, 160 (questioning Petitioner). Trial counsel could have reasonably believed that he would be more successful eliciting damning testimony about Ms. Dyer from these witnesses, rather than getting Ms. Dyer to admit to perjury and coaching. *See Ellis v. Raemisch*, 872 F.3d 1064, 1088-89 (10th Cir. 2017) (finding the OCCA reasonably applied *Strickland* where it found counsel engaged in sound trial strategy when he used cross-examination of other witnesses to try and establish "evidence of [the mother's] allegedly vengeful attitude and her children's alignment with her"). Finally, Dr. Waters had already made it clear that he examined H.D. several days after the alleged rape. Tr. Day 3 at 124. Whether "the medical profession" would believe that Ms. Dyer was negligent for the delay (which she denied causing, Tr. Day 2 at 125) is not relevant and trial counsel thus had no duty to ask the question.

For these reasons, the OCCA reasonably found that trial counsel's conduct in questioning the witnesses was not deficient, and any related ineffective assistance of appellate counsel claim necessarily failed under *Strickland*.

d. Ground One (2)(Fact 4)

According to Petitioner, at a hearing in conjunction with his first trial, Dr. Ray Hand, Ph.D., a licensed psychiatrist, gave testimony that Ms. Taylor "seemed in a hurry and didn't allow H.D. to develop a narrative before asking the next question [in H.D.'s forensic interview]." Pet. at 21. Petitioner says that Dr. Hand also testified that using anatomical dolls in a forensic interview leads to more "fantastic details" from children. *Id.* After hearing Dr. Hand's testimony, the trial court granted the State's motion to exclude the testimony. Felony Mot. Tr. at 176-226. At Petitioner's third and final trial, the attorney did not re-urge the issue. Nevertheless, appellate counsel challenged the trial court's exclusion of Dr. Hand's testimony on direct appeal. *See* Brief of Appellant at 38-43. The OCCA rejected the claim, holding:

> In Proposition III [Petitioner] complains that, before the first mistrial, the trial court ruled he could not present an expert witness, Dr. Hand, regarding the way in which H.D.'s forensic interview was conducted. Nothing in the record shows that [Petitioner] asked to offer Dr. Hand's testimony before this third trial, or asked the trial court to reconsider the first pretrial ruling in this trial. Before the second mistrial the trial court stated that its ruling on any previous motions, with the specific court minutes outlining the rulings, would stand. The trial court made this same announcement at the start of this trial, specifically referring to the previous ruling on the admissibility of child hearsay statements. [Petitioner] apparently believes that this announcement preserved this issue for appeal. He is mistaken. Defense counsel never filed a separate witness list, and did not specifically say he intended to call the witnesses on the witness list from the first mistrial. He did not call Dr. Hand; did not list him as a witness; did not ask to call him; did not ask the trial court to reconsider its previous ruling concerning Dr. Hand; and did not make any offer of proof stating that he wanted to call Dr. Hand or what he would say if called to testify. This Court is reviewing issues raised in [Petitioner's] last, full, trial, not incidents which occurred before his first mistrial. As nothing indicates [Petitioner] ever intended to call Dr. Hand in this trial, and there is no offer of proof regarding any ruling prohibiting Dr. Hand's testimony from the third trial, there is nothing for this Court to review.

OCCA Summary Order at 6-7.

In Ground One (2)(Fact 4), Petitioner claims his appellate attorney should have raised an ineffective assistance of trial counsel claim because the attorney failed to file a motion to use testimony from Dr. Hand, thus preserving the issue for appellate review. *See* Pet. at 21. The Court should find that the OCCA reasonably rejected this claim, as trial counsel's failure to preserve the issue for appeal was not prejudicial.

The State moved to exclude Dr. Hand's testimony because he did not qualify as an expert on forensic interviewing techniques. Or. at 133-36. After a hearing, the trial court agreed finding:

> I'm concerned by Dr. Hand's testimony that he – concerning the issue of his familiarity with his forensic interviewing techniques. He's self-taught. He relies upon various authors and persons . . . , but say it's based on – and he can't really tell and show this Court what is his specific protocol other than he's develop it.
>
> He hasn't been able to articulate to the Court what he found to be questionable about leading questions. Nor has he interviewed [H.D.].
>
> I just don't think under these circumstances that you've carried your burden.

Felony Mot. Tr. at 226.

