

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8083

Summary Calendar

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GUS ANDREW ARGEANAS,

Petitioner-Appellant,

versus

JAMES A COLLINS, Director  
Texas Dept. of Criminal Justice,  
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Western District of Texas  
EP 91 CV 308

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( June 18, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Gus Andrew Argeanas is incarcerated in the Texas Department of Corrections following his jury conviction for robbery with an enhanced sentence of 85 years for two prior felony convictions.

Argeanas's jury conviction followed trial testimony that Argeanas entered a Safeway supermarket, approached a clerk and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

repeatedly demanded the money from the cash register, showing the handle of a gun inside his coat. When the clerk refused and attempted to restrain Argeanas, he fled from the store with a trail of pursuers behind him, including the clerk. Argeanas jumped into the back seat of a Ford Grenada and sped from the scene, leaving behind on the ground a knife that bore his finger prints. He was later apprehended and identified by several individuals who saw him at the supermarket, and the weapon, a pellet gun, was seized together with other evidence.

Argeanas's conviction was affirmed. Argeanas's petition for discretionary review was refused by the Texas Court of Criminal appeals. The Texas Court of Criminal Appeals also denied without written order Argeanas's application for state writ of habeas corpus.

Argeanas filed a 28 U.S.C. § 2254 petition in district court. The magistrate judge recommended that the petition be denied. The district court adopted the magistrate judge's Report and Recommendation and denied the petition. Argeanas filed a timely notice of appeal.

Argeanas's principal argument is that he was deprived of a fair trial and his right to due process because the prosecutor conspired to convict him through introducing perjured testimony and improperly bolstering testimony of the witnesses. Although this argument is interwoven throughout Argeanas's appellate brief, the issues will be considered separately.

Argeanas argues that perjurious testimony was used regarding fingerprint identification. This argument lacks merit.

The government's fingerprint expert, Art Orozco, compared fingerprints taken from a gun box (Ex. 26), a knife blade (Ex. 27), and a gun (Ex. 28), with fingerprints taken from Argeanas on the day of trial (Ex. 30). The gun and gun box were found in the Ford Grenada when Argeanas was arrested. Orozco positively identified the prints taken that day (Ex. 30) with prints on the blade (Ex. 27) and the gun box (Ex. 26). An oily substance prevented lifting any fingerprints from the gun.

Argeanas called another fingerprint expert, Sergio Reyes, also a detective from the county sheriff's department, who made a positive identification between prints on the blade (Ex. 27) and Argeanas's prints taken that day (Ex. 30). No positive identification was made with the prints on the gun box (Ex. 26).

During cross examination by the prosecutor, Reyes clarified that, instead of the prints taken that day (Ex. 30), he used other known prints on file to draw his conclusions. Because Reyes considered the prints made that day (Ex. 30) to be of lower quality, the prosecutor asked Reyes to take another sample and make a comparison. Argeanas accused Orozco of perjury, accused Reyes of trying to patch up a botched fingerprint analysis, and objected to taking more prints because the prosecutor had rested the state's case. The state judge disagreed. Reyes took another sample (Ex. 32), which he positively linked to the prints found on the knife blade. The prosecutor called Orozco, who testified that there were

sufficient points for comparison to allow positive identification between the prints first taken that day (Ex. 30) and those lifted from the gun box (Ex. 26) and the blade (Ex. 27).

A prosecutor's use of perjured testimony to convict a defendant is grounds for habeas corpus relief. See Giglio v. U.S., 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In order to obtain habeas corpus relief on these grounds, Argeanas must prove that (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the testimony was material to proving his guilt. See Little v. Butler, 848 F.2d 73, 76 (5th Cir. 1988).

The Texas court of appeals rejected Argeanas's perjured testimony argument as "full of sound and fury signifying nothing." That appellate court further rejected any indication of perjury by Orozco or any prosecutorial misconduct and dismissed the fingerprint issue as "the sincere product of differing levels of expertise." The magistrate judge agreed and found no basis in the record to conclude that perjury had occurred, nor that their testimony rendered the trial fundamentally unfair.

Argeanas fails to prove that the positive identification made by Orozco on exhibits 26 and 27 against 30 was false, nor does he prove that the prosecutor knew it was false. Both expert witnesses positively linked Argeanas's fingerprints to those found on the knife blade. Argeanas thus fails to meet the standard for relief under Little.

Argeanas argues that the prosecutor coached witness Humberto Olivares to deliver perjured testimony. This argument is meritless because it is not supported by the record.

