

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3505

(Summary Calendar)

CLIFFORD MCGRAW,

Petitioner-Appellant,

VERSUS

BRUCE N. LYNN, Secretary,
Dept. of Corrections, and
RICHARD P. IEYOUB, Attorney
General, State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
CA 91 4080 M

(March 23, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Clifford McGraw was convicted of first degree murder and sentenced to death. After exhausting his state remedies, McGraw sought habeas corpus relief pursuant to 28 U.S.C. § 2254 (1988), contending that: (a) the trial court abused its discretion in denying his motion to sever his trial; and (b) he was denied the

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

effective assistance of counsel. The district court denied the petition, and McGraw, proceeding pro se, appeals. We affirm.

I

The facts underlying McGraw's offense of conviction are undisputed, as summarized by the Louisiana Supreme Court:

Kress [the victim] and his bride, a Pennsylvania couple, were in New Orleans on their honeymoon. Late in the evening of February 24, 1975, they met the codefendants [McGraw and Valerie Manchester] in a French Quarter night spot. They had several drinks together, and they all ultimately wound up in the apartment of the defendant McGraw, ostensibly to have a drink before going to breakfast.

When they arrived there, McGraw asked Kress into another room and closed the door. Mrs. Kress heard loud thuds and noises from the other room. When she attempted to investigate, Ms. Manchester attempted to prevent her from entering the room by hitting her. McGraw came out of the room, struggled with and struck her, and then with Ms. Manchester, took Mrs. Kress into the street. Her screams brought police to the area.

The victim, Kress, was subsequently found dead. He had been beaten and shot. Mrs. Kress was also severely injured (broken jaw and chin) by the beating. The husband had been robbed of his wallet and ring. Mrs. Kress' rings were also taken.

State v. McGraw, 366 So. 2d 1278, 1280-81 (La. 1978) (affirming conviction, but amending life sentence to life imprisonment).

After exhausting his state remedies, McGraw filed a petition with the federal district court for habeas corpus relief, pursuant to 28 U.S.C. § 2254 (1988), contending that: (a) the trial court abused its discretion in denying his motion to sever his trial; and (b) he was denied the effective assistance of counsel. The district court denied the petition. Proceeding pro se, McGraw appeals.

II

A

McGraw first argues that the district court abused its discretion in denying his motion to sever his trial from his co-defendant, Manchester. See Brief for McGraw at 7. We review the district court's denial of a motion to sever for abuse of discretion. *United States v. Rocha*, 916 F.2d 219, 227 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2057, 114 L. Ed. 2d 462 (1991). "To demonstrate an abuse of discretion, a defendant must show that he suffered specific and compelling prejudice against which the district court could not provide adequate protection, and that this prejudice resulted in an unfair trial." *Id.*

McGraw specifically contends that he suffered compelling prejudice because he and Manchester presented antagonistic defenses at trial.¹ See Brief for McGraw at 9. We disagree. "The test for antagonistic defenses requires that the defenses be irreconcilable

¹ Although we have previously held that "[c]o-defendants are entitled to severance when they demonstrate antagonistic defenses," *Rocha*, 916 F.2d at 231, the Supreme Court has recently cast doubt on this proposition. In *Zafiro v. United States*, ___ U.S. ___, 113 S. Ct. 933, 61 U.S.L.W. 4147 (1993), the Court expressly declined to adopt a bright-line rule requiring severance whenever co-defendants presented antagonistic defenses, even when prejudice was shown. *Id.* at 937-38. Instead, the Court held that "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 938. The Court added that "limiting instructions often will suffice to cure any risk of prejudice." *Id.* Because McGraw cannot even show that he and Manchester presented antagonistic defenses, we conclude that McGraw's joint trial did not pose a serious risk of compromising his right to a fair trial.

or mutually exclusive: the jury, in order to believe one defendant's defense must necessarily disbelieve the antagonistic defense of another defendant." *Rocha*, 916 F.2d at 231 (citing *United States v. Hernandez*, 842 F.2d 82, 86 (5th Cir. 1988)). Because McGraw did not take the stand on his own behalf, we must assume that McGraw's defense was non-involvement))i.e., he was not involved in the robbing and killing of the victim.² Manchester's defense was lack of intent, preparation, and knowledge, as well as non-involvement in the robbery and murder.³ See Trial Transcript

² In his brief on appeal, McGraw does not state what his defense was at trial. However, he does allege, in conclusory fashion, that if not for Manchester's testimony he would have received a manslaughter, rather than murder, conviction. See Brief for McGraw at 9.