The OCCA would have reviewed that decision for an abuse of discretion. *See Bramlett v. State*, -- P.3d --, 2018 WL 2451792, at *8 (Okla. Crim. App. 2018). In so doing, the OCCA would have recognized that a defendant has a constitutional right to present a defense, but that the "'right to present a defense ultimately turns on whether the evidence at [the defendant's] disposal is admissible.'" *Tryon v. State*, -- P.3d --, 2018 WL 2531331, at *12 (Okla. Crim. App. 2018) (citation omitted)). And in Oklahoma, a witness cannot testify as an expert unless he or she has the relevant "knowledge, skill, experience, training or education" and (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles to the case at hand. Okla. Stat. tit. 12, § 2702. Based on the trial court's findings, the OCCA would have likely upheld the decision. *See Bramlett*, 2018 WL 2451792, at *9 (finding no abuse of discretion in the trial court's finding that witness did not qualify as an expert); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 225 (Okla. Crim. App. 2010) (affirming the trial court's exclusion of a psychologist's testimony where "nothing in the record" showed the doctor had "any specialized knowledge or training . . . that would qualify him as an expert in [the relevant field]"). As trial counsel's conduct was therefore not ineffective, the OCCA then reasonably found that appellate counsel had no obligation to raise this claim on direct appeal.

e. Ground One (2)(Fact 7)

Next, Petitioner argues that his appellate counsel should have raised an ineffective assistance of trial counsel claim on grounds that trial counsel failed to object to sleeping jurors during testimony from Ms. Taylor, Dr. Waters, and while the forensic interview was playing. *See* Pet. at 24-25. However, the record lacks any support for Petitioner's claim that jurors were sleeping, *see* Tr. Day 3, *passim*, and the trial court held that Petitioner's trial notes (noting sleeping jurors) had "no evidentiary value." Order at 2. The Court may presume that the OCCA implicitly rejected the underlying ineffective assistance of trial counsel claim on this ground. *See, e.g.*, *Coddington v. Royal*, No. CIV-11-1457-HE, 2016 WL 4991685, at *20 (W.D. Okla. Sept. 15, 2016) (unpublished district court order) (finding the OCCA reasonably rejected a sleeping juror issue, holding: "The bottom line is that petitioner's claim lacks a factual basis. As the OCCA found, there is no evidence that the juror was actually sleeping or that she missed any of the presented evidence."). In turn, the OCCA therefore reasonable applied *Strickland* when it held that appellate counsel was not ineffective for failing to raise this claim on direct appeal.

f. Ground One (2)(Fact 8)

According to Petitioner, his trial attorney failed to request a jury instruction stating that H.D.'s testimony had to be corroborated, and that the State had to "elect a crime." Pet. at 25. Petitioner blames his appellate counsel for failing to challenge this conduct on direct appeal. *See id.* However, as noted, the OCCA would not have required corroboration in this case, and, more importantly, H.D.'s testimony was sufficiently corroborated. *See supra* at 15-16; *infra* at 41. Further, there was no error in the State's timeframe listed in the Information. *See infra* at 34-35. Under such circumstances, the OCCA reasonably applied *Strickland* to find no prejudice in trial attorney's failure to request such instructions. *See Short v. State*, 980 P.2d 1081, 1107 (Okla. Crim. App. 1999) (finding no ineffective assistance of trial counsel's failure to request corroboration jury instruction where there was otherwise "ample corroboration in the record"). With this underlying decision, the OCCA reasonably applied *Strickland* in finding that appellate counsel was not ineffective for failing to raise the claim on direct appeal.

g. Ground One (2)(Fact 9)

Petitioner wanted to call James Hekia as a witness at trial to establish that Mr. Hekia (Ms. Dyer's brother) is a registered sex offender and had unsupervised access to H.D. during the relevant time period. Tr. Day 4 at 162-64.

The OCCA has held:

> Before evidence tending to show that another party might have committed the crime would be admissible, "the evidence offered must connect such other person with the fact; that is, some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than to the defendant, as the guilty party", "there must be such proof of connection with it, such a train of facts or circumstances, as tend clearly to point out some one besides the prisoner as the guilty party. Remote acts, disconnected, and outside of the crime itself, cannot be separately proved for such a purpose", and "there must be evidence of acts or circumstances that tend clearly to point to another, rather than the accused."

Gore v. State, 119 P.3d 1268, 1275-76 (Okla. Crim. App. 2005) (citations omitted).

