

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4395
Summary Calendar

CURTIS ANTONIO DAVIS,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(6:91CV408)

(August 15, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant Curtis Antonio "Jumper" Davis (Davis), an inmate of the Texas Department of Criminal Justice, appeals the district court's dismissal of his petition for writ of habeas

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

corpus challenging his state court conviction for murder. We affirm.

Facts and Proceedings Below

Early in the morning of December 26, 1985, Davis shot and killed William "Junior" Jennings, Jr. (Jennings), at the After Hours Club (Club) in Tyler, Texas, a late night cafe owned and operated by Jennings. At Davis's state trial for murder, the prosecution introduced evidence that Jennings was working in the kitchen of the Club on the night of December 25. Davis entered the Club shortly after midnight and approached the half door that served as a window into the kitchen. When Davis opened a container of food meant for someone else, Jennings asked him to leave the Club. Davis complied but returned a few minutes later with a gun. Davis walked to the window area and fired his gun into the kitchen. The bullet struck Jennings in the neck; he died shortly thereafter.

Davis claimed that he acted in self-defense and, in the alternative, that the shooting was accidental. According to his version of the events, Jennings pulled a gun on him when he returned to the Club. Davis then kicked Jennings and obtained the gun while Jennings was doubled over. Davis claimed that as he backed away the gun inadvertently discharged, killing Jennings.

None of the several employees and customers of the Club who were present at the time of the shooting and testified for the State at Davis's trial corroborated any part of Davis's self-defense theory. Most testified that Jennings was in the kitchen, separated from his assailant by the closed bottom half of the door. None had heard sounds of any quarrel or struggle prior to the

shooting. It was through these eyewitnesses that the State presented the evidence that Davis returned to the Club with a gun after Jennings asked him to leave and shot into the kitchen, killing Jennings.

The pathologist who performed the autopsy on Jennings testified that Jennings had not sustained any injury consistent with having been kicked. The pathologist also opined that the trajectory of the bullet was consistent with its having been fired by a man of Davis's height. Although several eyewitnesses stated that Jennings had retrieved his gun from beneath the cash drawer before Davis returned to the Club, their testimony generally tended to show that Jennings had replaced the gun by the time of Davis's return. After the shooting, a Club employee retrieved the gun from under the cash drawer and took it, along with some money from the drawer, to William Jennings, Sr., the victim's father. Jennings, Sr., later turned the weapon over to the police. A firearms examiner for the Texas Department of Public Safety stated at trial that, in his opinion, upon examination of both the pistol that Jennings, Sr., turned over to the police and the bullet that killed Jennings, the victim's pistol had not fired the fatal bullet.

After the shooting Davis turned himself in to the police and provided a written statement. At his state court trial, the jury rejected his claim of self-defense and convicted him of murder. His conviction was affirmed on appeal. After exhausting his habeas remedies in the state courts, Davis, proceeding *pro se* and *in forma pauperis*, filed this action in the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. § 2254. Acting

upon the report and recommendation of the magistrate judge, the district court dismissed the petition. Davis timely appeals to this Court.

Discussion

I. Motions *In Limine*

Davis complains that the state trial court should have allowed him to introduce evidence of Jennings's criminal record. He sought to present this evidence in support of his claim that he was afraid of Jennings at the time of the shooting. According to Davis, Jennings had been convicted of possession of heroin and had been shot and stabbed by another person. The trial court granted the State's motion *in limine* respecting the admission of that evidence. During the defense's case-in-chief, defense counsel questioned Davis outside the presence of the jury concerning his knowledge of Jennings's conviction and prior violent involvements.¹ Once again,

¹ Defense counsel questioned Davis as follows:

"Q. You say you have known this deceased for a long, long time. Is that correct?

"A. Yes.

"Q. Tell the Court whether or not you were aware of the fact and you had heard that William Jennings, Jr. had been shot with a pistol by Aubrey Dean (phonetic spelling)?

"A. Yes, I knew about that.

"Q. Did you also hear about him being knifed by this same Aubrey Dean?