³ Manchester testified as follows:

BY MR. LEMANN [Manchester's counsel]:

Q. Did you have a specific intent or desire to murder or kill Gregory Kress?

A. No, I did not.

Q. Did you ever agree with Clifford McGraw that Gregory Kress should be murdered?

A. No, I did not.

Q. Did you know at the time this was happening that Clifford was attempting to rob, or in the process of robbing Gregory Kress?

A. No, I did not.

. . . .

Q. Did you ever enter into a plan or agreement with Clifford McGraw to either rob or murder Gregory Kress?

A. No, I did not.

Q. At any time did you participate in robbing Gregory Kress?

A. No.

Q. Or murder Gregory Kress?

A. No.

at 172-73. Her testimony did not implicate McGraw as a murderer. See *id.* Therefore, because the jury, in order to believe Manchester's defenses of lack of intent and non-involvement, need not have disbelieved McGraw's defense of non-involvement, the co-defendants' defenses were not so irreconcilable to warrant severance. See *United States v. Stotts*, 792 F.2d 1318, 1322 (5th Cir. 1986) (holding that co-defendants' identical defenses of non-involvement were not irreconcilably antagonistic since "[i]t would be consistent . . . to find that none of the appellants were guilty . . . and that . . . unidentified [people] . . . framed the appellants"); *United States v. Swanson*, 572 F.2d 523, 529 (5th Cir.) (holding that defenses of lack of intent and non-involvement were not irreconcilably antagonistic), *cert. denied*, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978).

McGraw maintains that he suffered compelling prejudice by the denial of his motion for severance because Manchester's attorney explicitly labeled him a "brutal[] murdere[r]," and made other similar accusations during closing argument. See Trial Transcript at 211. We have previously held that severance may be required where "[a]n accusation by counsel . . . state[s] the core of his client's defense and cast[s] blame on the co-defendant." *United States v. Romanello*, 726 F.2d 173, 179 (5th Cir. 1984). However, we find *Romanello* distinguishable because there, the defense raised by one defendant, which directly implicated his co-defendant, and the defense of his co-defendant, were irreconcilably antagonistic.

Trial Transcript at 172-73.

See *id.* at 181. In contrast, Manchester's testimony at trial))which formed the core of her defense))went only to her lack of intent and knowledge, and did not implicate McGraw as a murderer. See Trial Transcript at 172-73. Therefore, we find *Romanello* distinguishable.⁴ Moreover, the district court cured any prejudice that may have resulted from Manchester's comments by instructing the jury to not consider statements by counsel as evidence of guilt. See State Records, vol. 1 tab. 6, at 16; *Zafiro*, 113 S. Ct. at 939 (holding that trial court's instruction to not consider opening and closing arguments as evidence, sufficiently cured any prejudice); *United States v. Mota*, 598 F.2d 995, 1000 (5th Cir. 1979) (holding that defendant was not prejudiced where the trial court instructed the jury that the comments of counsel were not evidence and could not be considered as such), *cert. denied*, 444 U.S. 1084, 100 S. Ct. 1042, 62 L. Ed. 2d 770 (1980)). Because McGraw cannot show a serious risk that his joint trial compromised his right to a fair trial, we cannot conclude that the district court abused its discretion in denying McGraw's motion for severance. See *Zafiro*, 113 S. Ct. at 938.

B

McGraw next argues that he was denied the effective assistance of counsel. See Brief for McGraw at 14. We examine claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the petitioner.

⁴ Furthermore, the record indicates that, unlike in *Romanello*, the attacks by Manchester's attorney occurred only during closing argument.

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). We indulge a strong presumption that counsel's conduct was not deficient. *Id.* at 689, 104 S. Ct. 2065. Furthermore, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. McGraw claims that his attorney's failure to challenge the admissibility of evidence seized from his person and his apartment, on the ground that the warrantless arrest was not supported by probable cause, denied him effective assistance of counsel. See Brief for McGraw at 13. McGraw mischaracterizes the record, which indicates that his attorney did contest the admission of evidence seized on the ground that the search was "made without a search warrant or probable cause." State Records, vol. 1 at tab. 11 (McGraw's Motion to Suppress Evidence). In denying the motion to suppress, the trial court found ample probable cause to support the warrantless arrest. See Suppression Hearing Transcript at 2-3, 26-28. Because McGraw cannot show that his attorney's performance was deficient, the district court did not err in finding that McGraw was not denied the effective assistance of counsel. See *Strickland*, 466 U.S. at 694, 104 S. Ct. 2067.

III

For the foregoing reasons, we **AFFIRM**.