Olivares testified that he was in line, facing the clerk, Hector Soto, when Argeanas went around him, told him not to move, and ordered Soto to give him the money in the register, displaying a weapon in the process. Olivares responded to the prosecutor's question whether any statement was made, and Olivares added that Argeanas threatened to fill Soto with holes if he did not comply. Olivares admitted during cross-examination that he first "remembered" the "full of holes" comment recently while preparing to testify and finally admitted that he never heard Argeanas make the statement. Olivares testified that he heard about the comment from "the attorney."

The district court held that the record failed to support a finding that the prosecutor coached Argeanas to offer perjured testimony. Argeanas does not offer any evidence other than Olivares's testimony that he heard about the "full of holes" statement from the attorney. Argeanas does not offer any evidence that the prosecutor knew it was false. Further, although it might have been false for Olivares to say that he heard it, Soto had already testified that Argeanas had made the "full of holes" statement. Two people identified Argeanas at the scene of the crime and Olivares refused to retract his identification of Argeanas. Olivares's statement was thus not material to proving

Argeanas's guilt. For reasons set forth above, Argeanas fails to meet the standard under Little.

Argeanas argues that the trial court committed reversible error by restricting his argument on a significant issue. In his § 2254 petition, Argeanas contended that the trial court's restriction of his final argument deprived him of a fair trial and his right to effective assistance of counsel. This argument lacks merit.

In a direct appeal case, this court has held that the trial court has discretion to limit closing arguments so long as an argument is not "unreasonably curtailed," in which case "reversal may be warranted" if actual prejudice results from the court's action. See United States v. Bernes, 602 F.2d 716, 722 & n.9 (5th Cir. 1979). In Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), adopted, 881 F.2d 1273, 1276 (5th Cir. 1989) (en banc), aff'd, 497 U.S. 227 (1990), a death penalty case, the petitioner sought habeas relief, alleging that counsel's decision to waive closing argument during the guilt stage of trial constituted ineffective assistance. See id. at 592. This court held that the petitioner was not prejudiced by the waiver of closing argument after noting of the following factors: (1) the strong evidence against the petitioner; (2) the fact that the jury was "fairly apprised" of the nature of the petitioner's defense during voir dire, defense counsel's opening statement, and defense testimony during trial; and (3) petitioner's failure to state what he might have said in closing argument. Id. Although Sawyer addresses prejudice in the

ineffectiveness context, which is focused deferentially on the correctness of counsel's conduct including "tactical considerations," see id., Argeanas cannot show how the action by the trial court, which merely limited portions of Argeanas's argument, deprived him of an opportunity to present an adequate defense to the jury.

Argeanas attacked the prosecutor's case in his closing argument as one involving a conspiracy to offer perjured testimony. As to portions of that argument, the prosecuting attorneys' objections on grounds that they were not supported by the evidence were sustained. The portions objected to were that (1) the prosecutor told a witness how to identify the defendant in court, (2) the government was vouching for witnesses who were committing perjury, and (3) officials gave an eyewitness a sheet of paper with the license plate number on it and told him to testify that he wrote it down himself.

Addressing the prosecutor's first objection, the court of appeals noted that, although "simulated quotation inferred from the evidence" would be acceptable, Argeanas's argument did not clearly delineate that he was doing that and therefore exceeded the scope of proper argument. The other two objections also tended to exceed the scope of proper argument, although defense counsel ended his commentary on the license number with "[i]t's conceivable. Well, think about that." Argeanas's failure to qualify his hypothetical commentary at the onset appeared to be a statement on the evidence. Apart from the portions of Argeanas's argument objected to by the

prosecution, Argeanas had the opportunity to argue that the jury could "draw the inference" of a government frame-up by pointing to the evidence as unreliable. For the above reasons, the trial court correctly restricted defense counsel's comments.

Argeanas argues that it was unfair for the trial court to prevent Argeanas from arguing that the prosecutor sought to deceive the jury when the prosecutor characterized Argeanas's change in appearance as an effort to deceive or evade identification.

Argeanas did not object to the prosecutor's argument that he altered his appearance to evade identification. In contrast to Argeanas's perjury argument, evidence at trial showed that Argeanas's appearance was changed; he was heavier, wore a beard, had darker hair, and wore his hair differently. This change caused some difficulty in identifying him at a pretrial hearing. Argeanas took opportunity to emphasize this difficulty at trial. One witness testified that Argeanas made a gesture that could be interpreted as intimidating to someone at the pretrial hearing, possibly allowing an inference that he did not want to be identified. The evidence thus allowed the prosecutor to comment on his change of appearance.

