

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7239

(Summary Calendar)

CHARLES PHILLIPS,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(DC89-W190-S-0)

(December 2, 1993)

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

PER CURIAM:*

Charles Phillips was convicted of murder and sentenced to life imprisonment. Following his unsuccessful appeal to the Supreme Court of Mississippi, Phillips filed a federal petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (1988), claiming numerous grounds for relief, including insufficiency of evidence, prosecutorial misconduct, *Brady* violations, improper admission of evidence, improper jury instructions and cumulative error. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court denied Phillips' petition, and Phillips appeals. We affirm the district court in all respects.

I

Charles Phillips shot and killed Homer L. "Buddy" Baker, Jr. at Baker's home in Walls, Mississippi. On the night before the shooting, Phillips went to Baker's home, where he saw a microwave oven which he believed to have been stolen from his ex-wife, Dianne Phillips. Ralph Brannon overheard Phillips asking Baker if he had been "messing with" Phillips' ex-wife, and, according to Brannon, when Baker replied that he had been, Phillips told Baker that he was "a dead M.F."

The next evening, Brannon allegedly received a phone call from Baker, in which Baker stated that Phillips had just called, threatening to kill him. That night, Phillips and his ex-wife went to Baker's home, intending to confront Baker about Ms. Phillips' microwave. Phillips went there armed with a pistol. Although at first Baker did not respond to the repeated shouts and knocks on the door, Ms. Phillips allegedly looked through a window and saw Baker coming toward the door carrying a shotgun. Phillips asserts that Baker opened the door and fired the shotgun, narrowly missing Phillips' head. However, the shotgun blast damaged the rafters of Baker's front porch. Phillips claims that he grabbed the barrel of the shotgun, then fatally shot Baker with his pistol. However, a fingerprint expert testified at trial that Phillips' fingerprints were not found on the barrel of the shotgun. Furthermore,

Phillips' testimony that he seized the shotgun barrel before shooting Baker is contradicted by the medical examiner's testimony that Baker was shot from a distance of more than two and a half feet.

Phillips and Ms. Phillips immediately fled the scene. After dropping Ms. Phillips off at her house, Phillips drove to his home in Memphis. While en route, he threw his gun into the Mississippi River. Later that night, when Phillips called his ex-wife, he spoke with law enforcement officers present at her home, and decided to turn himself in. At no time during his conversations with the officers, or when he turned himself in, did Phillips claim that he shot Baker in self-defense.

II

A

Phillips claims that there was insufficient evidence to support his murder conviction.¹ The standard of review in a habeas action alleging insufficient evidence 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 v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Guzman v. Lensing*, 934 F.2d 80, 82 (5th Cir. 1991). In

¹ A claim of insufficient evidence is cognizable in a federal habeas corpus proceeding. *Jackson*, 443 U.S. 307, 321, 99 S.Ct. 2781, 2790, 61 L.Ed.2d 560 (1979); see *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) (holding that Due Process Clause of Fourteenth Amendment protects defendant in criminal case against conviction except upon proof beyond reasonable doubt of every element of crime charged).

its consideration of the sufficiency of the evidence to sustain Phillips' conviction, the court is limited to a review of the record evidence presented at trial. *Guzman*, 934 F.2d at 82 (citing *Tyler v. Phelps*, 643 F.2d 1095, 1102 (5th Cir. 1981), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1992, 72 L.Ed.2d 455 (1982)).

The record is replete with evidence to support Phillips' murder conviction. Phillips admitted shooting and killing Baker, but he alleges that he did so in self-defense. However, testimony presented at trial indicated Phillips was overheard threatening Baker the night before the killing. Phillips claims he shot Baker during a struggle at close range. However, the medical examiner testified that Baker's fatal bullet wound was delivered from a distance of over two and one half feet. Phillips also asserts that he grabbed Baker's shotgun when it was allegedly thrust in his face; however, Phillips' fingerprints were not found on the shotgun. In addition, Phillips' claim that the shotgun blast narrowly missed his head is contradicted by evidence that the shotgun blast damaged the rafters of Baker's front porch. Because a reasonable trier of fact could have found beyond a reasonable doubt that Phillips did not act in self-defense, the district court did not err in rejecting Phillips' insufficiency of the evidence claim.

