UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7347

(Summary Calendar)

RICKY LIVINGSTON,

Petitioner-Appellant,

versus

EDWARD HARGETT,
Superintendent, Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(J91-0491(B))

(November 24, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Ricky Livingston was convicted of rape and sentenced to a term of forty years imprisonment in a state correctional facility, where he is currently incarcerated. After an unsuccessful appeal to the Mississippi Supreme Court,[1] Livingston filed a federal petition for a writ of habeas corpus claiming due process violations stemming from the court's failure to sequester the jury, improper admission

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] *See Livingston v. State*, 519 So.2d 1218 (Miss. 1988).

of evidence, ineffective assistance of counsel, and cumulative error.[2] The district court denied the petition, and from that denial Livingston appeals. We affirm the district court in all respects.

I

On December 14, 1984, Karen Thomas was alone in her apartment and answered a knock at her door. She was confronted by a young black male standing approximately one foot from her door. It was a bright day, and Thomas had a clear, unobstructed view of the man's face, whom she later identified as Ricky Livingston. The man forced his way into Thomas' apartment, slammed the door and choked her until she momentarily passed out. He raped Thomas twice, continuing to choke her and threaten to kill her. He then demanded money and fled. The entire episode lasted ten to fifteen minutes.

Thomas screamed as the man forced his way into her apartment and slammed the door. Steve Gifford, who resided in the apartment complex, heard a scream and a door slam at around noon on the day of the attack, from the vicinity of Thomas' apartment. Approximately fifteen minutes later, Gifford observed a young black male run from the direction of Thomas' apartment, across the courtyard, and under Gifford's balcony. Gifford had a clear view of the man, whom he later identified as Ricky Livingston.

On the day of Livingston's arrest, Gifford positively

[2] In the district court Livingston also alleged that the state trial court erroneously failed to order a transcript of certain proceedings. Livingston does not press that claim on appeal.

identified Livingston in a police lineup. Two days later, Thomas identified Livingston. Livingston was indicted for rape, convicted, and sentenced to forty years imprisonment.

II

A

Livingston claims that the court's failure to sequester the jury during his two-day rape trial was contrary to Mississippi state law, and violated his right to due process. This Court has held that there is no right to jury sequestration guaranteed by the United States Constitution. *See Young v. Alabama*, 443 F.2d 854, 856 (5th Cir. 1971), *cert. denied*, 495 U.S. 976 (1972) (holding jury sequestration is not a fundamental right).[3] Livingston therefore alleges only a violation of state law. *See Baldwin v. Blackburn*, 653 F.2d 942, 948 (5th Cir. 1981) (holding that violation of state sequestration law did not require federal habeas relief). On collateral review, "the federal courts sit to determine whether there has been a constitutional infraction of the appellant's due process rights that would render the trial as a whole `fundamentally unfair,' not to enforce state procedural rules." *Id.*

The record does not indicate that Livingston's trial was

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[3] "The constitutional standard of fairness requires that a defendant have `a panel of impartial, "indifferent" jurors.'" *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)), *cited in Baldwin v. Blackburn*, 653 F.2d 942, 948 (5th Cir. 1981) (holding that violation of state sequestration law did not require federal habeas relief).

unfair because of the court's failure to sequester the jury. At the beginning of the second day of Livingston's two-day trial, the court polled the jury and determined that no jury member had discussed the case, read newspapers or watched the news. Neither does Livingston allege any other facts which would indicate that he was prejudiced by the trial court's failure to sequester the jury. Therefore the lack of jury sequestration did not render Livingston's trial fundamentally unfair, and his claim must fail.

B

Livingston asserts that the admission of testimony concerning pre-trial out-of-court identifications made in the absence of counsel violated his right to due process. The Supreme Court has held that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S.Ct. 1877, 1881, 32 L.Ed.2d 411 (1972). It is the initiation of criminal proceedings that immerses the defendant in the "intricacies of substantive and procedural criminal law," and "marks the commencement of `criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[4] *Id.* at 689-90, 92 S. Ct. at 1882; *see also Powell v. Alabama*, 287 U.S. 45, 66-71, 53 S.Ct. 55, 63, 77 L.

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Ed. 158 (1932) (holding right to counsel attaches at time of arraignment). The right to counsel attaches specifically at the time of arraignment or the preliminary hearing. *Kirby,* 406 U.S. at 688-89, 92 S.Ct. at 1881.