Argeanas argues that he was deprived of a fair trial when the jury learned of offenses for which he was charged but not convicted.

Stuart Leeds, an attorney and expert on pen packets, testified during the punishment phase of the trial. When the prosecutor questioned Leeds regarding the offenses for which Argeanas was



convicted, Leeds read off the top of the judgment, "eight counts of aggravated robbery," when the judgment reflected that he was convicted of only four counts. Argeanas moved for a mistrial. The trial judge overruled the motion and instructed the jury to disregard Leeds's previous statement for all purposes. Leeds then testified that the judgment reflected that he was convicted of only four counts.

The appellee argues that, because the jury was given a limiting instruction, Leeds's error did not violate notions of "fundamental fairness" under the Due Process Clause.

The district court's review of a state court's evidentiary ruling is "limited to determining whether a trial judge's error is so extreme that it constituted denial of fundamental fairness." Wiley v. Puckett, 969 F.2d 86, 105 (5th Cir. 1992) (citation omitted); see Jones v. Estelle, 622 F.2d 124, 126 (5th Cir. 1980), cert. denied, 449 U.S. 996 (1980) (prosecutor's reference to acquitted conduct in closing argument did not render trial fundamentally unfair). The erroneous admission of evidence prejudicial to the defendant need not render a trial fundamentally unfair if the error is cured by limiting instructions. See Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990).

The state court of appeals held that error alleged by Argeanas did not rise to the level of constitutional error and that "the curative instruction in this case [was] adequate to have purged the harm and eliminate the necessity for a new trial." The magistrate

judge correctly observed that, although evidence of the dismissed counts was highly prejudicial, it did not rise to the level of a "fundamental error" as defined by Dowling. In light of the limiting instruction given by the trial court taken together with Leeds's corrected testimony, the error did not render Argeanas's trial fundamentally unfair.

Argeanas argues that the evidence was insufficient to establish his guilt.

"A criminal defendant has a federal due process right to be convicted only upon evidence that is sufficient to prove beyond a reasonable doubt the existence of every element of the offense." Foy v. Donnelly, 959 F.2d 1307, 1313 (5th Cir. 1992) (quoting Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Argeanas argues that his conviction cannot be sustained unless every reasonable hypothesis inconsistent with guilt is excluded. This argument lacks merit.

When reviewing a federal habeas petition challenging a state conviction for sufficiency of evidence, the inquiry 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." Foy, 959 F.2d at 1313 (citation omitted). The standard is the same for circumstantial or direct evidence. Id. at 1313-14 & n.9.

This standard requires "explicit reference to the substantive elements of the criminal offense as defined by state law." Id. at

1314 (citation omitted). However, the Jackson standard controls even if state law imposes a more onerous burden, such as the exclusion of every reasonable hypothesis of innocence. Id. at 1313 n.9.

A conviction for robbery required that the prosecutor prove beyond a reasonable doubt that Argeanas, with the intent to obtain or maintain control of the property of another, intentionally and knowingly threatened or placed another in fear of imminent bodily fear or death. See Tex. Penal Code Ann. § 29.02 (West Supp. 1989).

The evidence at trial included eyewitness testimony by Soto, the clerk targeted by Argeanas, Olivares, who waited in line and faced the clerk, Martin Dominguez, a Safeway employee who followed Argeanas for twenty minutes in the store, and Zublasky, who was eating lunch outside and observed Argeanas entering and fleeing from the supermarket in a Ford Grenada described by Zublasky, including the license plate number. Three arresting officers also testified, identifying Argeanas at trial and the evidence seized, and noting the general consensus of eyewitness testimony placing Argeanas at the scene of the crime. The difficulty in identifying Argeanas at trial was attributed largely to his change of appearance. By contrast, Argeanas was readily identified by witnesses on the day of his arrest as the individual who either committed the robbery or who ran from the supermarket immediately after the robbery.

Argeanas argues that the prosecutor's sole assertion was that Argeanas robbed the supermarket because expert testimony identified

Argeanas's fingerprints on the blade of the knife he dropped while in flight and that such evidence only tended to place him at the scene of the crime. Argeanas's argument mischaracterizes the content of the record and is meritless.

Although the experts positively identified Argeanas's fingerprints on the knife, the prosecutor's case included other evidence directly incriminating Argeanas.

For reasons set forth above, the evidence, construed in a light most favorable to the prosecution, was clearly sufficient to convict Argeanas.

