UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-1670

VERNON LEE ROSE,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(CA3 90 1522 D)

(December 29, 1992)

Before BROWN, GARWOOD, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

The petitioner was convicted in Texas state court for the attempted capital murder of two police officers. He brings this habeas corpus appeal contending that several errors occurred in his state court trial and subsequent appeal. Finding constitutional

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

infirmities neither in the trial nor in the appeal, we deny habeas corpus relief.

I. FACTS AND PROCEDURAL HISTORY

On October 24, 1984, Vernon Lee Rose (Rose) and George Fitch, Jr. (Fitch) robbed Sandra Koscielski (Koscielski) while she was working at Al's Formal Wear in Dallas, Texas. The next day, Rose and Fitch left some clothes to be cleaned at Comet Cleaners in Ennis, Texas. Cynthia Wilson, an employee of Comet Cleaners, while she was examining the pockets of the clothes that had been left to be cleaned, discovered a plastic packet containing Koscielski's driver's license, credit cards, and paycheck. Wilson notified Al's Formal Wear of her discovery. Fifteen minutes later, Fitch and Rose returned to the cleaners to ask Wilson if she had found any papers. Wilson denied having found anything and Rose and Fitch left.

After learning of the robbery from employees of Al's Formal Wear, Wilson notified the Ennis Police. Officer Reno responded to her call and questioned her about the identity of the men that left the clothes. After Wilson identified Rose as one of the robbers, Officer Reno proceeded to Rose's apartment complex in Ennis. Officer Reno approached Rose and Fitch as they were arriving at the apartment. Meanwhile, Officer Shoquist arrived to help Officer Reno in the arrest.

Officer Reno identified himself as a police officer and asked Rose and Fitch for identification. While questioning Rose and Fitch, Officer Reno saw that Fitch was carrying a pistol. Officer

Reno took the pistol from Fitch and stuck it in his belt. Meanwhile, Officer Shoquist was having difficulty subduing Rose. Officer Reno went over to help Officer Shoquist and, during the resulting struggle,[1] the pistol that Officer Reno had removed from Fitch fell out of Officer Reno's belt. Fitch picked up the gun. When Rose saw that Fitch had the gun, he yelled at Fitch "shoot 'em, shoot 'em, shoot 'em." Fitch did exactly that--shooting Officer Reno in the neck and causing him serious injury. Fitch then turned the gun on Officer Shoquist, shooting at him until the gun was empty. When Fitch heard the gun "click" on an empty chamber, he fled. In return, Officer Shoquist fired at Fitch hitting him in the hand and Fitch surrendered. While Officer Shoquist was arresting Fitch, Rose fled the scene in Officer Shoquist's patrol car. After a lengthy high speed chase in which he wrecked the patrol car, Rose was arrested by other officers.

Rose was charged with the attempted capital murders of Officer Reno and Officer Shoquist to which he pleaded not guilty. After a trial, the jury found him guilty on both charges and sentenced him to two thirty-five-year terms of imprisonment for each offense.[2] The judge ordered the sentences to run consecutively. Rose's convictions were affirmed by the Texas Court of Appeals, Tenth Supreme Judicial District of Texas, on March 13, 1986. Rose v. State, Slip op. Nos. 10-85-019 and 10-85-020 (Tex. App.--Waco

[1] In attempting to subdue Rose, Officer Reno struck him three times in the head with the barrel of his pistol.

[2] The sentences were enhanced by Rose's two prior felony convictions.