B

Phillips asserts that the failure of the prosecution to provide the defense with exculpatory statements made by Gerald

Glover, Jr.² constitutes a due process violation. Suppression by the prosecution of evidence favorable to the defendant, upon the defendant's request for the information, is a violation of due process "where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. State of Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963); see *United States v. Bagley*, 473 U.S. 667, 681-82, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (stating that prosecutor's failure to respond to *Brady* request amounts to due process violation only where reasonable probability exists that result of proceeding would have been different had the material been disclosed). However, Glover's statements were neither suppressed, nor favorable to Phillips, nor material to guilt or punishment.³

² The allegedly exculpatory statements are not part of the record. Specifically, Glover's handwritten statements were never introduced into the record, nor was Glover ever called to testify. According to defense counsel, Glover noted that "certain things [were] going on in [Baker's] house as far as drinking, drugs, a party the night before [the shooting]." Defense counsel claims that Glover indicated he and Baker had a "scuffle" on the night of either January 21 or January 22 of 1986, and that "Buddy said this morning that he bought the microwave from this guy and he took it somewhere else. The microwave was in the kitchen the night I was there. Buddy said some guy had come to his house and seen it and said it used to belong to him. He said he removed it from his house." Defense counsel urged that "it is basically the theory of our case that the microwave was there and then Friday night or Saturday night when he came back the microwave was not there[.]"

³ To establish a *Brady* violation, the evidence must be suppressed, must be favorable to the defendant, and must be material to guilt or punishment. *Barnes v. Lynaugh*, 817 F.2d 336, 338-39 (5th Cir. 1987), *overruled in part on other grounds*, *United States v. Broce*, 488 U.S. 563, 574, 109 S.Ct. 757, 765, 102 L.Ed.2d 927 (1989), *cited in Taylor v. Whitley*, 933 F.2d 325

The state listed Glover as a trial witness during discovery. At trial, the court offered the defense a recess to examine Glover's statements and interview him, and, during the attorneys' arguments regarding his statements, Glover was available for a record to be made. Glover's statements concerned an argument he had with Baker a few nights prior to his death, and a conversation Glover had with Baker the morning of the murder, regarding contested ownership of a microwave in Baker's home. The argument and conversation between Glover and Baker were not favorable or material to any issue regarding Phillips' guilt or punishment. Because failure of the prosecution to provide the defense with Glover's testimony did not constitute a violation of due process, this claim fails.

C

Phillips contends that the prosecutor committed misconduct during his opening statement by stating that "the proof is going to show that he ran through the night like a chicken-eating dog that had been caught in the hen house," and by persistently questioning Dianne Phillips after she invoked her Fifth Amendment privilege. In reviewing allegedly improper prosecutorial statements, "it is not enough that the prosecutor['s] remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Darden v. Wainwright*, 669 F.2d 1031, 1036 (8th Cir. 1983)). The relevant question is whether the comments so "infected the trial with

(5th Cir. 1991).

unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). We ask "whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988) (quoting *Kirkpatrick v. Blackburn*, 777 F.2d 272, 278-79 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986)).

(1)

The record does not suggest that the result of the trial would have been different if the prosecutor had not made the "chicken-eating dog" statement above. Upon Phillips' objection and motion for mistrial, the court admonished the jury to disregard the remark. Furthermore, a prosecutor's remarks will render a trial fundamentally unfair only if the remarks evince "persistent and pronounced misconduct[,] or . . . the evidence [is] so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Kirkpatrick*, 777 F.2d at 281 (quoting *Fulford v. Maggio*, 692 F.2d 354, 359 (5th Cir. 1982), *rev'd on other grounds*, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983)). Phillips admits that he shot and killed Baker, and as discussed above, *see supra* part II.A., ample evidence supports the conclusion that he did not do so in self-defense. Phillips' account of the shooting as an act of self-defense is contradicted in the record by sufficient forensic and scientific evidence to

support the verdict. See *supra* part II.A. Furthermore, although Phillips contends that the prosecutor's comment was indicative of "persistent and pronounced" misconduct, Phillips points to no other objectionable comments by the prosecutor. Therefore, the trial was not fundamentally unfair, and this claim must fail.

(2)

Phillips asserts that the prosecutor engaged in misconduct during the examination of Dianne Phillips by persistently questioning her after she invoked her Fifth Amendment privilege against self-incrimination. Phillips argues that by creating an "atmosphere of guilt" the prosecution unduly prejudiced the jury against him and violated his right to due process.⁴

Ms. Phillips answered questions regarding her name and address before invoking her privilege against self-incrimination. After she invoked her Fifth Amendment privilege in response to a number of substantive questions, and after defense counsel objected to further questioning, the prosecution asked two more questions: "On January 25, 1986, at about 5:30 or 5:45 p.m. were you at Twin Lakes Grocery with Randy Phillips?" and "Will you tell these people anything about what happened on January 25, 1986?" After each question, defense counsel objected to any further questioning, and