"A. Yes.

"Q. Had you also heard that he had been convicted of possession of heroin in another county in South Texas and had served time in the penitentiary?

"A. I knew about that.

"Q. And you knew all this before all this happened between you and him. Is that right?

"A. Yes.

"Q. And you're telling the Court you had seen him with a pistol, you knew he carried a pistol and you

the trial court disallowed the evidence over defense counsel's objection.²

Under Texas law, "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." TEX. PENAL CODE § 9.31(a) (Vernon 1974). Davis would be justified in using deadly force against Jennings if, *inter alia*, he reasonably believed the deadly force was immediately necessary to protect himself against Jennings's "use or attempted use of unlawful deadly force[.]" *Id.* § 9.32 (Vernon Supp. 1994). Where there is evidence to support a claim of self-defense, a defendant may offer evidence tending to show the violent nature of the deceased as well as specific acts of violence committed by the deceased. *Gutierrez v. State*, 764 S.W.2d 796 (Tex. Crim. App. 1989).

A violation of rights under state law does not itself render a petitioner eligible for federal habeas corpus relief. Such relief is available to correct an evidentiary error in a state trial "only when the trial judge's error is so extreme that it

knew all of this before the incident happened. Is that correct?

"A. Yes, sir."

² Davis offered only the evidence of Jennings's prior conviction for possession of heroin and of the injuries sustained by Jennings at the hands of Aubrey Dean. He has not preserved for appellate review any other evidence excluded by the State's motion *in limine*. *Draughon v. State*, 831 S.W.2d 331, 333 (Tx. Crim. App. 1992) (a motion *in limine*, by itself, is insufficient to preserve for appellate review complaint regarding the exclusion of evidence; no adverse ruling on the admissibility of the evidence occurs until the evidence is tendered and an objection to its exclusion is made).

constitutes a denial of fundamental fairness under the Due Process Clause." *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984). The challenged evidence must be a crucial factor in the context of the entire trial. *Thomas v. Lynaugh*, 812 F.2d 225, 230 (5th Cir.), cert. denied, 108 S.Ct. 132 (1987).

Davis sought to introduce evidence of Jennings's prior felony conviction for possession of heroin, as well as evidence of Davis's knowledge of past violence involving Jennings. This evidence was not crucial to his claim of self-defense, being only tangentially relevant to whether he believed Jennings intended to use deadly force against him. Jennings's conviction for possession of heroin dated back to 1972 and was not in any way related to Davis or his disagreement with Jennings at the Club thirteen years later. Davis was allowed to introduce some evidence that Jennings was involved in drug-related activities: he testified that "[t]he word was on the street that a pouch of cocaine was stripped from him" after his death.

Davis's knowledge of prior incidents of violence resulting in injury to Jennings was only slightly more relevant.³ Its omission was more than compensated by the admission of evidence of other incidents more pertinent to the question of possible violent tendencies on the part of Jennings. The trial court permitted Davis to testify before the jury that he had known Jennings for years, knew that Jennings carried weapons, had seen a stash of

³ Indeed, it would appear more relevant to the issue of Davis's fear of Jennings had Jennings been the perpetrator of the prior shooting or stabbing injuries rather than the victim.

weapons kept by Jennings under the mattress of his bed, had been present when Jennings threatened other people,⁴ had quarreled with Jennings over Davis's dating relationship with Jennings's daughter, and, finally, that he was scared of Jennings at the time of the incident at the Club.⁵ This testimony was adequate to allow the jury to decide the reasonableness of Davis's belief that deadly force was needed to protect himself against Jennings's attempted use of deadly force.

Davis was not deprived of an opportunity to inform the jury, based upon his own relationship with the deceased, that Jennings carried weapons and had acted upon occasion in a threatening and violent manner, and that Davis had reason to be and was afraid of him. The trial court did not render Davis's trial fundamentally unfair by disallowing the evidence of Jennings's thirteen-year-old heroin conviction and of the fact that Davis had heard that Jennings had been stabbed or shot by Dean.