1986). Rose did not file a Petition for Discretionary Review with the Texas Court of Criminal Appeals. Rose did, however, file a state application for a writ of habeas corpus with that court. In unpublished opinions, the Texas Court of Criminal Appeals reformed both lower court judgments by deleting the affirmative findings of a deadly weapon, but denied all other relief requested by Rose. Ex Parte Rose, Application Nos. 70,942 and 70,943 (October 11, 1989). Rose then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Texas (USDC). The USDC, on the recommendation of the magistrate, found Rose's claims to be without merit and denied habeas relief. Rose filed a timely notice of appeal on June 18, 1991. On January 21, 1992 we granted Rose's application for a certificate of probable cause, but denied his application for appointment of counsel.[3]

II. DISCUSSION

1. Sufficiency of the Evidence

Rose contends that the evidence introduced at trial was insufficient to support his convictions for attempted capital murder for the following reasons: (1) the state did not prove that the weapon introduced at trial was the weapon used to shoot Officer Reno; (2) the state did not prove by medical evidence (in the form of medical records) that Officer Reno was seriously injured; and

[3] Rose is representing himself on this appeal. We denied Rose's application for appointment of counsel because Rose is a capable pro se litigant who has adequately presented the issues in his brief.

(3) the state did not prove that Rose had the requisite specific intent to commit capital murder.

The United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979), set out the test for a federal court to use in a habeas corpus proceeding when reviewing a petitioner's challenge to a state court conviction on the sufficiency of the evidence. In Jackson, the Court stated:

> the critical inquiry on review of the sufficiency of the evidence . . . [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 320 (citations omitted). In applying that test, we review the evidence and the reasonable inferences from the evidence in the light most favorable to the state and give great weight to the determination of the state court. Gibson v. Collins, 947 F.2d 780, 781-82 (5th Cir. 1991), cert. denied, __U.S.__, 113 S. Ct. 102, 121 L. Ed. 2d 61, (1992); King v. Collins, 945 F.2d 867, 868 (5th Cir. 1991) ("[F]indings made by the state court are entitled to a presumption of correctness in federal habeas proceedings.").

To determine whether any rational trier of fact could have found the petitioner guilty beyond a reasonable doubt, federal courts must look to the substantive elements of the criminal

offense as defined by state law. Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985). There are three state statutes applicable to the instant case: (1) Texas Penal Code Section 19.03(a)(1), which makes the murder of a peace officer acting in the lawful discharge of an official duty who is known by the accused to be a peace officer a capital offense; (2) Texas Penal Code Section 15.01(a), which makes criminal an attempt to commit an offense if, with specific intent to commit that offense, the actions of the accused amount to more than mere preparation, but less than the actual commission of the offense; and (3) Texas Penal Code Section 7.02(a)(2), which makes a party criminally responsible for the substantive offense if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid an other person to commit the offense.

With the applicable federal standards and state laws in mind, we review Rose's contentions. Rose's first two contentions that the state did not prove that the weapon introduced into evidence was the weapon used to shoot Officer Reno and that the state did not prove by medical evidence that Officer Reno was seriously injured are simply not relevant to our determination of the sufficiency of the evidence. Those contentions, if true, do not show that a rational trier of fact based on the evidence presented could not have convicted Rose of the attempted capital murders. The essential inquiries are whether Rose had the specific intent to kill Officer Reno and Officer Shoquist and whether Rose encouraged

Fitch in his attempt to kill those officers. Whether the gun and the medical records were introduced into evidence does not make it more probable or less probable that Rose had the requisite specific intent or that he encouraged Fitch to attempt to kill the officers.

Unlike Rose's first and second contentions, Rose's third contention that the state did not prove that he had the requisite specific intent to commit capital murder is a relevant issue for our review because specific intent is an essential element of attempted capital murder. Rose, however, fails to show how a rational trier of fact could not have found beyond a reasonable doubt that he had the specific intent to commit the attempted capital murders. The evidence presented by the state showed that Rose, upon seeing that Fitch possessed the gun, encouraged Fitch to shoot Officer Reno and Officer Shoquist. This was graphically illustrated by Rose's order to Fitch to "shoot 'em, shoot 'em, shoot 'em." Additionally, upon seeing that Fitch had shot Officer Reno in the neck, Rose fled the scene in a stolen patrol car instead of attempting to help the officer. Simply put, Rose has failed to meet his burden of proving that a rational trier of fact could not have found beyond a reasonable doubt that he was guilty as an accomplice to the attempted capital murders of Officer Reno and Officer Shoquist.

