

DEC 14 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH W. FOOSE,

Petitioner - Appellant,

v.

JACQUELINE CRAWFORD, et al.,

Respondents - Appellees.

No. 08-15908

D.C. No. 3:03-CV-00245-LRH-
RAM

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted November 18, 2009**

Before: HUG, SKOPIL, and BEEZER, Circuit Judges.

Kenneth W. Foose, a Nevada state prisoner, appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

DISCUSSION

Foose claims his constitutional due process rights were violated when the state trial court admitted evidence of prior acts of misconduct. Contrary to the state's contention, this claim was properly exhausted. *See Chambers v. McDaniel*, 549 F.3d 1191, 1195-99 (9th Cir. 2008) (concluding under similar circumstances that the Nevada Supreme Court's denial of a petition for extraordinary writ satisfies the federal exhaustion requirement).

On the merits, Foose's contention that he is entitled to federal habeas relief because the state trial court admitted propensity evidence has been rejected by this court. *See Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 941 (2009); *Alberni v. McDaniel*, 458 F.3d 860, 863-67 (9th Cir. 2006). We explained in those cases that *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991), expressly reserved deciding whether admission of propensity evidence violates due process. Accordingly, a state court's decision rejecting such a claim cannot be said to be contrary to, or an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d).

To the extent Foose seeks to raise additional uncertified issues or expand the certificate of appealability, we deny the motion. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.