Citing *Gore*, the State had previously moved to exclude such testimony, on grounds that Petitioner lacked any evidence to link Mr. Hekia with an overt act constituting a crime against H.D. Or. at 341. The trial court sustained the motion, *id.* at 354, and when Petitioner's attorney re-raised the issue at trial, the court again denied him the opportunity to call the witness. Tr. Day 4 at 164-74. According to the court, Petitioner lacked any admissible evidence that Mr. Hekia had been living at Ms. Dyer's parents' home at the time in question or that he had ever been alone with H.D. *Id.* at 172.

According to Petitioner, his trial attorney should have developed and presented the evidence in his "Attachment C" so as to overcome the State's objections, and appellate counsel was ineffective for failing to challenge the trial attorney's omission. *See* Pet. at 25-26. But Petitioner's "Attachment C" confirms only that Mr. Hekia is a registered sex offender, based on an indecent exposure conviction, and that he lived with Ms. Dyer's mother. *See id.*, Attachment C, *passim*; *see also* Order at 1 (explaining the documents). This evidence does *not* establish that Mr. Hekia was ever alone with H.D., and while Ms. Dyer admitted that H.D. might have been at her mother's house at the same time as Mr. Hekia, she was adamant that H.D. was never alone with him. Tr. Day 2 at 140-42. More compelling, H.D. also denied that she was ever alone with Mr. Hekia, and, in fact, denied that she ever saw him at her grandmother's house. Tr. Day 3 at 105. Finally, Petitioner fails to point to any evidence of any overt act, performed by Mr. Hekia, towards H.D. So, even if Petitioner's trial attorney had presented "Attachment C" to the trial court, there is not a reasonable probability that the trial court would have allowed Mr. Hekia's testimony. As such, the OCCA reasonably applied *Strickland* in finding that trial counsel was not ineffective

for failing to present "Attachment C" to the trial court, and thus appellate counsel had no duty to raise the meritless claim on direct appeal.

h. Ground One (2)(Fact 10)

Finally, Petitioner believes that his appellate attorney should have raised a claim on direct appeal accusing trial counsel of failing to fully advise Petitioner of the "trial strategy" when presenting the State's plea offer. Pet. at 26-27. Petitioner explains that trial counsel never told him that he was not calling the witnesses discussed in Ground One (2)(Fact 3). *Id.* at 27. But to prevail on direct appeal, Petitioner would have had to "show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). Paramount to that, Petitioner would have to prove that "a plea agreement was formally offered by the government." *United States v. Cortez-Diaz*, No. 11-20031-01, 2017 WL 2384198, at *2 (D. Kan. June 21, 2017) (unpublished district court order).

Aside from claiming that he would have taken the plea, Petitioner points to no evidence that his appellate attorney could have presented to the OCCA to prove that the State actually offered Petitioner a formal plea agreement during trial, or that the court would have accepted it.[12] Thus, the OCCA reasonably found that appellate counsel's failure to challenge trial counsel's conduct did not constitute prejudice under *Strickland*.

[12] Petitioner suggests relevant evidence exists in Attachment "N," Brief at 41, but the Court finds nothing relevant in that exhibit. *See* Pet., Attachment N.

i. Summary of Ground One (2)(Fact 1)-(Fact 10)

For the reasons discussed above, Petitioner cannot show that the OCCA unreasonably applied *Strickland* when it found, implicitly, that trial counsel's conduct was not deficient and/or prejudicial at trial. And, because the underlying trial counsel claims would have therefore lacked merit on direct appeal, the OCCA further reasonably applied *Strickland* in finding no reasonable likelihood that the outcome of the direct appeal would have been different had appellate counsel challenged trial counsel's conduct. *See Fairchild*, 784 F.3d at 715; *Cargle*, 317 F.3d at 1202.

3. Petitioner's Underlying Claim Involving Fatal Infection of the Trial with False Testimony – Ground One (3)

Petitioner claims that his trial was fatally infected with perjured testimony from Ms. Dyer and Ms. Taylor and that the prosecutor knowingly allowed the false testimony. *See* Pet. at 27-28. 31-37. In Ground One (3), Petitioner challenges his appellate attorney's failure to raise this issue on direct appeal. *See id*. at 27-23. The Court finds that the OCCA reasonably applied United States Supreme Court law in rejecting this claim.