2. Effective Assistance of Counsel.

Rose contends that he was denied effective assistance of counsel. The Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984), set out the following

two-part test for determining whether a petitioner has been denied effective assistance of counsel--(1) the petitioner must show that his counsel's performance was deficient; and (2) the petitioner must show that the counsel's deficient performance prejudiced his defense. Id. at 687.

To satisfy the first prong of the test, the petitioner must show that counsel's actions fell below an objective standard of reasonable professional assistance. Bates v. Blackburn, 805 F.2d 569, 577 (5th Cir. 1986), cert. denied, 482 U.S. 916, 107 S. Ct. 3190, 96 L. Ed. 2d 678 (1987). In determining whether counsel's actions fall below that standard, federal courts should recognize that counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 689.

To satisfy the second prong of the test, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Bates v. Blackburn, 805 F.2d 569, 578 (5th Cir. 1986), cert. denied, 482 U.S. 916, 107 S. Ct. 3190, 96 L. Ed.2d 678 (1987). A reasonable probability is a probability sufficient to undermine confidence in the result of the trial. Id. at 578. An inadequate showing of prejudice leads to rejection of the claim of ineffective assistance without examination into the adequacy of counsel's performance. Id. at 577.

Rose contends that his counsel committed numerous errors before and during trial which included failing to investigate the crime scene, interview defense witnesses, review the prosecution's files, obtain evidence to determine if the gun introduced at trial was the one used to shoot Officer Reno, investigate Officer Reno's attending physician to determine if Officer Reno was seriously injured, and call alibi witnesses. Additionally, Rose contends that he could not get his counsel to communicate with him during his appeal. Moreover, Rose contends that he wrote his counsel several times seeking information about his Petition for Discretionary Review, but his counsel never responded resulting in the time allowed for filing the petition expiring and thus him being unable to file such a petition.

Assuming arguendo that Rose's contention that his counsel's pretrial and trial behavior was constitutionally deficient, which we seriously doubt, Rose has not shown how he was prejudiced by that deficient behavior. Concerning Rose's contention that his counsel failed to conduct an adequate investigation, Rose has not shown what exculpatory evidence his counsel would have discovered had he conducted an investigation. Additionally, Rose cannot show how his counsel's other pretrial actions, such as failing to interview witnesses, if taken, would have affected the outcome of the trial. Rose's contention that he was prejudiced by his counsel's failure to object to the admission of the gun during trial on the ground that a chain of custody had not been established is without merit. A review of the record reveals that

there was no confusion whether the gun introduced at trial was the gun that Fitch used to shoot Officer Reno and to shoot at Officer Shoquist. Moreover, the gun was not crucial or even relevant to the state proving its case, and the evidence of guilt was so overwhelming that an objection to the admissibility of the gun would have been pointless. Therefore, we hold that Rose has failed to show that he was prejudiced by his counsel's alleged pretrial and trial errors.

Regarding Rose's contention that he received ineffective assistance of counsel on appeal, the Supreme Court has held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal adequate and effective. Evitts v. Lucey, 469 U.S. 387, 392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). There are two types of denial of appellate counsel--(1) when counsel fails to brief certain issues on appeal, and (2) when there has been actual or complete denial of counsel. Penson v. Ohio, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); Sharp v. Puckett, 930 F.2d 450, 451 (5th Cir. 1991). The first type of denial of counsel requires a showing of prejudice. Sharp, 930 F.2d at 452. Under the second type, when the defendant is completely denied assistance of counsel, prejudice is presumed and therefore a showing of prejudice is not required. Id.

Here, Rose's contention that he could not get his counsel to communicate with him during his appeal, and, despite writing to his counsel on several occasions, counsel never responded is a

contention that fits within the analysis reserved for the first type of denial of effective assistance of counsel. Rose's appellate counsel, who was also his trial counsel, filed a brief with the Texas Court of Appeals, Tenth Supreme Judicial District in which he raised several non-frivolous grounds of error.[4] A petitioner is not entitled to relief without a showing of prejudice if he has been represented by counsel who has read the record and filed a brief arguing a non-frivolous issue. Sharp v. Puckett, 930 F.2d 450, 453 (5th Cir. 1991).