II. State's Prosecution of Davis

A. State Witness Shaun Gossett

Davis complains that the State failed to inform him that Shaun Gossett would testify for the prosecution at the sentencing phase

⁴ The testimony on this point was as follows:

"Q. [By defense counsel] And how many times, if you ever saw him, did you ever see him threaten anybody?

"A. Yeah, it was a natural habit of [Jennings]."

⁵ Davis also presented his version of the shooting to the jury, including his testimony that he was defending himself against Jennings's attack and that the gun went off by accident due to his fear.

of his trial and allowed Gossett to give perjured testimony. The State called Gossett to testify about Davis's reputation for being a peaceful and law-abiding citizen in the community. Gossett stated that she had known Davis for about seven years and that his reputation was bad. The State did not question Gossett about any particular instances of Davis's conduct.

According to an affidavit filed by Davis's trial counsel, his lawyer did not object to Gossett's testimony because Davis had given him reason to believe that her testimony might be beneficial to Davis. Earlier, Davis had informed his lawyer that Gossett had assaulted him and cut him with a knife; Davis omitted telling his lawyer, however, the crucial reason for her assault. On cross-examination, defense counsel inquired into the matter. In response to a question about whether she had ever assaulted Davis with a knife, Gossett replied that Davis had tried to rape her and that she had cut him with a knife in self-defense.

The fact that Davis's counsel questioned Gossett about the assault on Davis provides a clear inference that he was aware that Gossett might testify for the prosecution. Although the evidence of the attempted rape was a surprise to defense counsel and was not favorable to Davis's case, it was elicited by the defense, not by the State. The State thus did not allow Gossett to give perjured testimony, nor, apparently, was the defense unaware that Gossett might testify. Davis's claims are without merit.

B. Improper Prosecutorial Remarks

Davis attributes reversible error to three allegedly improper remarks by the prosecution at his trial. First, he asserts that a

remark by the prosecutor improperly bolstered the testimony of Jennings, Sr. Next, he argues that the prosecutor improperly questioned him about his failure to call witnesses to corroborate his testimony. Finally, he claims that the prosecutor, during closing argument, wrongly attributed to him claims of involvement of the Mafia.

On habeas review, improper prosecutorial remarks do not constitute errors of constitutional significance unless they were so prejudicial that they rendered the petitioner's state court trial fundamentally unfair within the meaning of the Fourteenth Amendment. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 2907 (1986). No fundamental unfairness results unless there is persistent and pronounced misconduct or it appears probable that, but for the improper remarks, no conviction would have occurred. *Id.*

During closing arguments, the prosecutor stated: "I submit to you there is not a more honest man walking around than William Jennings, Sr." This comment in support of Jennings, Sr.'s, honesty followed questions raised by the defense attacking the credibility of his testimony. The defense attempted to cast aspersions on Jennings, Sr.'s, testimony by referring to testimony that he had removed jewelry from his son's body and by questioning the manner in which the police obtained the deceased's gun. The prosecutor's statement, by itself, was not significant in the overall context of the case.

A prosecutor may comment upon a defendant's failure to call material witnesses. *O'Bryan v. Estelle*, 714 F.2d 365, 387-88 (5th

Cir. 1983), *cert. denied*, 104 S.Ct. 1015 (1984). Thus, the prosecutor's questions regarding the dearth of witnesses to corroborate Davis's version of the incident were not improper.

The prosecutor's references to the Mafia during the closing arguments, although improper, likewise did not render Davis's trial fundamentally unfair. During the State's cross-examination of Davis, the prosecutor asked Davis if he knew why the eyewitnesses for the State would perjure themselves by not corroborating his story, assuming his version of the incident at the Club was true. Davis replied:

"The reason why I would think so is because Junior himself to me and a lot of other people around there was a powerful influential man. And on top of that his father owns clubs and things and rent houses and they have a lot of money and most of these people that was in there are the type people that do drugs, this and that. I would think that they was doing this here just because they didn't want to have no bad dealings with the family themself. They would much rather go with that crew than to go with me. I don't have nothing to offer them; they do. And those people worked in there. They was working there then."