Argeanas argues that the prosecutor's pretrial decision to prosecute him as a habitual offender resulted from his refusal to plead guilty and was thus tantamount to vindictive prosecution. This argument lacks merit.

On direct appeal, this court will look to the conduct of the prosecutor in light of the entire proceedings to determine whether the prosecutor's actions were vindictive. United States v. Molina-Iquado, 894 F.2d 1452, 1454 (5th Cir.), cert. denied, 498 U.S. 831 (1990). The inquiry into prosecutorial conduct in a pretrial context may be distinguished from conduct occurring thereafter. United States v. Goodwin, 457 U.S. 368, 379-82, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Although Goodwin is also a direct-appeal case, it is roughly analogous because it addresses prosecutorial vindictiveness in a pretrial context and it applies analysis used in Bordenkircher v. Hayes, 434 U.S. 357, 362, 98 S.Ct. 663, 98 L.Ed.2d 663 (1978). This circuit adopts Bordenkircher and its

progeny to address allegations of vindictive prosecution in a § 2254 petition. See Ehl v. Estelle, 656 F.2d 166, 169 (5th Cir. Unit A 1981), cert. denied, 455 U.S. 953 (1982).

A prosecutor has broad discretion during pretrial proceedings "to determine the extent of the societal interest in prosecution." Goodwin, 457 U.S. at 380 (quoting Bordenkircher, 457 U.S. at 382). A prosecutor also has discretion to pursue additional charges than those originally filed because such charges "may not reflect the extent to which an individual is legitimately subject to prosecution." Id.

Argeanas's reliance on North Carolina v. Pearce, 395 U.S. 711, 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), is misplaced because it involved the imposition of a heavier sentence after the defendant's original sentence was set aside. See id. This court has held that Bordenkircher is more analogous when addressing prosecutorial or judicial vindictiveness in a plea bargaining context and declined to apply Pearce in such situations.<sup>1</sup> Ehl, 656 F.2d at 169.

Argeanas concedes that, after counsel was informed that he was a "major violator" on account of his previous convictions, he rejected the offer of a reduced sentence in exchange for his guilty plea. In such cases, where the evidence as a whole fails to show vindictiveness, the prosecutor may use the additional charges to

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<sup>1</sup>Even assuming arguendo that Pearce applied, the "presumption of vindictiveness" in Pearce does not operate as an iron-clad rule. See Alabama v. Smith, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) (conditioning presumption upon "reasonable likelihood" that heavier sentence was the actual product of vindictiveness by sentencing authority).

induce a defendant to plead guilty without being subjected to a presumption of vindictiveness. See Goodwin, 457 U.S. at 378 n.10.

Argeanas provides no evidence of actual vindictiveness by the prosecutor other than his pretrial decision to seek enhancement under the habitual criminal statute. Because the actions of the prosecutor were part and parcel of the plea negotiation process, Argeanas's conclusional argument collapses.

Argeanas contends that comments made by the prosecutor regarding the possible reaction of friends and the community to their verdict, Argeanas's propensity to kill, his use of a gun, his flight from the scene of the crime, his changed appearance, the "full of holes" threat, and to defense counsel's "red herrings" and "theatrics," all deprived him of a fair trial.

Prosecutorial comments may be attacked as a "generic substantive due process violation" or as a violation of a specific constitutional guarantee. See Rogers v. Lynaugh, 848 F.2d 606, 608-09 (5th Cir. 1988). The challenges raised by Argeanas address generic due process violations. In such cases, in order to establish a claim for relief in a habeas proceeding, a prosecutor's remarks to the jury must be more than undesirable or even universally condemnable; 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). There must be a reasonable probability that, but for the

prosecutor's persistent or pronounced misconduct, the verdict might have been different. Rogers, 848 F.2d at 609. Argeanas fails to show that, but for the prosecutor's comments, there is a reasonable probability that the result might have been different.

As set forth above, the prosecutor's comments addressing his change of appearance to avoid identification, and Argeanas's "fill you with holes" threat are all supported by the record and could be considered by the jury as evidence of Argeanas's guilt. See Whittington v. Estelle, 704 F.2d 1418, 1423 (5th Cir.), cert. denied, 464 U.S. 983 (1983). Argeanas's other claims will be addressed separately below.

"[A]n appeal to the jury to act as the conscience of the community is not impermissible." United States v. Phillips, 664 F.2d 971, 1030 (5th Cir. Unit B 1981) (direct appeal) (citation omitted), cert. denied, 457 U.S. 1136 (1982). As noted by the magistrate judge, the same is true to reminders by the prosecutor that the jury will have to answer to their friends and neighbors. Whittington, 704 F.2d at 1423-25. It is not improper for the prosecutor to argue regarding the likely response of various members of the community, including friends, so long as the prosecutor does not argue that community expectations mandate a particular result. Id. at 1423.