Because Rose's counsel raised several non-frivolous issues, Rose must show that he was prejudiced by the failure of his counsel to confer with him during his appeal to prevail on his claim of ineffective assistance of counsel. To show prejudice, Rose must show that there is a reasonable probability that, if counsel had communicated with him during his appeal, the result of the appeal would have been different. Rose has failed to meet the prejudice requirement in that he has not shown what he would have told his counsel if his counsel had communicated with him and how what he would have told his counsel would have changed the outcome of his appeal. The alleged failure of Rose's appellate counsel to confer

[4] On Rose's appeal, his counsel contended that: (1) the trial court erred in not severing Rose's trial from his co-defendant's trial; (2) the identification of Rose by a state's witness was tainted by prosecutorial misconduct; (3) the trial court erred in admitting evidence that Rose participated in the robbery of Al's Formal Wear; (4) the trial court erred in permitting the state to impeach its own witness; and (5) the state engaged in prosecutorial misconduct by attempting to have the jury consider the effect of the parole law on a twenty-five-year sentence.

with him is further mitigated by the fact that Rose's appellate counsel was also his trial counsel, and thus thoroughly familiar with the record.

Rose's contention that he was denied effective assistance of counsel on his Petition for Discretionary Review is without merit because Rose was not entitled to counsel in the first instance. A criminal defendant has no right to counsel and thus no right to effective assistance of counsel beyond his first appeal as of right. Coleman v. Thompson, __U.S.__, 111 S. Ct. 2546, 2568, 115 L. Ed. 2d 640 (1991); Evitts v. Lucey, 469 U.S. 387, 395, 105 S. Ct. 830, 835, 83 L.Ed.2d 821 (1985). In Ayala v. State, 633 S.W.2d 526, 528 (Tex. Crim. App. 1982), the Texas Court of Criminal Appeals held that a Petition for Discretionary Review is not a first appeal as of right in a Texas state court. In that case, the court stated:

> [t]he decisions of the courts of appeals may be reviewed by this court, but the appellant has no right to such a review. Discretionary review by the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Therefore, the Fourteenth Amendment does not require that indigent appellants be provided with the services of counsel in seeking discretionary review with this court.

Ayala, 633 S.W.2d at 528 (citations omitted).

If a petitioner does not have a right to counsel, he cannot complain of ineffective assistance of counsel. Because a Petition for Discretionary Review is not a first appeal as of right and therefore Rose had no right to counsel, Rose may not now claim that he was deprived of effective assistance of counsel.

3. Prosecutorial Misconduct

Rose contends that the prosecutor's comments to the jury during voir dire were so prejudicial that he was denied a fair trial. Specifically, Rose complains of the following comments that the prosecutor made during voir dire:

Prosecutor: [I]f you think about it, you are here as representatives of the people of Ellis County. You are going to be the conscience of the community. You are going to determine what the standards are in Ellis County. And I can't think of anything better than have the people of Ellis County to determine how much crime you are going to put up with or how much you are not going to put up with.

Defense Counsel: Your Honor, I am going to object at this time for the Prosecution assuming that my client is guilty of the charge, and he is already talking about the crime. I object to it, and I ask the Court to instruct the Panel to disregard that.

The Court: Overruled.

The Prosecutor: If I didn't assume he was guilty, I wouldn't be here.

Defense Counsel: Your Honor, I am going to object at this time for the Prosecutor trying to put in his personal opinion in front of the jury.

The Court: I sustain it.

