

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3627
Summary Calendar

JOHN KIRK RICHARD,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
from the Eastern District of Louisiana
(CA 93-85 "H" (4))

(January 25, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

By EDITH H. JONES, Circuit Judge:*

John Kirk Richard was convicted of second-degree murder in Louisiana state court; he was sentenced to life imprisonment at hard labor without the benefit of parole. His conviction was affirmed in State v. Richard, 525 So. 2d 1097, 1098 (La. Ct. App. 1988), writ denied, 538 So. 2d 609 (La. 1989). Richard was charged

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

with the first-degree murder of his mother-in-law, Mabel Ruth Bates Fowler, who was found stabbed to death in her apartment on November 3, 1986. The cause of death was determined by autopsy to be a neck wound that severed the internal carotid artery.

Richard had been married to Fowler's daughter, Christine Knorr (Knorr). Knorr, Richard, and their baby had shared Fowler's apartment until a little more than a month before the murder, when Fowler ejected Richard from the apartment for his abusive behavior toward Knorr. Fowler's 13-year-old daughter, Claire Greenwood (Greenwood), also resided in the apartment.

During the evening of November 2, 1986, Knorr was at work at a Pizza Inn near Fowler's apartment when she received a telephone call from Richard, who told her, "No matter what happens, remember I still love you." At 11:00 p.m., Knorr left work with a co-employee, Edmund Williams, whom she was dating. As the two walked to Williams' car, Knorr noticed Richard's car parked in a nearby lot, facing the apartment complex. She was not surprised to see the car because Richard had been following her for a couple of weeks. Knorr and Williams went to Fowler's apartment; Fowler, Greenwood and the baby were there. Knorr changed clothes and left with Williams about 11:45 p.m. As they walked out of the apartment, Knorr saw Richard's car in the parking lot and saw the car accelerate and "peel out," but she did not see it leave the lot.

About 15 minutes later, Greenwood went onto the front balcony of the apartment. She saw Richard standing in the

courtyard, wearing blue jeans and a black jacket that she recognized. Greenwood went back inside and told Fowler, who told her not to worry about it.

Fowler and Greenwood watched television until 12:50 a.m., when Fowler went into Knorr's bedroom to check on the baby. Greenwood heard a noise that sounded like something hitting the wall of the bedroom; she attempted to enter the room, but the door felt as if it were being held shut and she could not get it open. She could hear Fowler screaming for help. Greenwood ran to her brother's apartment, about two blocks away, to summon help. In response to his sister's alarm, William Knorr, Fowler's son, rushed to the apartment and discovered his mother's body on the floor of Christine Knorr's bedroom.

The detective who responded to the call observed Fowler lying on the bedroom floor when he entered.

Detectives watched Richard's apartment from 5:30 a.m. until daylight. While waiting, they noticed that the hood of Richard's car was warm, indicating recent use. During an interview subsequent to his arrest, Richard admitted he had entered Knorr's bedroom through the window approximately two weeks after Fowler had ordered him to move out of the apartment.

Knorr testified that Richard had broken into her bedroom through the window during the night several times before the killing. The first time was the same day Richard was ejected; Knorr testified that when she walked into the bedroom, she discovered Richard, who grabbed her by the mouth and held a knife

to her throat. After talking to her, he said that if she told Fowler he had been there he would return and kill her. The second time was a week later, when he again broke into her bedroom, armed with a knife. Four days before the homicide, Richard entered the bedroom through the window; this time he was unarmed. He told Knorr he blamed her mother for the breakup of their marriage and he showed her a knife. Knorr testified that the knife police seized from his apartment was like the one Richard used when he broke into her bedroom, and also stated she had not reported the break-ins to the police because she feared Richard would hurt her family.

Richard filed a petition for federal habeas relief, raising the issues of: (1) double jeopardy,¹ (2) ineffective assistance of counsel, (3) denial of due process because of the exclusion of evidence, and (4) the sufficiency of the evidence. The district court dismissed Richard's petition and granted a certificate of probable cause.

I.

Richard argues that there was insufficient evidence to support his conviction because the testimony of the witnesses was not in substantial agreement. Insufficiency of the evidence can support a claim for federal habeas relief only if the evidence, viewed in the light most favorable to the prosecution, is such that no rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. Young v. Guste, 849 F.2d 970, 972 (5th Cir. 1988) (citing Jackson v. Virginia, 443 U.S. 307,

¹ Richard abandoned this claim on appeal.

99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The Court accords "great weight" to a state appellate court's determination that the evidence was sufficient. Porretto v. Stalder, 834 F.2d 461, 467 (5th Cir. 1987). "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). Richard's argument that the testimony presented against him was inconsistent is essentially a challenge to witness credibility. Such credibility determinations are solely within the province of the jury. Schrader, 904 F.2d at 287.

Because Richard was convicted of a violation of state law, the substantive law of Louisiana defines the elements of the crime that must be proved. Young, 849 F.2d at 972. Under Louisiana law, second-degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. LA. REV. STAT. ANN. 14:30.1.

The earlier recitation of evidence speaks for itself. Given Richard's presence near the apartment at the time of the murder, the evidence of his ill will toward Fowler, and his prior entry into the apartment and accompanying threats, a rational jury, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that Richard murdered Fowler.