It is true that "[a] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."). However, as noted above, "[c]ontradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991); *see also United States v. Gordan*, 657 F. App'x 773, 779-80 (10th Cir. 2016). Indeed, as the Tenth Circuit has explained:

> Discrepancies in testimony are common, and can generally be explained as resulting from human failings short of intentional lying. To reverse [a defendant's] conviction on this ground would bring many, perhaps most, convictions into question. We will reserve such reversals for cases in which perjury and knowledge of perjury are either clear on the record or have been found by the lower court.

United States v. Frazier, 429 F. App'x 730, 734 (10th Cir. 2011).

On post-conviction, Petitioner presented all his evidence attempting to prove the various witnesses' testimony constituted perjury, but the trial court rejected his allegations, finding his numerous exhibits did not support his suppositions. *See* Order of Summary Disposition at 10; Order at 1-3. The OCCA affirmed the final order, and this Court therefore presumes that the OCCA also found that the alleged inconsistencies in the witnesses' testimony did not amount to perjury. *See Hittson v. Chatman*, -- U.S. --, 135 S. Ct. 2126, 2127 (2015) (holding that "'[w]here there has been one reasoned state judgment rejecting a federal claim,' . . . federal habeas courts should presume that 'later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.'" (citation omitted)). This Court further presumes that the court's factual findings are correct and finds that Petitioner has not presented clear and convincing evidence sufficient to rebut that presumption of correctness. *See Rivera v. Beck*, 122 F. App'x 408, 409 (10th Cir. 2005) (holding petitioner had failed to rebut the presumption of correctness afforded to the state court's factual findings where he "introduced no new evidence . . . that contradicts the findings"); *Cole v. Zavaras*, No. 07-cv-01197-WDM-MJW, 2009 WL 1600556, at *20 (D. Colo. June 4, 2009) (unpublished district court order) (noting that the state appellate court made a factual finding that the relevant testimony did not constitute perjury and, because petitioner did not present any additional evidence to overcome that presumption and instead wanted the court to "reweigh the evidence previously presented," presuming that finding to be correct), *aff'd*, 349 F. App'x 328, 334 (10th Cir. 2009) ("A review of the full record reveals Cole has presented no

evidence that his conviction was based on perjured testimony. Nor has he presented evidence or argument sufficient to show that the district court's conclusion on this issue was debatable or wrong.").

Additionally, Petitioner's trial attorney repeatedly challenged Ms. Dyer's truthfulness and motives, and both Ms. Monsalve and Petitioner disputed and contradicted Ms. Dyer's testimony. Tr. Day 2 at 93-154; Tr. Day 4 at 4-49, 75-78, 90-148. The attorney also challenged Ms. Taylor's testimony, attempted to show she performed a biased and leading interview. Tr. Day 3 at 50-72, 84-87. Finally, and most significantly, both of these witnesses served only to set the stage for H.D.'s testimony. To that end, the jury heard H.D. describe Petitioner: (1) performing oral sex on her, (2) requiring her to perform oral sex on him, and (3) putting his penis into her vagina. *See* State's Ex. 3. H.D. told the jurors that this was all true, Tr. Day 3 at 96-97, and Dr. Waters testified that H.D.'s physical exam was highly consistent with this abuse. *Id.* at 130-31, 134, 136. So, even if Petitioner *could* overcome the presumption that the testimony did not constitute perjury, the OCCA reasonably applied federal Supreme Court law in concluding that Ms. Dyer and Ms. Taylor's testimony would not have affected the judgment of the jury. Thus, in turn, the OCCA reasonably applied *Strickland* in holding that appellate counsel was not constitutionally ineffective for failing to raise a due process claim based on perjured or false testimony.

4. Petitioner's Underlying Claim Involving the Trial Court's Failure to "Require Election of a Crime" – Ground One (4)

Next, Petitioner argues that his appellate counsel should have raised a claim on direct appeal that the trial court failed to require the State to "elect a crime." Pet. at 28-29. Specifically, Petitioner argues the time frame in the Information was too broad. *See id.* The Court should find that the OCCA reasonably rejected this allegation under *Strickland*, because the underlying argument lacks merit.