A federal court can grant habeas corpus relief only if a state prosecutor's statements were so prejudicial that they rendered the defendant's trial fundamentally unfair within the meaning of the

Due Process Clause of the Fourteenth Amendment. Ortega v. McCotter, 808 F.2d 406, 408 (5th Cir. 1987); Whittington v. Estelle, 704 F.2d 1418, 1421 (5th Cir.), cert. denied, 464 U.S. 983, 104 S. Ct. 428, 78 L. Ed. 2d 361 (1983). In ascertaining whether the trial was fundamentally unfair, the prosecutor's comments must be examined in the context of the entire trial to determine whether the comments were a crucial and highly significant factor in the jury's determination of guilt. Only when the comments were a "crucial, critical, highly significant factor upon which the jury based its verdict of guilty" is the defendant entitled to relief. Whittington v. Estelle, 704 F.2d 1418, 1425 (5th Cir.), cert. denied, 464 U.S. 983, 104 S. Ct. 428, 78 L. Ed. 2d 361 (1983).

While Rose correctly states that the government should not imply that it would not have brought Rose to trial unless Rose was guilty, those statements were not a significant factor that the jury used in reaching its verdict. See United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978). In the context of the entire trial, the prosecutor's statements were not so prejudicial, or pronounced as to make the trial fundamentally unfair so as to deny Rose due process. The statements were made early in the adversarial process--during voir dire--and the trial court sustained Rose's counsel's objections to the prosecutor's statements. The statements were not persistent and after Rose's counsel's objection was sustained, the prosecutor made no further improper remarks on what effect the state bringing charges against

Rose had on his guilt. As such, the prosecutor's statements did not so taint the jury as to render the trial fundamentally unfair.

4. Severance

Rose contends that the state trial court's refusal to sever his trial from that of his co-defendant Fitch prejudiced his defense because it prevented him from calling Fitch as a witness to testify for him, and it allowed the jury to infer that Rose was guilty from the evidence presented by the prosecution against Fitch. To obtain habeas corpus relief, a petitioner must show that the trial court's decision not to sever the trial rendered the trial fundamentally unfair and thus violated the petitioner's due process rights. Alvarez v. Wainwright, 607 F.2d 683, 685 (5th Cir. 1979).

We reject Rose's contention that his trial was rendered fundamentally unfair because of the state court's refusal to sever. Initially, Rose has not shown how Fitch's testimony would exculpate him since the state never disputed the fact that Fitch, rather than Rose, was the primary actor. Further, Rose's attorney called Fitch to testify during the trial and Fitch refused to do so, choosing to exercise his Fifth Amendment right against self-incrimination. Even in a severed trial, Fitch would have the right, and probably would have exercised it, against self-incrimination. Thus, Rose has not shown how a joint trial has prevented him from calling Fitch as a witness, much less how Fitch's testimony would be exculpatory.

Rose's next contention is that the trial court's refusal to sever rendered the trial fundamentally unfair because it allowed the jury to infer Rose's guilt from evidence presented to convict Fitch. Rose, however, fails to show how the jury was influenced by the evidence presented against Fitch since Rose and Fitch's theories of defense were not antagonistic to each other. Moreover, most, if not all, of the evidence presented against Fitch in the joint trial would have been admissible in any regard against Rose in a severed trial.

5. Identification Testimony

Rose contends that the in-court identification testimony of Sandra Koscielski was prejudicial because the prosecutor employed impermissibly suggestive identification procedures during both the investigation and the trial. Admissibility of evidence is a matter of state law, and only if the admission of the evidence rendered the trial fundamentally unfair or violated a specific constitutional right will it be considered in a federal habeas corpus proceeding. Johnson v. Blackburn, 778 F.2d 1044, 1050 (5th Cir. 1985). An identification procedure is improper if it was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. United States v. Merkt, 794 F.2d 950, 958 (5th Cir. 1986), cert. denied, 480 U.S. 946, 107 S. Ct. 1603, 94 L. Ed. 2d 789 (1987). In determining whether the procedure was impermissibly suggestive, a court should consider the following six factors:

> (1) the opportunity of the witness to view the suspect, (2) the witnesses' degree of

> attention, (3) the accuracy of the pre-identification description, (4) the witnesses' level of certainty, (5) the time that has elapsed between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself.