⁴ Phillips further claims that because the prosecution knew that Ms. Phillips would invoke her privilege against self-incrimination, she should not have been permitted to take the stand. Because Phillips did not object at trial to this witness being called, and because this issue was not raised before the district court, Phillips is barred from raising the objection at this time. See *Johnston v. Puckett*, 930 F.2d 445, 448 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 252, 116 L.Ed.2d 207 (1991).

the objections were sustained. After the last question, the jury was instructed to disregard and not consider the question in any way. The jury was further instructed that it was not to speculate on possible answers to the questions Ms. Phillips did not answer, or to infer anything adverse to the defendant from Ms. Phillips' refusal to answer. In light of the court's instructions, as well as the evidence showing that Phillips did not act in self defense, there is no reasonable probability that the trial would have come out differently had the prosecutor not continued to question Ms. Phillips. See *Rogers*, 848 F.2d at 609 (holding that due process violation is shown only if reasonable probability exists that verdict would have been different). Therefore, the questions did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," *Darden*, 477 U.S. at 181, 106 S.Ct at 2471, and this claim is without merit.

D

Phillips complains that the trial court erred in admitting into evidence photographs of Baker's corpse, claiming these photographs were unduly prejudicial. Generally, admissibility of evidence is a matter of state law which is not subject to review in a federal habeas proceeding unless the petitioner claims that admission of the evidence rendered the trial fundamentally unfair or violated a specific constitutional right. *Johnson v. Blackburn*, 778 F.2d 1044, 1050 (5th Cir. 1985).⁵ Even assuming the admission

⁵ An unfair trial is a trial that has been "largely robbed of dignity due a rational process." *Johnson*, 778 F.2d at 1050 (quoting *Houston v. Estelle*, 569 F.2d 372, 383 (5th Cir.

of the evidence was erroneous, federal habeas relief is not justified unless the evidence was "material in the sense of a crucial, critical, highly significant factor," in the context of the entire trial. *Id.* (quoting *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983), *cert. denied*, 467 U.S. 1268, 104 S.Ct. 3563, 82 L.Ed.2d 865 (1984)). Because ample evidence supports Phillips' conviction for murder, the record does not indicate that the photographs were "material in the sense of a crucial, critical, highly significant factor," or that admission of the photographs into evidence rendered the trial fundamentally unfair. *Id.* Therefore, Phillips' claim must fail.

E

Phillips complains that Ralph Brannon's testimony, concerning the threatening phone call from Phillips to Baker, was hearsay which caused the jury to return a guilty verdict. Upon defense counsel's objection to Brannon's entire testimony, the court instructed the jury to disregard the part of Brannon's testimony regarding the threat made by Phillips.

Evidence withdrawn from a jury, coupled with an instruction to disregard, is not grounds for federal habeas relief unless the withdrawn testimony is so highly prejudicial that it renders the trial fundamentally unfair. See *McAffee v. Procunier*, 761 F.2d 1124, 1126-27 (5th Cir.), *cert. denied*, 474 U.S. 907, 106 S.Ct. 237, 88 L.Ed.2d 238 (1985). The standard for determining the prejudicial effect of excluded testimony is whether a significant

1978)).

possibility exists that, considering all of the evidence presented by both the prosecution and defense, the excluded testimony had a substantial impact on the jury's verdict. *United States v. Perez-Robles*, 718 F.2d 700, 701 (5th Cir. 1983), *cert. denied*, 465 U.S. 1031, 104 S.Ct. 1297, 79 L.Ed.2d 697 (1984). Withdrawn evidence will not have a substantial impact on the jury if other evidence exists sufficient to support the jury's verdict. *See id.* at 702; *McAffee*, 761 F.2d at 1126-27.

As we have already indicated, the record supports the jury's finding of guilt beyond a reasonable doubt. *See supra* part II.A. We therefore affirm the district court's determination that the withdrawn evidence was not so prejudicial as to be incurable by the court's admonition to disregard.

F

In addition to the foregoing claims, Phillips contends that he is entitled to habeas relief due to cumulative error. The alleged cumulative error consists of some of the foregoing claims, as well as several others, including claims of an improper hypothetical propounded to a defense witness, erroneous admission into evidence of Baker's shotgun, and inadequate and defective jury instructions, which, Phillips contends, although not reversible in and of themselves, are reversible in combination with all the other alleged errors.

We recently explained the requirements for habeas relief based on a claim of cumulative error. *See Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert denied*, ___ U.S. ___, 113 S.Ct.