Oklahoma has long recognized that "[t]he United States and Oklahoma Constitutions require that an accused person be informed of the charges against which he must defend." *Parker v. State*, 917 P.2d 980, 985 (Okla. Crim. App. 1996). To that end, Oklahoma gives notice through a "charging document known as the Information, which is filed against an accused." *Id.* The Information must set forth a statement of facts constituting the offense, sufficient to describe the essentials of the crime, and should "enable a person of common understanding to know against what charge they must be prepared to defend." *Id.* However, "[t]he precise time at which an offense was committed need not be stated in the indictment or information; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense." Okla. Stat. tit. 22, § 405. In other words, an Information is "sufficient" when it is clear that "the offense was committed at some time prior to the time of filing the indictment or information." *Id.*, § 409. So, even if appellate counsel had raised this claim on direct appeal, it is clear the OCCA would have denied relief. *See Kimbro v. State*, 857 P.2d 798, 800 (Okla. Crim. App. 1990) (holding an Information alleging forcible oral sodomy on a seven-year old child was not unconstitutionally vague for alleging a several month span of time and noting: "To hold otherwise would create undue risk to child victims who for legitimate reasons are unable to specify the date or dates on which they were molested."); *see also Burling v. Addison*, 451 F. App'x 761, 766 (10th Cir. 2011) (finding no due process violation in an Oklahoma Information which alleged sexual abuse throughout a six-year time span).

5. Petitioner's Underlying Claim Involving Prosecutorial Misconduct – Ground One (5)

Petitioner also believes that his appellate counsel was ineffective for failing to raise a prosecutorial misconduct allegation on direct appeal. *See* Pet. at 29-37. Specifically, Petitioner claims that the State: (1) misstated evidence and misled the jury into believing Ms. Dyer had no

motive to "fabricate the allegations;" (2) told the jury that Petitioner and his witnesses were lying; (3) asserted a personal opinion about Petitioner's guilt; (4) asked the jury to give H.D. sympathy; and (5) knowingly allowed perjured testimony from Ms. Dyer and Ms. Taylor. *Id.* at 17, 29-37. The Court finds that the OCCA reasonably rejected the underlying prosecutorial misconduct claims, and thus the related ineffective assistance of appellate counsel claim.

To "succeed on his counsel's failure-to-[raise] claims, he must show that the underlying prosecutorial-misconduct claims themselves have merit." *Hanson*, 797 F.3d at 837. That is, the OCCA would not have granted relief "for improper argument unless, viewed in the context of the whole trial, the statements rendered the trial fundamentally unfair, so that the jury's verdict[] [was] unreliable." *Bosse v. State*, 400 P.3d 834, 863 (Okla. Crim. App. 2017); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (holding that a prosecutor's conduct is unconstitutional if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

a. Alleged Misstatement of Evidence

Petitioner first accuses the prosecution of misstating the evidence in closing argument. *See* Pet. at 30. But a "'prosecutor is allowed a reasonable amount of latitude in drawing inferences from the evidence during closing summation.'" *Duvall v. Reynolds*, 139 F.3d 768, 795 (10th Cir. 1998) (citation omitted). So, the OCCA reasonably found that the State was well within its rights to draw inferences from the testimony of Ms. Dyer, Ms. Taylor, and Petitioner himself. Further, "[i]n evaluating whether improper prosecutorial comments render a trial fundamentally unfair, [a court] view[s] the comments within the context of the trial as a whole." *Duvall*, 139 F.3d at 794. Because the jury heard evidence that contradicted Ms. Dyer and Ms. Taylor and heard Petitioner's testimony, the OCCA reasonably found that the prosecutor's comments, when viewed in context,

did not render the jury fundamentally unfair. In turn, the OCCA then reasonably applied *Strickland* in find that appellate counsel had no obligation to raise this claim on direct appeal.

b. Alleged Statements that Petitioner and his Witnesses were Liars and H.D. was Truthful, and Expression of Personal Opinion Regarding Petitioner's Guilt

Petitioner next alleges that the prosecutor called him a liar, expressed a personal opinion that H.D. was telling the truth, and expressed a personal opinion that Petitioner was guilty. So, according to Petitioner, his appellate counsel should have raised this issues on direct appeal. *See* Pet. at 31.

i. Calling Petitioner and His Witnesses Liars

Notably, in none of Petitioner's examples does the prosecutor actually call Petitioner or his witnesses liars. *See id.* Instead, the State commented on the evidence, and asked the jury to draw the conclusion that H.D. had been abused and that Petitioner had committed the crime. Tr. Day 4, at 180-90, 212-19. That this argument may have suggested that Petitioner and/or his witnesses were not truthful is irrelevant. "[I]t is not improper for a prosecutor to direct the jury's attention to evidence that tends to enhance or diminish a witness's credibility." *Thornburg v. Mullin*, 422 F.3d 1113, 1132 (10th Cir. 2005). Thus, the OCCA reasonably rejected this underlying prosecutorial misconduct claim.