Because criminal proceedings as defined by the Supreme Court had not been initiated against Livingston when the out-of-court identifications were made, his federal right to counsel had not attached. Two out-of-court line-up identifications were made, one by Mr. Steve Gifford on the same day of Livingston's arrest, and one by Thomas, the complainant, two days later.[5] Livingston was arrested on December 20, 1984 and indicted in January, 1985. The record does not indicate dates of arraignment or any preliminary hearings. Because the record does not show, and Livingston does not allege, that an arraignment or preliminary hearing was conducted prior to either of the identifications in question, Livingston has not demonstrated that his right to counsel had attached at the time of the identifications. *See id.*

Livingston argues, however, that the absence of counsel at lineup identifications violated Mississippi state law, and therefore amounts to a violation of due process. A violation of state law can amount to a violation of due process, but only if the trial is rendered fundamentally unfair. *See Nelson v. Estelle,* 642 F.2d 903, 905-06 (5th Cir. 1981). An unfair trial is a trial that

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[5] A photographic identification of Livingston was made by Thomas five days after the attack. This court has held that counsel for the accused is not required to be present at an out-of-court photographic identification, regardless of whether or not the accused is in custody. *See United States v. Ballard*, 423 F.2d 127, 131 (5th Cir. 1970).

has been "largely robbed of dignity due a rational process." *Johnson v. Blackburn*, 778 F.2d 1044, 1050 (5th Cir. 1985) (quoting *Houston v. Estelle*, 569 F.2d 372, 383 (5th Cir. 1978)). Even if Livingston was somehow prejudiced by the admission of the out-of-court identifications, those identifications were largely duplicative of independent, in-court identifications made by both Thomas and Gifford. Consequently, Livingston's trial was not rendered fundamentally unfair. *Cf. Washington v. Estelle,* 648 F.2d 276, 279 (5th Cir. 1981) (holding that trial was not rendered fundamentally unfair by counsel's failure to object to out-of-court identification, where there was ample evidence, including an in-court identification, to establish the defendant's guilt), *cert. denied,* 454 U.S. 899, 102 S. Ct. 402, 70 L. Ed. 2d 216 (1981).

C

Livingston claims he was denied effective assistance of counsel in violation of his Sixth Amendment rights. To justify reversal, this claim must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2053, 2064, 80 L.Ed.2d 674 (1984). First, counsel's performance must have fallen below an objective standard of reasonable professional service and, second, the conduct must have been so deficient as to prejudice the defense, depriving the defendant of a fair and reliable trial. *Id.*

Livingston claims that his counsel was negligent in failing to object to the non-sequestration of the jury. As discussed above, the record reflects that at the beginning of the second day of the two-day trial the court polled the jury and determined that no jury

member had discussed the case, read newspapers or watched the news,[6] and Livingston does not allege any prejudice resulting from the district court's failure to sequester the jury. Therefore, counsel's failure to object to non-sequestration of the jury did not so prejudice Livingston's defense as to deprive him of a fair and reliable trial.

Livingston also claims that his counsel was ineffective because he did not object to the admission into evidence of the out-of-court identifications. We disagree. We have already held that Livingston's federal right to counsel had not attached at the time of the out-of-court identifications. *See supra* part II.B. Therefore any objection by counsel on the basis of Livingston's federal rights would have been unavailing. Livingston was not entitled to the exclusion of the identifications on federal law grounds. Assuming *arguendo* that the trial court would have excluded the out-of-court identifications on state law grounds (had defense counsel objected),[7] Livingston still has not shown that counsel was ineffective for failing to object to the out-of-court identifications, since their admission into evidence did not deprive Livingston of a fair and reliable trial. The witnesses who made the out-of-court identifications also made independent in-

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[6] *See supra* part II.A.

[7] The Mississippi Supreme Court ruled that Livingston's right to counsel under the Mississippi constitution attached prior to the lineup identifications. *Livingston v. State*, 519 So.2d 1218, 1221 (Miss. 1988). However, because Livingston failed to object at trial to the introduction of the testimony and to the alleged absence of counsel at the pre-trial line-up, the Mississippi Supreme Court ruled that this claim was procedurally barred. *See id.*

court identifications of Livingston which were largely duplicative of the identifications to which Livingston objects. As a result, admission into evidence of the out-of-court identifications did not render Livingston's trial fundamentally unfair. *See Washington,* 648 F.2d at 279 (holding that trial was not rendered fundamentally unfair by counsel's failure to object to out-of-court identification, where there was ample evidence, including an in-court identification, to establish the defendant's guilt). Livingston's ineffective assistance claim therefore is without merit.

D

Based on the foregoing claims, Livingston asserts that he is entitled to habeas relief due to cumulative error. Sitting en banc 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*. (citing *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 v. Blackburn,* 777 F.2d 272, 281 (5th Cir. 1985)).

As noted above, the failure to sequester the jury raises an issue of state law which did not render Livingston's trial fundamentally unfair. *See supra* part II. A. That claim therefore is not subject to review in habeas proceedings as cumulative error. *See Derden*, 978 F.2d at 1458 (holding errors of state law not cognizable in habeas corpus unless of constitutional dimension). Admission into evidence of out-of-court identifications was not error, and Livingston did not receive ineffective assistance of counsel. *See supra* parts II.B. and II.C. Those claims therefore do not show trial errors, but merely events and rulings which Livingston regards as unfavorable. They are therefore precluded from review as part of a cumulative error claim. *See Derden,* 928 F.2d at 1458 (allowing review of actual errors only, not unfavorable rulings or events).

Applying the *Derden* requirements to each of the foregoing claims, the cumulative error claim fails.

III

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