

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

May 28, 2020

Lyle W. Cayce
Clerk

No. 19-30282

LARRY MURRAY,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY

Respondent-Appellee

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:15-CV-827

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Larry Murray, Louisiana prisoner # 520360, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his second-degree murder conviction and resulting life sentence. To obtain a COA, he must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which in turn requires him to show that jurists of reason would debate whether the petition should have been resolved in a different manner or that the issues presented deserve

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The district court rejected Murray's arguments that (1) trial counsel denied him the right to testify in his own defense; (2) trial counsel was ineffective in failing to object to Dr. Edgar Shannon Cooper's and Officer David Fauntleroy's testimony regarding autopsy results and evidence recovered therefrom when they neither performed nor attended the autopsy, and the prosecution's failure to call Dr. Corrigan, who performed the autopsy, violated his right of confrontation; (3) the prosecutor engaged in misconduct when he elicited impermissible testimony from witnesses to imply that Murray or someone in his family had called and threatened an eyewitness prior to trial.

To establish ineffective assistance, a defendant must show that his attorney's performance was deficient and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either prong defeats the claim. *Id.* To demonstrate deficient performance, the defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. To demonstrate prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

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Regarding Murray's first claim, as the district court explained, the record is devoid of any evidence to corroborate his conclusory assertion that he expressed his desire to testify but was prevented from doing so by his attorney, and therefore Murray had not demonstrated any deficient performance by counsel. *See id.* at 687. Significantly, Murray had not provided any information regarding what his testimony would have been or how it would have favorably influenced the jury. Moreover, Murray's claim fails for lack of prejudice given the overwhelming evidence of his guilt, which included photographic lineup evidence from two witnesses identifying Murray as the shooter and an eyewitness's trial testimony positively identifying Murray as the man who shot Trahan. *See id.* at 694.

Second, Murray contends that the district court erred in denying his claim that counsel was ineffective in failing to object to Dr. Cooper's and Officer Fauntleroy's testimony on the ground that it violated his right of confrontation. Even assuming that trial counsel was deficient for failing to object to Dr. Cooper's testimony regarding the autopsy report and/or Officer Fauntleroy's testimony regarding bullets recovered during the autopsy, Murray cannot show that reasonable jurists would conclude that, but for counsel's failure, he would not have been convicted. *See Strickland*, 466 U.S. at 694. Dr. Cooper's testimony involved only the uncontested fact that Trahan died of blood loss following gunshot wounds. Both Dr. Cooper and Officer Fauntleroy testified that three bullets were recovered from Trahan's body. Murray's defense was not based on cause of death resulting from gunshot wounds; instead, his defense was that he was not the shooter, but the trial evidence established that he was the sole shooter and in fact shot Trahan. Because there was ample evidence of Murray's guilt and because neither Dr. Cooper's nor Officer Fauntleroy's testimony was relevant to the sole

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contested issue at trial, reasonable jurists would not debate that the state court's rejection of this claim is entitled to deference.

Third, Murray argues that the district court erred in denying his prosecutorial-misconduct claim. He renews his assertion that the prosecutor made impermissible comments which pervaded his trial and prejudiced the jury against him. To be successful on a claim of prosecutorial misconduct, the applicant must show that the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Geiger v. Cain*, 540 F.3d 303, 308 (5th Cir. 2008) (internal quotation marks and citation omitted). In making this determination, we look to the remarks' prejudicial effect, the impact of any cautionary instruction, and the strength of the evidence supporting the verdict. *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). The applicant must demonstrate "that the prosecutor's misconduct was persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks." *Geiger*, 540 F.3d at 308 (internal quotation marks, citation, and brackets omitted).

The district court determined that, even if improper, the prosecutor's comments in the instant case did not amount to a due process violation because the comments were not pervasive and because Murray could not show any prejudicial effect, citing defense counsel's successful objections to the comments, the court's specific instructions to the jury to disregard the comments and advising that attorney arguments did not constitute evidence, and the ample evidence of Murray's guilt.

Murray's argument to the contrary notwithstanding, jurors are presumed to follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987). In view of the court's jury instructions and the uncontradicted

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evidence establishing that he committed the offense, Murray has not made a debatable showing that he would not have been convicted but for the prosecutor's remarks. *See Geiger*, 540 F.3d at 308. Consequently, reasonable jurists would not debate the district court's rejection of his prosecutorial-misconduct claim. *See Slack*, 529 U.S. at 484.

Finally, Murray seems to suggest that the district court wrongly declined to hold an evidentiary hearing before denying his § 2254 petition. Murray does not need a COA to challenge the denial of an evidentiary hearing. *See Norman*, 817 F.3d at 234. Murray's claim is unavailing. The determination whether a state court's decision was contrary to or involved an unreasonable application of federal law "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Accordingly, the district court's review of Murray's claims was limited to the record that was before the state courts, and an evidentiary hearing was not warranted. *See id.* Inasmuch as Murray complains that the state courts' refusal to hold an evidentiary hearing on his claims was error and deprived him of due process, the claim is not cognizable. *See In re Gentrass*, 666 F.3d 910, 911 (5th Cir. 2012) ("Infirmities in state postconviction proceedings are not grounds for relief under § 2254.").

For the foregoing reasons, Murray's motion for a COA is denied. We construe his motion for a COA with respect to the district court's denial of an evidentiary hearing as a direct appeal of that issue, *see Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016), and affirm, *see Cullen v. Pinholster*, 563 U.S. 170, 181-82, 185-86 (2011).

COA DENIED; AFFIRMED.