IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3208

Summary Calendar

ALPHONSO SMITH,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
and RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(93-CV-141-E-5)

(March 3, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

The district court denied petitioner Alphonso Smith's petition for writ of habeas corpus and granted a certificate of probable cause to appeal.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

In 1983, petitioner Alphonso Smith was charged by information with attempted second-degree murder in Orleans Parish, Louisiana. After jury trial, he was convicted of aggravated battery and sentenced as a "double offender" to twenty years at hard labor. The judgment was affirmed on direct appeal. Smith later petitioned for post-conviction relief. The Louisiana state courts denied the requested relief, whereupon Smith filed his habeas petition in federal district court raising the same claims. The district court dismissed his petition and found probable cause to appeal.

The evidence adduced at trial, viewed in the light most favorable to Alphonso Smith's conviction, tended to show the following. On March 12, 1983, Smith met his estranged sister, Vickie Graham, for the first time in several years while they visted their mother in the hospital. After the visit, Smith accompanied Graham home. Graham was then living with the victim of the crime, Eddie Veal, the former boyfriend of Smith and Graham's mother. Earl Moore, a friend of Veal, was also present.

According to Veal's testimony, Moore was leaving and Veal was talking with him on the front porch when Smith suddenly emerged from the house and shot Veal with a pistol. Graham and Moore corroborated Veal's story.

Smith testified on his own behalf to the effect that he and Veal had argued that evening after Veal began to make derogatory comments about Smith and Graham's mother. According to Smith,

Graham gave him the gun when Veal and Moore went out onto the porch. At some point, Smith testified, he and Veal resumed their conversation on the porch, and Veal slapped him. A fight ensued, and Smith fell down, pulled the gun from his coat pocket, shot Veal, and ran away.

II. STANDARD OF REVIEW

Petitioner complains that the trial judge should have given a jury instruction regarding the law of retreat in Louisiana. The burden of showing that an erroneous jury instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than that required to demonstrate plain error on direct appeal. Henderson v. Kibbe, 431 U.S. 145, 154 (1977). The question is whether the flawed instruction so infected the entire trial that the conviction violates due process; it is not enough to show that the instruction is undesirable, erroneous, or even universally condemned. United States v. Anderson, 987 F.2d 251, 259 (5th Cir.), cert. denied, 114 S. Ct. 157 (1993). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson, 431 U.S. at 155.

Smith also complains about the trial court's refusal to declare a mistrial after the prosecutor made a prejudicial remark. To establish that a prosecutor's remarks are so inflammatory that they caused prejudice to the substantial rights

of a defendant, a habeas petitioner must demonstrate "either persistent and pronounced misconduct or that the evidence was so insubstantial that absent the remarks, a conviction would probably not have occurred." Byrne v. Butler, 845 F.2d 501, 508 (5th Cir.), cert. denied, 487 U.S. 1242 (1988). Even if the court's refusal to declare a mistrial was a violation of Louisiana law, we, as a federal habeas court, are without authority to correct a simple misapplication of state law; we may intervene only to correct errors of constitutional significance. Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988).

III. ANALYSIS

A. Jury Instruction on "Retreat"

The trial court's jury instruction on the law of self defense closely tracked the language of La. Rev. Stat. Ann. § 14:19 (West 1986) ("The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person . . . provided that the force or violence used must be reasonable and apparently necessary to prevent such offense . . . ."). Smith concedes that the instruction "is a correct statement of law as far as it goes." Smith contends, however, that the trial court should have given a specific jury instruction regarding the possibility of retreat. Although Smith did not proffer any jury instruction on this point himself, he apparently believes the trial court should have specifically called the jury's attention to the fact that,

on Smith's account of the facts, Smith lacked any reasonable possibility of retreat from the altercation with Veal.

The cases cited by Smith do not stand for the proposition that the trial judge must provide the jury with a list of factors to consider in evaluating whether a particular use of force is "reasonable and apparently necessary." At most, these cases simply demonstrate that the Louisiana Supreme Court has recognized the possibility of escape as a factor in the determination of whether a particular use of force was reasonable and necessary. State v. Brown, 414 So. 2d 726, 729 (La. 1982); State v. Collins, 306 So. 2d 662, 663 (La. 1975). In any event, "the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." Estelle v. McGuire, 112 S. Ct. 475, 482 (1991).

We find no flaw in the jury instructions that so infected the entire trial that Smith's conviction violates due process.

B. Prejudicial Remarks

Smith complains that he should have been granted a mistrial because of a prejudicial remark made by the prosecutor while Smith was on the stand. Defense counsel asked to have Veal brought in while Smith was on the stand so that the jury could compare the two men in size. After this request was made, the prosecutor said, "Well, Your Honor, perhaps we should give a gun to the defendant, too. We're trying to make the situation . . . ." The trial court immediately said, "No. I'm not going to make

. . . ." Defense counsel then moved for a mistrial outside the hearing of the jury, which the court denied.

Smith contends that the trial court's refusal to declare a mistrial violated LA. CODE CRIM. PROC. ANN. art. 770 (West 1981). We are inclined to disagree, because the prosecutor's remark does not clearly come within any of the categories of prejudicial remarks for which article 770 guarantees a mistrial. That article provides that a mistrial shall be ordered if a district attorney refers to:

> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
> (3) The failure of the defendant to testify in his own defense; or
> (4) The refusal of the judge to direct a verdict.

LA. CODE CRIM. PROC. ANN. art. 770.

Even assuming arguendo that the trial court's refusal to grant a mistrial violated article 770, we must note that errors of state law rise to the level of constitutional violations only if they so infuse the trial with unfairness as to deny the defendant due process of law. Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 2928 (1993). The state offered strong evidence of Smith's guilt in the form of three witnesses who testified consistently that Smith's attack was unprovoked, and the prosecutor's remark was not grossly inflammatory. We conclude that the isolated remark did not taint the entire trial, nor did it have the probable

effect of securing a conviction that probably would not have otherwise occurred. See Byrne, 845 F.2d at 508.

IV. CONCLUSION

For the foregoing reasons, the denial of habeas relief is AFFIRMED.