IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2157
Conference Calendar

DANNY DURYEA YORK,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-91-803
- - - - - - - - - - -
(November 1, 1993)

Before POLITZ, Chief Judge, SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Danny Duryea York, a state prisoner, appeals the dismissal of his petition for writ of habeas corpus. York claims that the State used its peremptory challenges to exclude blacks from the jury in violation of the Equal Protection Clause. See Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). There is a three-step process for making a Batson objection:

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*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

> (1) a defendant must make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

United States v. Clemons, 941 F.2d 321, 324 (5th Cir. 1991) (citing Hernandez v. New York, ___ U.S. ___, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion)). The second step of the Batson analysis involves a question of law. A neutral explanation means an explanation based on something other than the race of the juror. Hernandez, 111 S. Ct. at 1866. This issue was the subject of a published opinion by the state appellate court in which it correctly determined that the prosecutor had articulated race-neutral reasons for striking each of the six black jurors. See York v. State, 764 S.W.2d 328, 329-31 (Tex. Ct. App. 1988).

York bears the burden of proving purposeful discrimination. Clemons, 941 F.2d at 324. "Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is . . . a question of historical fact." Hernandez, 111 S. Ct. at 1870; see Batson, 476 U.S. at 98 n.21. The state appellate court and the state trial court expressly found that the prosecutor did not intend to discriminate on the basis of race. York, 764 S.W.2d at 331. In habeas cases, the factual findings of state courts are presumed to be correct if they are adequately supported by the record and otherwise meet the requirements of 28 U.S.C. § 2254(d). See Hernandez, 111 S. Ct. at 1868-71. York has not shown that any of the exceptions to the § 2254(d)

presumption apply in this case and has not established by clear and convincing evidence that the factual determination by the state courts was erroneous. See 28 U.S.C. § 2254(d).

York contends that there was insufficient evidence upon which to convict him for aggravated robbery because the evidence did not prove the use of a deadly weapon. Insufficiency of evidence can support a claim for federal habeas relief only where the evidence, viewed in the light most favorable to the prosecution, is such that no rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. Young v. Guste, 849 F.2d 970, 972 (5th Cir. 1988) (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The substantive law of the state of Texas defines the elements of the crime of conviction. Young, 849 F.2d at 972.

In Texas, an "aggravated robbery" is a robbery in which the offender "uses or exhibits a deadly weapon." Tex. Penal Code Ann. § 29.03 (West 1974). The term "deadly weapon" includes "anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or . . . anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07(a)(11) (West 1974). A knife is not a deadly weapon per se, but can qualify as a deadly weapon through the manner of its use, its size and shape, and its capacity to produce death or serious bodily injury. Blain v. State, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983).

York admits he used a knife but denies that it was a "deadly weapon" under state law. At trial, Teresa Barger testified about the size of the knife and its manner of use.

> Barger testified that [York] held the knife by the handle, stuck his arm out at her, and swung the knife back and forth saying, "don't touch me, don't touch me.' Barger testified that [York] waived the knife at her three or four times and that she was scared for her life, thinking that she might receive bodily injury if she continued to pursue the appellant.

York v. State, No. 01-88-00236-CR, slip op. at 10 (Tex. Ct. App. 1988). Barger's testimony was corroborated by two other witnesses. Id. at 10-11. Based on this testimony, a rational jury could have concluded that the knife was a deadly weapon under Texas law.

York argues that the State failed to prove that he intended to harm Barger. The State was not required to prove York's subjective intent to harm Barger. It was only required to prove that York intentionally or knowingly placed Barger in fear of imminent bodily injury or death by using or exhibiting a deadly weapon. See Tex. Penal Code Ann. § 29.02 (West 1974) (defining "robbery").

Finally, York contends that the State presented insufficient evidence to support a finding of true on the prior conviction alleged in the indictment for enhancement of punishment. York does not argue that the State failed to prove the prior conviction for burglary of a habitation. Instead, he complains that the proof of the conviction was at variance with the indictment. Accordingly, the claim is not properly evaluated as one putting at issue the sufficiency of the evidence.

The indictment alleged that York was convicted for burglary of a building in cause number 324799. The judgment in cause number 324799 stated that the conviction was for burglary of a habitation. The state court found:

> [While] the indictment correctly alleged the date of the prior offense, the cause number, the court of the conviction, the location of the convicting court, and the fact that the offense was a felony . . . [a] variance exists between the name of the prior offense alleged (burglary of a building) and the name of the offense proved (burglary of a habitation).

York, slip op. at 13. This discrepancy did not require reversal under state law which permits a variance between the offense alleged in an enhancement paragraph and the judgment offered as proof thereof unless the defendant was prejudicially surprised by the variance at trial. See Freda v. State, 704 S.W.2d 41, 42-43 (Tex. Crim. App. 1986).

The notice clause of the Sixth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment, guarantees that criminal defendants have the right "to be informed of the nature and cause of the accusation" against them. In re Oliver, 333 U.S. 257, 273-74, 68 S. Ct. 499, 92 L. Ed. 682, (1948); see Tarpley v. Estelle, 703 F.2d 157, 160-61 (5th Cir.), cert. denied, 464 U.S. 1002 (1983). This Court must examine the record to determine whether the variance between the charge and the indictment "so infected the entire trial that the resulting conviction violates due process." Plunkett v. Estelle, 709 F.2d 1004, 1009 (5th Cir. 1983), cert. denied, 465 U.S. 1009 (1984) (internal quotations omitted).

In Texas, the punishment for conviction of a first-degree felony is enhanced if the State proves that the defendant "has been once before convicted of any felony." Tex. Penal Code Ann. 12.42(c) (West Supp. 1993). "Burglary of a building" and "burglary of a habitation" are both felonies under Texas law. The indictment alleged sufficient information to put York on notice of the particular conviction that the state intended to use for enhancement purposes. York was advised of the nature and cause of the enhancement charge and the variance between the indictment and the proof offered at trial did not rise to the level of a due process violation.

The judgment of the district court is AFFIRMED. York's motion for appointment of counsel is DENIED.