At no time did Davis mention an alleged connection between the Jennings family and the Mafia. He did testify that he had received death threats after the incident. In argument, defense counsel referred to the State's witnesses as "thieves and robbers and narcotics dealers."

The State responded:

"In the complete total investigation of this [Detective Beverly Grage] couldn't find one individual in and around that club that night that would say it happened in any manner like this Defendant says it did. What's his explanation for that? The Mafia. Well, the Mafia. Somehow Junior Jennings is tied into the Mafia and they're keeping everybody from coming in here and testifying under oath. And this is this invisible Mafia

out here that is the reason there is not anybody that says it happened anything like he does. . . . And when you start talking about all these people that came in here and testified, ladies and gentlemen, if you want to believe this Defendant's theory that this is some big conspiracy, which I guess is what he's going on, through the workings of the MafiaSOand William Jennings, Sr. got together with the Mafia and got all these people down here, all who gave their names to Detective Graze."

Defense counsel did not object to the references to the Mafia in the State's closing argument.

Davis did not mention organized crime in his testimony; he merely implied that the Jennings family was wealthy and influential to the point of being intimidating. The prosecutor went well beyond reasonable inference by attributing to Davis the belief that the power of the Mafia caused the State's witnesses to testify favorably to the Jennings family.

Although the references to the Mafia were improper, they did not, either taken by themselves or in conjunction with the remark bolstering Jennings, Sr.'s, veracity, constitute an error of such magnitude as to render the trial fundamentally unfair. Moreover, the evidence against Davis was overwhelming.

III. Sufficiency of the Evidence

Davis argues that the State's evidence at his murder trial was insufficient to support his conviction.

We will affirm a state court jury verdict upon habeas review if the evidence, viewed in the light most favorable to the verdict, is sufficient to allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Young v. Guste*, 849 F.2d 970, 972 (5th Cir. 1988). We look only to the federal constitutional standard for sufficiency of the evidence, even if state law would

impose a more demanding standard of proof. *Schrader v. Whitley*, 904 F.2d 282, 284 (5th Cir.), *cert. denied*, 111 S.Ct. 265 (1990).

Texas law, under which Davis was convicted, provides that a person is guilty of murder if he "intentionally or knowingly causes the death of an individual." TEX. PENAL CODE ANN. § 19.02(a)(1) (Vernon 1989). According to eyewitness testimony at the trial, Davis approached the service window, carrying a pistol, and fired at Jennings without provocation. No witness corroborated Davis's claim that the shooting followed a scuffle between the two men.⁶ Although Davis claimed that he acted in self-defense or that the gun went off accidentally after he kicked Jennings, witnesses testified that the bottom half of the divided door leading into the kitchen was closed at the time of the shooting; Jennings and Davis were on opposite sides of the door. Other testimony showed that Jennings was looking away from Davis, into the kitchen, when he was shot. One eyewitness stated that she heard someone other than Jennings say "[y]ou f---ed over me, brother" just before the shooting. Expert witnesses testified that the fatal bullet had not come from the victim's gun, and that Jennings's wound was consistent with his having been shot by a person of Davis's height while Jennings had his head turned away from his assailant.

Upon this evidence, the jury could have rejected Davis's claims of accidental homicide and self-defense and inferred that Davis intentionally or knowingly shot and killed Jennings.

⁶ One witness did state that she heard an argument before the shooting, but the argument was between two persons not involved in the shooting and did not occur near the kitchen area.

IV. Ineffective Assistance of Counsel

A. Trial Counsel

Davis challenges his state conviction on the grounds of ineffective assistance of trial counsel. He alleged fourteen grounds on which he bases this claim.