ii. Vouching for H.D. and Expressing an Opinion on Guilt

At one point in closing arguments, the State asked the jury to consider Dr. Waters' testimony that H.D. was missing her hymen, her vaginal opening appeared large, and that he "suspected penile penetration." Tr. Day 4 at 215. The prosecutor then said:

> To believe what the defense wants to say, to believe that everybody's lying here, that [Ms. Dyer] is this liar, that [H.D.] is this liar. If you believe that then you have to believe that she wasn't abused. If they're lying, if they're making this up she wasn't abused, but she was abused. She's not lying.

Id.

Thereafter, the State commented:

> Ladies and gentlemen, what the evidence shows is that [H.D.] was abused and that the only person that could have done this was [Petitioner].
>
> Ladies and gentlemen, you have a – a task at hand. You have to go back to that deliberation room, you have to look at those jury instructions, and you have to make a decision. And once you find that the State has proven beyond a reasonable doubt all those elements . . . then the instructions say that you shall find [Petitioner] guilty and assess punishment.
>
> I ask you to do that. I ask you to find [Petitioner] guilty of sexually abusing his daughter, [H.D.], and set an appropriate punishment.
>
> . . .
>
> What do you think is appropriate? [Petitioner's] guilty of this, and I ask that you find him so.

Id. at 218-19.

In general, a prosecutor should not express an opinion on the credibility or guilt of a witness. *See Hanson*, 797 F.3d at 837 ("'It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.'" (citation omitted)). However, an argument only becomes "impermissible vouching" if "'the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony.'" *Id.* (citation omitted). Here, the State did not make a personal assurance that H.D. was credible or that Petitioner was guilty, nor did the State infer that it knew information not presented to the jury. Thus, the OCCA reasonably found no prosecutorial misconduct or

fundamental unfairness in these comments, and in turn, reasonably applied *Strickland* in finding no related ineffective assistance of appellate counsel.

c. The State's Attempt to Evoke Sympathy

Petitioner also claims prosecutorial misconduct based on the State's evoking sympathy for H.D., specifically, suggesting that Petitioner did not love H.D., that she was heartbroken, and that she would have to live with what happened the rest of her life. *See* Pet. at 17.

In relevant part, the State told the jury:

> 'I love my Marine family. I felt a responsibility to my Marine family.' Those are two things he said on the stand. Think back. Tell me one time, one time he said, 'I love my family.' Tell me one time he said, 'I love my daughter.' He didn't do it. . . . Not once.
>
> . . .
>
> [H.D.] sat right there and pointed to him and said, 'My daddy,' right there, 'He's the one that did it.' That is something that [H.D.] will have to live with the entire rest of her life.
>
> Heartbroken? Absolutely. Tragically heartbroken. Sexually abused? Absolutely. By her father. Is that heart breaking?
>
> . . .
>
> What's appropriate [for punishment]? What's appropriate? Two years after the fact you still see how emotional [H.D.] is. What is an appropriate punishment for [Petitioner] for doing this?

Tr. Day 4 at 189-90, 219.

While it is true that a prosecutor's remarks directed to encourage sympathy for the victim are not condoned, *see Moore v. Gibson*, 195 F.3d 1152, 1172 & n.11 (10th Cir. 1999), the jury saw a then seven-year-old H.D. describe Petitioner forcing her to perform oral sex upon him, ejaculating into her mouth, and putting his penis inside her vagina. *See supra* at 8. Thus, the State's evidence had already likely created jury sympathy for H.D. before closing arguments and

the trial court instructed the jury that it "should not let sympathy, sentiment or prejudice enter into . . . deliberations . . . ." Or. 403. In combination, the OCCA reasonably concluded that the comments did not render Petitioner's trial fundamentally unfair. *See Moore*, 195 F.3d at 1172-73 (finding the prosecutor's sympathetic remarks did not render trial fundamentally unfair where the jury was likely already sympathetic to the victim through the evidence admitted at trial and the jury was instructed not to let such sympathy enter into deliberations).

d. The State's Alleged Use of Perjured Testimony

Finally, Petitioner accuses the State of using perjured testimony, primarily from Ms. Dyer and Ms. Taylor, and alleges that his appellate counsel should have argued this on direct appeal. *See* Pet. at 31-37. Again, the Court finds that the OCCA reasonably found no prosecutorial misconduct, and then reasonably applied *Strickland* in finding that appellate counsel's conduct was not constitutionally ineffective.