The prosecutor told the jurors that "when you leave this courtroom, your friends are going to ask you what happened. And I want you to think about it." After defense counsel's objection was overruled, the prosecutor continued as follows:

They will ask you what happened, and I want you to give them an answer you can be proud of, an answer that will tell people like this defendant here --

. . .  
what will be tolerated and what will not be tolerated. And you're going to tell them whether or not we can have individuals like Gus Argeanas walk into court and be found not guilty when that evidence does show them to be guilty.

Ladies and gentlemen, it is an important decision that you make, and I hope you do it with the utmost sincerity and the utmost consideration. We would request that you take a good look at those exhibits. We would request that you return a verdict of guilty as charged in the indictment. I thank you for your time.

Id. at 399-400.

Although this argument may walk the line between a proper call to law enforcement and an improper call for decision on matters other than evidence, see Whittington, 704 F.2d at 1423-25, the prosecutor's invitation to reflect on reactions from friends and community was linked with commentary on the strong evidence and the possible disappointment resulting from an erroneous verdict. The prosecutor's final comments were in the form of a request to find Argeanas guilty, and the prosecutor deferred to the judgment of the jury. Although it is still a close question, rather than telling the jury that community expectations mandated a guilty verdict, which would violate Whittington, the prosecutor's comments taken as a whole fairly directed the jury to search the evidence which pointed to Argeanas's guilt. The comments thus failed to render Argeanas's trial fundamentally unfair.

As noted by Argeanas, the prosecutor made repeated reference to the gun used by Argeanas to rob the supermarket, and to his propensity to kill, take loved ones, and destroy lives. Although



the prosecutor may himself have engaged in "theatrics" to argue his point, discussion of the use of the gun was relevant to showing that the clerk was placed in fear of imminent bodily injury or death, an element of the crime of robbery.

The weapon used by Argeanas was a pellet gun, using cartridges as a propellant. Although the gun was not actually a deadly weapon is irrelevant because Soto and Olivares testified that they both feared bodily harm when they saw the gun handle. This was sufficient to show that Argeanas intentionally and knowingly threatened or placed another in fear of imminent bodily fear or death. See Tex. Penal Code Ann. § 29.02 (West Supp. 1989).

The comment regarding Argeanas's propensity to kill is more troublesome. The prosecutor's comment was in one respect a fair attempt to counter defense counsel's argument that the government was trying to frame-up Argeanas. The prosecutor's response, attempting to present Argeanas as a gun-bearing "killer" and thus a greater threat to society, was a bit overdone. As noted by the magistrate judge, although the comment is not clearly supported by the evidence and is speculative, the comment was not so egregious that it raised a reasonable probability that the verdict would have been different without it. See Rogers, 848 F.2d at 609. The comment was thus not so inappropriate as to warrant habeas relief.

Argeanas argues that the prosecutor improperly characterized his apprehension as being carried out in flight "as if running away in a high speed chase or something, when the evidence shows that petitioner was driving off after being parked and didn't even know

he was being followed." Argeanas argues further that the prosecutor used the flight to "state his own opinion of petitioner's guilt."

Flight from the scene of the crime may allow an inference of guilt. See Whittington, 704 F.2d at 1425. The prosecutor mentioned, without objection, that, when officers apprehended Argeanas, the car had been previously parked, that he was fleeing or, at least, *had* fled from the scene of the crime, and that flight is "a strong indication of guilt." The prosecutor's argument was within the scope of trial evidence and did not characterize the defendant as being apprehended in a high speed chase. See id. Argeanas's argument is thus meritless.

To warrant habeas relief, comments by a prosecutor that attack the integrity or character of defense counsel must be so egregious that the defendant was deprived of a fundamentally fair trial. O'Bryan v. Estelle, 714 F.2d 365, 388 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984). Although the prosecutor characterized the defense counsel's arguments as tainted with "theatrics" and "red herrings," defense counsel had taken every opportunity to show that the prosecutor was perpetrating fraudulent testimony to frame-up Argeanas. Although the prosecutor's comments were inappropriate if viewed in isolation, they fairly countered the attacks made by defense counsel. Argeanas fails to show that the prosecutor's statements, taken as a whole, were so egregious that Argeanas was deprived of a fundamentally fair trial.

AFFIRMED.