2928, 124 L.Ed.2d 679 (1993). First, the cumulative error theory must refer to actual errors committed in the state trial court, and not merely to unfavorable rulings or events. *Id.* at 1458. Second, the error must not have been procedurally barred from habeas corpus review. *Id.* Third, errors of state law, including evidentiary errors, are not cognizable in habeas corpus unless they rise to constitutional dimension. *Id.* "Errors of state law rise to constitutional dimension only if they 'so infused the trial with unfairness as to deny due process of law.'" *Id.* (quoting *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L. Ed. 166 (1941)). "Fourth, the federal court must review the record as a whole to determine whether the errors more likely than not caused a suspect verdict." *Id.* (citing *Kirkpatrick*, 777 F.2d at 281).

Phillips offers several of the foregoing allegedly reversible errors))including Brady violations, prosecutorial misconduct, erroneous admission into evidence of photographs of Baker, and unduly prejudicial effect of the withdrawn testimony of Ralph Brannon))as cumulative errors sufficient to justify habeas relief. We have already found the claim of *Brady* violations to be without merit,⁶ which obviates cumulative error discussion. *See id.* (allowing review only of actual errors, not unfavorable rulings). As previously discussed, we have determined that the claims of prosecutorial misconduct, erroneous admission of photographs, and unduly prejudicial effect of Brannon's withdrawn testimony are not

⁶ See *supra* part II.B.

of constitutional dimension.⁷ Cumulative error analysis is therefore precluded with respect to those claims. *See id.* (holding errors of state law not cognizable in habeas corpus unless of constitutional dimension).

Phillips offers three alleged errors solely for cumulative error purposes. Phillips alleges that the prosecution propounded an improper hypothetical to defense witness Jimmy W. Radford, based on defense counsel's opening statements.⁸ This claim, if meritorious, would allege only an error of state law. Because there is ample evidence to show that Phillips murdered Baker, there is no reasonable probability that the trial would have come out differently had the prosecution not asked the hypothetical question. The allegedly improper hypothetical therefore did not render the trial fundamentally unfair or rise to the level of constitutional error, and this claim does not give rise to a claim for cumulative error. *See id.* (requiring errors of state law to be of constitutional dimension for habeas corpus review).

Second, Phillips alleges that the state trial court erred by admitting into evidence Baker's shotgun, asserting that the shotgun had not been made available to defense counsel prior to trial. After the trial court offered defense counsel a recess to examine

⁷ See *supra* parts II.C., D., and E.

⁸ The prosecutor asked Radford for his opinion of a statement which defense counsel made during his opening remarks. Defense counsel objected on the grounds that the facts to which he had referred in his opening statement were not yet in evidence. The trial court overruled defense counsel's objection, and instructed the jury that defense counsel's opening remarks did not amount to evidence.

the shotgun, the shotgun was offered into evidence without objection. Therefore, this claim is procedurally barred from habeas review and does not give rise to a claim for cumulative error. See *id.* (holding that errors procedurally barred from habeas review are not cognizable as cumulative error and stating that "it is important that a defendant objected to errors to demonstrate that they were believed at the time of trial to have had an adverse effect on the defense").

Third, Phillips complains that the trial court erred by refusing to grant certain self-defense instructions, and by giving a defective instruction on the definition of murder. For habeas corpus relief to lie for improper jury instructions, the petitioner must establish that improper instructions resulted in a "fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *Williams v. Lockhart*, 736 F.2d 1264, 1267 (5th Cir. 1984).

Phillips does not establish these grounds for relief. The self-defense instruction approved by the Mississippi Supreme Court, see *Robinson v. State*, 434 So.2d 206, 207 (Miss. 1983), was given verbatim, and Phillips does not argue that this instruction was improper. Instead, Phillips argues that his self-defense instruction should have been given in addition to the court's instruction. However, the jury need only be instructed once on a principle of law. See *Laney v. State*, 486 So.2d 1242, 1246 (Miss. 1986). Because the jury was properly and adequately instructed on

self-defense, the court did not err in refusing to grant Phillips' requested instruction.

Phillips also alleges that the court gave a defective instruction when it failed to include the word "malice aforethought" in the elements of murder, substituting instead the words "deliberate design." The Mississippi Supreme Court has held that the words "malice aforethought" and "deliberate design" are synonymous and interchangeable. See *Lancaster v. State*, 472 So.2d 363, 367 (Miss. 1985). This claim is therefore without merit. Because these claims are based on unfavorable rulings rather than actual errors committed by the state trial court, they are precluded from review as cumulative error. See *Derden*, 978 F.2d at 1458 (allowing cumulative error review of actual errors only, not of unfavorable rulings).

Applying the *Derden* requirements to each of the alleged errors, Phillips' cumulative error claim must fail.

III

For the foregoing reasons, we **AFFIRM** the decision of the district court in all respects.