To prove prosecutorial misconduct based on this claim, Petitioner bears the burden of showing: (1) the testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material. *See McBride v. United States*, 446 F.2d 229, 232 (10th Cir. 1971); *see also United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002). As discussed above, Petitioner has failed to prove that the inconsistencies in Ms. Dyer and Ms. Taylor's testimonies constituted perjury or that the inconsistencies about which he complains were material to the question of guilt or innocence. *See supra* at 32-34. Accordingly, the OCCA reasonably applied federal law in rejecting the underlying prosecutorial misconduct claim, and thus reasonably applied *Strickland* in denying relief on Petitioner's related ineffective assistance of appellate counsel claim.

6. Petitioner's Underlying Claim Involving the Admission of Improper Hearsay – Ground One (6)

The trial court allowed the State to admit and publish to the jury a recording of H.D.'s forensic interview. Tr. Day 3 at 89. Ms. Dyer and Ms. Taylor were also permitted to repeat H.D.'s statements made to them. *See supra* at 7-8. Petitioner alleges that this was allowed in error, because: (1) H.D.'s statements had not been sufficiently corroborated; (2) the trial court failed to hold a hearing on reliability; and (3) the State did not make known the particulars of H.D.'s statements "10 days in advance." Pet. at 37-39. In turn, Petitioner alleges that his appellate attorney was constitutionally ineffective for failing to raise these arguments on direct appeal. *See id.* The Court finds that the OCCA reasonably rejected these claims.

Under a specific exception to the hearsay rules in Oklahoma, out of court statements made "by a child under thirteen years old describing acts of physical or sexual conduct performed on or with the child" are admissible. *Folks v. State*, 207 P.3d 379, 382 (Okla. Crim. App. 2008). Under the relevant statute, the trial court is required to hold a hearing, outside the jury's presence, to determine whether the statements are trustworthy. *See id.*

Here, the trial court held such a hearing on April 8, 2011, and found H.D.'s statements to be inherently trustworthy. Felony Mot. Tr. at 54-167. And, because H.D. testified at trial, there was no need for independent corroboration under the statute. *See* Okla. Stat. tit. 12, § 2803.1(A)(2)(b) (requiring "corroborative evidence of the act" when a child witness is unavailable to testify); *see also supra* at 15. More importantly, even if corroboration *was* required, it was accomplished. *See id.* at 16-17. Finally, Petitioner was given a copy of H.D.'s forensic interview before the April 8, 2011 hearing, *see* Felony Mot. Tr. at 57, and the record fails to establish that his attorney did not have access to all the relevant statements within the necessary time period.

In sum, Petitioner's arguments on this issue are meritless, and the OCCA reasonably applied *Strickland* when if found, essentially, that appellate counsel had no constitutional duty to raise the claims on direct appeal.

7. Petitioner's Underlying Claim Involving the Trial Court's Refusal to Grant Petitioner's Demurrer at his First Trial– Ground One (7)

As discussed above, Petitioner's first trial ended in a mistrial. *See supra* at 1. According to Petitioner, his appellate attorney should have argued on direct appeal that the trial court erred in overruling Petitioner's demurrer in that first case, claiming that the trial court's error allowed the State the opportunity to "shore up holes in their case" for the last trial. Pet. at 39-40.[13] But addressing another issue, the OCCA held it was "reviewing issues raised in [Petitioner's] last, full, trial, not incidents which occurred [at] his first mistrial." OCCA Summary Order at 6. So, Petitioner cannot show a reasonable probability that the outcome of his direct appeal would have been different had his appellate counsel raised an error allegedly occurring in the first mistrial, and thus the OCCA reasonably applied *Strickland* in rejecting this claim.