The Supreme Court established a two-part test to evaluate claims of ineffective assistance of counsel in *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). In order to establish such a claim, Davis must meet both prongs of this test. First, he must show that his trial counsel's performance was deficient. To do this, Davis must show that his counsel made errors so serious that the lawyer was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Representation by counsel is deficient only if it falls below an objective standard of reasonableness, measured under prevailing professional norms. *Id.* at 2064, 2065. In assessing counsel's decisions, we must afford counsel's performance a high degree of deference. *Id.* at 2065. Second, Davis must show that his defense was prejudiced by the deficient performance. The alleged errors must have been so serious as to deprive Davis of a fair trial, a trial whose result is reliable. *Id.* at 2064. In order to establish prejudice, he must show that there is a reasonable probability that a different result would have occurred but for the deficient representation. *Id.* at 2068.

Davis's varied contentions are conclusory and without merit, as a discussion of selected complaints will reveal. Davis argues, *inter alia*, that his trial counsel failed to request a mistrial after introduction of the victim's gun, recovered by the police at

the home of Jennings, Sr. However, the gun was clearly relevant in light of Davis's claim that he used it to shoot Jennings.

Next, Davis argues that his attorney failed to object to the surprise testimony of Shaun Gossett; as discussed above, Gossett was not really a surprise witness. Next in the line of Davis's complaints is that his counsel failed to conduct an independent investigation of the facts which would corroborate Davis's version of the events. According to counsel's affidavit submitted for state habeas review, he did interview witnesses, including character witnesses suggested by Davis, but was unable to find any to corroborate Davis's version of the shooting or who would otherwise be helpful. The state habeas court credited this affidavit. The decisions involved in presenting witness testimony lie primarily within the domain of counsel's trial strategy. Moreover, Davis bears the difficult burden of showing that the witnesses who were not called would have testified at trial and what their testimony favorable to the defense would have been. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Davis does not allege facts meeting these requirements.

Davis also alleges that his lawyer did not seek a plea bargain agreement and failed to investigate a claim that a juror had been seen with the deceased's wife. There is no indication in the trial record that the state ever offered a plea agreement, and Davis does not identify the juror or allege how counsel's failure to follow up on this resulted in a fundamentally unfair trial.

Davis's complaints do not add up to a constitutionally deficient performance by his trial counsel. Moreover, he has

failed to allege facts tending to show that the result of his trial would have been different but for the allegedly deficient representation.

B. Appellate Counsel

Davis next argues that he received ineffective assistance from his appellate counsel, claiming that his second appellate attorney raised the same issues in his brief as did his first appellate attorney and refused to raise the issues Davis wished to raise. Among the issues proffered by Davis were perjury and misconduct by the State's witnesses, ineffective assistance of trial counsel, and prosecutorial misconduct. No relief is available on such a claim unless, *inter alia*, "the failure to raise an issue worked to the prejudice of the defendant." *Sharp v. Puckett*, 930 F.2d 450, 453 (5th Cir. 1991). Davis has not shown that any of the issues he suggested might have been meritorious.

V. District Court Rulings on Habeas Review

Finally, Davis contends that the district court should have held an evidentiary hearing on his habeas petition and appointed counsel to represent him. Davis did not file a formal motion requesting either an evidentiary hearing or appointment of counsel. Instead, he suggested in his objections to the magistrate judge's report that an evidentiary hearing, with the help of counsel, could help develop his contention that the State's witnesses feared the Jennings family. The district court did not comment upon a motion for appointment of counsel in its final judgment.

Assuming, *arguendo*, that Davis's comment constituted a motion for an evidentiary hearing and appointment of counsel, the district

court need not have granted the motion. An evidentiary hearing is unnecessary in a section 2254 case if the state record before the district court is adequate to dispose of the claim. *Joseph v. Butler*, 838 F.2d 786, 788 (5th Cir. 1988). Such was the case here.

A district court must appoint counsel for a habeas petitioner if an evidentiary hearing is required or the interests of justice so require. *Bell v. Watkins*, 692 F.2d 999, 1014 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 142 (1983). The interests of justice did not require that counsel be appointed, and an evidentiary hearing was not necessary as the state court record sufficed.

Conclusion

For the reasons discussed above, the district court's dismissal of Davis's petition for habeas relief is

AFFIRMED.