

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7652

DAVID M. McFEE,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA H89-0150-P-N)

(June 24, 1994)

Before GARWOOD, JOLLY, and SMITH, Circuit Judges.

PER CURIAM:*

Prisoner David M. McFee filed this habeas corpus action to challenge the sufficiency of the evidence supporting his conviction. He also argues that his trial was fundamentally unfair because of remarks made during the prosecutor's closing argument, and because of references made to the fact that the victim had been stabbed forty-one times. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Sometime in the early morning hours of April 26, 1983, Mrs. Rose Gunter was brutally murdered in her home in rural Mississippi. Her son-in-law discovered her, blindfolded and gagged, lying on blood stained sheets. She had been stabbed repeatedly, and there were some indications that she had been raped. On May 5, David McFee, who had been taken into custody, admitted that he had been at the victim's home on the day she was killed. On May 16, 1984, approximately one year later, McFee was formally charged with Mrs. Gunter's rape.¹ In early August, McFee was tried before a jury. The jury convicted McFee, who presented no evidence in his own defense. See McFee v. State, 511 So.2d 130, 131-32 (Miss. 1987). After exhausting his direct appeals, he filed a petition for writ of habeas corpus. The district court denied the petition, and later denied a certificate of probable cause. McFee appeals to this court, which granted McFee's motion for a certificate of probable cause.

¹McFee was originally indicted for the capital murder of Mrs. Gunter. McFee agreed to plead guilty to the reduced charge of murder in exchange for testifying for the prosecution at the trial of Eric Fuselier, his co-indictee. McFee was sentenced to life imprisonment. As agreed, McFee testified at Fuselier's trial, but in a manner that greatly surprised prosecutors, and eventually led to the reversal of Fuselier's conviction for capital murder. See Fuselier v. State, 468 So.2d 45, 49-50 (Miss. 1985). The State then prosecuted McFee for perjury for the conflicting statements made at the Fuselier trial, and he was ultimately convicted. The State then indicted and prosecuted McFee for the rape of Mrs. Gunter.

II

McFee presents three issues to be considered on appeal. First, McFee contends that there is insufficient evidence to support his conviction. Insufficiency of the evidence can support habeas relief only where the evidence, viewing it in the light most favorable to the prosecution, is such that no rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, 576-77 (1979); Marler v. Blackburn, 777 F.2d 1007 (5th Cir. 1985). "The evidence need not exclude every reasonable hypothesis of innocence, however, and a jury may choose any reasonable construction of the evidence." Story v. Collins, 920 F.2d 1247, 1255 (5th Cir. 1991).

In this case, the evidence is sufficient to support McFee's conviction. Under Mississippi law, the prosecution was required to prove that McFee had non-consensual sexual intercourse with the victim, a female above the age of twelve years, by the use of force or threatening the use of force. See Miss. Code Ann. § 97-3-65(2) (1972). During the trial, the prosecution introduced evidence that the victim suffered bruising and superficial lacerations in the vaginal area consistent with forcible intercourse. A photograph of the victim's body demonstrated that her pajama bottoms had been torn in such a manner as to allow access to the pubic area. A combing of the victim's pubic area produced a pubic hair of caucasian origin that exhibited the same microscopic

characteristics as McFee's pubic hairs.² Moreover, a doctor testified that the victim had wounds on her arms that were consistent with attempts to fight off the attackers, and the fact that the victim was found dead could allow a jury to reasonably infer that force had been used in connection with the rape. As the Mississippi Supreme Court noted, "the exclusion of Fuselier, coupled with McFee's presence on the scene, the identification of a pubic hair possessing the same characteristics as McFee's, and the proof that the victim had been raped, are sufficient to place the jury's verdict beyond our authority to disturb." McFee v. State, 511 So.2d at 134.

Next, McFee argues that the fact that evidence was admitted that the victim had been stabbed forty-one times rendered his rape trial fundamentally unfair. Dr. Sergio Gonzalez, a forensic pathologist who examined the victim's body, was asked if he could determine whether the victim had resisted her attacker. Dr. Gonzalez responded "Well, this lady sustained 41 stab wounds and obviously. . . ." At that point, defense counsel objected. The district court immediately explained to the jury that "[w]e are trying a rape case only in this trial and that's the only thing we

²The hair found on the victim was analyzed by a forensic scientist. Through this analysis, the scientist was unable to make a positive identification from the hair comparisons, although he could eliminate persons through this technique. The analysis demonstrated that hair had the same characteristics as McFee's, but it eliminated Eric Fuselier, McFee's accomplice, from the possible pool of rape suspects. See McFee v. State, 511 So.2d at 132.

are trying, is a rape case." Because "[o]ur practice is based on the belief that the jury heeds the trial court's instructions," United States v. Parker, 877 F.2d 327, 333 (5th Cir.), cert. denied, 493 U.S. 871 (1989), and because the district court immediately instructed the jury that "we are trying a rape case," the admission of this evidence did not render McFee's trial fundamentally unfair.

Finally, McFee argues that his was convicted because the prosecutor engaged in prosecutorial misconduct. To establish a claim of prosecutorial misconduct in a habeas proceeding, a prosecutor's remarks to the jury must be more than undesirable; they must be so egregious that they rendered the entire trial so fundamentally unfair as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 178-81, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Ortega v. McCotter, 808 F.2d 406, 410 (5th Cir. 1987). To determine whether a trial was fundamentally unfair, the prosecutor's remarks must be examined within the context of the entire trial to ascertain whether the statements were a highly significant factor in the jury's decision to convict. McFee is entitled to relief only if the prosecutor's statements were a "crucial, critical, highly significant factor upon which the jury based its verdict of guilty." Whittington v. Estelle, 704 F.2d 1418, 1425 (5th Cir.), cert. denied, 464 U.S. 983 (1983).

There are two prosecutorial remarks of which McFee complains. First, in his opening statement, the prosecutor described McFee as "a type of animalistic, mean person. . . ." Defense counsel objected, and the court instructed the jury to disregard the prosecutor's description of McFee. This statement by the prosecutor was not so inflammatory that McFee's trial amounted to a denial of due process. Although the characterization was unflattering, it was generally supported by the evidence submitted at trial. See United States v. Ivy, 929 F.2d 147, 153 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 234, 116 L.Ed.2d 191 (1991); United States v. Malatesta, 583 F.2d 748, 759 (5th Cir. 1978). Moreover, the court instructed the jury to disregard the prosecutor's characterization of the defendant. As noted above, "[o]ur practice is based on the belief that the jury heeds the trial court's instructions," United States v. Parker, 877 F.2d at 333, and as such, this characterization, even if improper, does not amount to a denial of due process.

McFee also complains that during the prosecutor's closing argument, he stated that "The only thing that will put Rose Gunter's spirit to rest is to convict the defendant for the crime that this man committed." The defense counsel objected to this statement, but the court gave no curative instruction. It is argued on appeal that this statement not only reminded the jury that the victim had died, but that it also conjured up notions and beliefs of religion or the supernatural. Such remarks concerning

the "resting" of a deceased's spirit, even if irrelevant to trial issues, are fairly common. Furthermore, there were no religious, supernatural, or satanic overtones associated with the defendant's crime, such that a religious reference would stir latent prejudice. In any event, this single statement made during the prosecutor's closing argument was not misconduct that was so persistent and pronounced that the conviction would not have occurred but for the remark. See Jones v. Butler, 864 F.2d 348, 356 (5th Cir. 1988), cert. denied, 490 U.S. 1076, 109 S.Ct. 2090, 104 L.Ed.2d 653 (1989).

III

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.