Id. at 958.

Two days after the robbery at Al's Formal Wear, Koscielski identified Rose from photographs shown to her by police officers. Because the officers showed only six photographs to Koscielski during her identification of Rose, Rose contends that the identification process was impermissibly suggestive. Rose's contention, however, is without merit. The record shows that during the robbery Koscielski spent approximately twenty to thirty minutes with Rose, she had conversations with both Rose and Fitch, she was able to make eye contact during that period, she identified Rose in the photo line-up two days after the robbery, and only one other person had come in the store on the day of the robbery. The photographic identification could in no way therefore be considered impermissibly suggestive.

Additionally, Rose contends that the in-court identification of Rose and Fitch by Koscielski was impermissibly suggestive. Koscielski testified that immediately before the start of the trial, while in the company of the prosecutor, she observed Rose and Fitch in the courtroom. Later, although the prosecutor did not point out Rose and Fitch, Koscielski testified that the prosecutor told her that the defendants were in the courtroom. At that time, Rose and Fitch were the only black men in the courtroom. Although

we agree with Rose that the prosecutor's statements were impermissibly suggestive and we do not approve of those type of statements, we do not believe that they led to a very substantial likelihood of misidentification. "Reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). For the reasons stated above, Koscielski's observation of Rose during the crime was sufficiently lucid to render her in-court identification reliable.

6. Extraneous Offense.

Rose contends that the trial court erred in admitting evidence of an extraneous offense--the armed robbery of Koscielski at Al's Formal Wear the day before the shooting--to show that Rose had the propensity to commit crimes. Introduction of evidence of an extraneous offense is constitutionally permissible if there is a strong showing that the defendant committed the extraneous offense and the extraneous offense is rationally connected with the offense charged. Enriquez v. Procunier, 752 F.2d 111, 115 (5th Cir. 1984), cert. denied, 471 U.S. 1126, 105 S. Ct. 2658, 86 L. Ed. 2d 274 (1985). The armed robbery of Koscielski at Al's Formal Wear meets that standard.

First, there is strong evidence that Rose committed the robbery because he was later convicted of that offense by a jury in a separate trial. Second, the robbery was rationally connected to the charged offense of attempted capital murder. The robbery was therefore admissible to show Rose's motive in attempting to kill

the officers since the aggravated robbery occurred the day before the shootout.[5] A reasonable jury could fairly conclude that to facilitate his escape so as not to be arrested for the armed robbery, Rose encouraged and intended for Fitch to kill the officers. In addition, Officer Reno and Officer Shoquist were attempting to arrest Rose and Fitch for committing the robbery when the shooting began. The robbery therefore led Rose to a confrontation with the two officers and was rationally connected to the charged crimes of attempted capital murder.

7. Double Jeopardy.

Rose contends that the state trial court violated his right against double jeopardy when it ordered his two convictions for attempted capital murder to run consecutively. Specifically, Rose contends that the attempted capital murders of Officer Reno and Officer Shoquist arose out of the same criminal transaction, and that multiple punishments arising out of the same criminal transaction violate the Double Jeopardy Clause of the Constitution.

That contention is without merit and has previously been rejected by this court in Miller v. Turner. 658 F.2d 348, 350-51 (5th Cir. 1981). In Miller, this court specifically held that the appellant's argument that the judge's running of his two sentences consecutively for two counts of murder, both of which occurred

[5] Under the Texas Rules of Evidence, an extraneous offense may be admissible to show motive, intent, opportunity, plan, identity, preparation, knowledge, or absence of mistake or accident. Tex. R. Crim. Evid. 404(b).

during the same criminal episode, violated his right against double jeopardy was "frivolous." Id. at 351.

III. CONCLUSION

We find no errors sufficient for habeas corpus relief have occurred in Rose's trial or appeal. For the foregoing reasons, the USDC's order denying Rose habeas corpus relief is AFFIRMED.