

MAY 05 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>PATRICK MICHAEL KNOST,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>JOSEPH S. WARSHOLL, II, Probation Officer,</p> <p>Respondent - Appellee.</p>
--

No. 10-15987

D.C. No. 2:08-cv-02564-MCE

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Submitted April 20, 2011**

Before: RYMER, THOMAS, and PAEZ, Circuit Judges.

California state probationer Patrick Michael Knost appeals from the district court's order denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253 and affirm.

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

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

Knost contends that his trial counsel was ineffective for failing to move for acquittal at the close of the prosecutor's case in chief. Specifically, he argues that at that point in time, the prosecution had failed to prove beyond a reasonable doubt that the victim was unconscious or asleep when he penetrated her, as required by Cal. Pen. Code § 289(d). He asserts that had his counsel moved for acquittal, there is a reasonable probability that the motion would have been granted.

The California Court of Appeal, applying *Strickland v. Washington*, 466 U.S. 668 (1984), determined that there was not a reasonable probability that Knost would have received a more favorable determination if his counsel had moved for acquittal at the close of the prosecution's case. Based on the record before us, this determination was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d); *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (per curiam).

AFFIRMED.