

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 22 2016

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

LARRY BANKS,

Petitioner - Appellant,

v.

CONNIE GIPSON, Warden,

Respondent - Appellee.

No. 13-17371

D.C. No. 1:11-cv-02067-LJO-MJS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted February 10, 2016
San Francisco, California

Before: THOMAS, Chief Judge and SCHROEDER and NGUYEN, Circuit Judges.

Larry Banks appeals the district court's order denying his habeas petition.

Banks was convicted of the May 10, 1977 first degree murder of Susan Vallin.

Banks contends that the trial court erred in instructing the jury that it could consider evidence of an uncharged sexual assault to show propensity to commit the

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

charged murder. His theory is that murder is not a crime similar to the uncharged sexual offense.

The challenged instruction directed the jury to regard the sexual assault evidence as relevant to the felony murder charge. That charged offense was not dissimilar to sexual offenses. The state court fully instructed the jury regarding the elements of the offense and the appropriate burdens of proof. *See Mendez v. Knowles*, 556 F.3d 757, 768–70 (9th Cir. 2009). The district court therefore correctly held that under 28 U.S.C. § 2254(d) there was no unreasonable application of Supreme Court law when the state court determined that the propensity instruction did not violate due process or render his trial fundamentally unfair.

AFFIRMED.