8. Summary

Under § 2254(d)(1), this Court's inquiry is not whether the OCCA's decision was correct or incorrect, but whether it was "'objectively unreasonable.'" *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (citation omitted). Under this standard, Petitioner cannot prevail. As discussed above, Petitioner has not established that his appellate attorney had an obligation to raise the underlying claims on direct appeal, or that there is a reasonable probability that the outcome

[13] Respondent reads Petitioner's argument as that appellate counsel should have challenged the trial court's failure to grant the demurrer at his last and final trial. *See* Resp. at 70. The Court disagrees with interpretation, as Petitioner clearly emphasizes that the failure to grant the demurrer allowed "for a hung jury and 2 subsequent trials . . . ." Pet. at 39-40; *see also* Reply at 4 ("Though the State argued that the [d]emurrer was proper for the third trial, it remains completely silent as to the demurrer at the first trial.").

of his direct appeal would have been different had he argued these issues. As such, the OCCA reasonably applied *Strickland* when rejected Petitioner's ineffective assistance of appellate counsel claim. The Court should therefore deny habeas relief on Ground One.

VI. Petitioner's Ground Two

In Petitioner's Ground Two, he claims that his entire trial was rendered fundamentally unfair through "a plethora inadmissible evidence" intended to prove only that Petitioner was "a bad person." Pet. at 41-42. The Court should deny habeas relief on this claim.

A. Clearly Established Law

Petitioner's argument focuses on the State's introduction of evidence in violation of Oklahoma law. However, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "Nevertheless, when a state court admits evidence that is 'so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.'" *Ochoa v. Workman*, 669 F.3d 1130, 1145 (10th Cir.2012) (*quoting Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). So, this Court's concern is not whether the trial court admitted the relevant evidence in violation of Oklahoma law, but whether the OCCA reasonably determined the evidence did not render Petitioner's trial fundamentally unfair. *See, e.g., Ochoa*, 669 F.3d at 1144 (holding that the question of whether evidence renders a trial fundamentally unfair is made "without regard to whether the evidence was properly admitted pursuant to state law" (*citing Estelle*, 502 U.S. at 67-68)).

B. The OCCA's Ruling

Petitioner raised this claim on direct appeal, and the OCCA rejected it, holding:

> We find . . . that the trial court did not abuse its discretion in allowing [Ms.] Dyer's testimony about their marriage and details of [Petitioner's] relationship with the child victim, H.D.
>
> In *Coates* [*v. State*, 773 P.2d 1281 (Okla. Crim. App. 1989)] the Court concluded the admission of an abundance of highly inflammatory evidence of other crimes or bad acts required reversal. The analogy is not apt. While the evidence of bad acts in Coates had no relevance to the charges, [Ms. Dyer's] testimony had some relevance to the issues at trial. Defense counsel elicited some of this evidence through cross-examination of [Ms. Dyer], and through his own witnesses, including [Petitioner] himself. The entirety of [Ms. Dyer's] testimony about her history with [Petitioner], and [Petitioner's] history with H.D., seems to support [Petitioner's] defense. [Petitioner] claimed he did not commit the crimes, and that [Ms. Dyer] coached H.D. to accuse [Petitioner] because she was angry with him.

OCCA Summary Opinion at 5.

The Court may presume, through the OCCA's rejection of the claim, that it found the evidence did not render Petitioner's trial fundamentally unfair, and the Court should find that decision reasonable.

Ms. Dyer certainly described Petitioner as a less-than-caring husband and father, but as the OCCA noted, this testimony was *useful* to Petitioner's defense, as he and his witnesses were then able to counter with testimony that Petitioner loved and supported H.D., and that Ms. Dyer was a lying, vindictive, drug-using adulteress who had motive to coach H.D. into naming Petitioner as her molester. *See supra* at 14, 19, 25. Further, when considered in light of the entire proceedings – including H.D.'s testimony, her forensic interview, and Dr. Waters' testimony – Petitioner has simply not shown that the OCCA unreasonably applied federal law when it rejected this claim on direct appeal. *See, e.g., Lott v. Trammell*, 705 F.3d 1167, 1193-94 (10th Cir. 2013) (finding no fundamental unfairness through the admission of bad acts evidence where evidence of guilt was otherwise overwhelming). The Court should therefore deny habeas relief on Ground Two.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Court DENY the Petition [Doc. No. 1].

NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to object to this Report and Recommendation. *See* 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by July 27, 2018. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *See Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

STATUS OF REFERRAL

This Report and Recommendation terminates the District Judge's referral in this matter.

ENTERED this 6th day of July, 2018.

BERNARD M. JONES
UNITED STATES MAGISTRATE JUDGE