Specific criminal intent is that state of mind that exists when the circumstances indicate that the offender actively

desired the prescribed criminal consequences to follow his act. LA. REV. STAT. ANN. 14:10. Specific intent may be inferred from the circumstances of the murder. LA. REV. STAT. ANN. 15:445.

On direct appeal, the state appellate court made specific fact findings in support of its determination that the evidence was sufficient to support a finding that Richard had the specific intent to kill Fowler:

The severity of the attack on the victim, in which she was stabbed 19 times, indicates that [Richard] had the specific intent to kill or to inflict great bodily harm when he stabbed the victim.

See Richard, 525 So. 2d at 1101 (citation omitted). This determination is amply supported by the record, and is entitled to great weight on federal habeas review. See Porretto, 834 F.2d at 467.

The manner in which Fowler was killed showed a specific intent to kill or cause great bodily harm. The evidence supports a finding that Richard was guilty of second-degree murder; therefore, under Louisiana state law, a rational jury could properly return a verdict of murder in the second degree. LA. REV. STAT. ANN. 14:30.1.

II.

Richard argues that his trial counsel was ineffective in: (1) failing to get copies of a police report which could have been used to impeach a witness for the prosecution, (2) not investigating a potential alibi witness, and (3) failing to object to hearsay testimony. To prevail on any of his claims, Richard

must show that his counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, Richard must demonstrate that his counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). To prove unreliability or unfairness, the movant must show the deprivation of a "substantive or procedural right to which the law entitles him." Fretwell, 113 S.Ct. at 844. Additionally, "the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citation omitted).

Richard argues that counsel was deficient in not obtaining police reports concerning allegedly similar acts by Richard. He contends that the police reports could have been used to impeach a key witness for the prosecution. Richard did not name this "key witness" in his brief; however, before the district court he argued that these police reports would have discredited testimony by Knorr, Richard's ex-wife. Specifically, he argued that the police reports would have undermined Knorr's testimony that police had been dispatched to Fowler's residence several times before the murder. Richard alleged that he had a friendly relationship with his ex-wife, and that the police report would have shown that no conflicts existed between them.

Knorr testified at trial that the police were called several times in November because Richard was beating her up. The police reports, obtained by Richard after his incarceration, are consistent with Knorr's testimony that the police were called several times to the apartment. Hence, there is nothing in the reports that indicates that they could have been used to impeach Knorr's testimony. Richard has obviously failed to show prejudice on this point.

Richard also argues that counsel was deficient in not interviewing a gas station attendant. Richard suggests that the hood of his car was warm at 2:00 a.m. because he bought gas some time before going to bed for the evening. "[B]ecause the presentation of testimonial evidence is a matter of trial strategy," complaints regarding uncalled witnesses are not favored.

U.S. v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). An ineffectiveness claim based on speculation or conclusional rhetoric will not warrant § 2254 relief. See Lincecum v. Collins, 958 F.2d 1271, 1279 (5th Cir.), cert. denied, 113 S.Ct. 417 (1992). Self-serving assertions about the testimony of uncalled witnesses are insufficient for post-conviction relief. Cockrell, 720 F.2d at 1427. The petitioner must provide more than his own speculation about such testimony.

As the district court observed: "Even if the store clerk could be located, could identify the defendant, and could recall when he was at the store, the clerk could not recall where the defendant was at 12:50 a.m., the time of the murder." In response,

Richard argues that counsel was deficient because interviewing the clerk would have shown that the distance between the gas station and the murder scene is so great that it would have been impossible for him to commit the murder. Richard's argument is fashioned with speculation and affixed with conclusional rhetoric and does not warrant habeas relief. See Lincecum, 958 F.2d at 1279.

Richard argues that the trial counsel was deficient in failing to object to hearsay testimony. The relevant hearsay statement was made when William Knorr testified at trial that when Greenwood came to his apartment she said, "Kirk has mom in the room." Greenwood's testimony indicated that she was not certain who was in the room with her mother, and trial counsel pointed the discrepancy out to the jury during closing arguments. Id. at 565. The district court noted that, considering counsel's argument to the jury, the decision not to object could have been a strategic choice. Cf. Strickland, 466 U.S. at 689 (defendant must overcome the presumption that the challenged action might be considered sound trial strategy) (citation omitted). It is doubtful that Richard has overcome the presumption that this was a strategic choice.

Nevertheless, a claim of ineffective assistance may be rejected because of an insufficient showing of prejudice, without assessing the adequacy of counsel's performance. U.S. v. Fuller, 769 F.2d 1095, 1097 (5th Cir. 1985). Because of the strength of the evidence indicating that Richard was the murderer, he has not shown that he was prejudiced by the hearsay statement.

III.

Richard contends that the trial court violated his due process rights by denying him the opportunity to rebut Greenwood's testimony that she could recognize Richard in the apartment courtyard from the apartment balcony on the night of the murder. Richard's trial counsel sought to rebut Greenwood's testimony concerning the lighting present in the courtyard and the distance from the balcony to the courtyard by introducing testimony by one of his associates who had visited the apartment. See Richard, 525 So. 2d 1100. In the alternative, counsel sought permission to take the jury to the apartment complex. Id.

A federal court may intervene only when the admission of evidence rendered a trial fundamentally unfair or violated a specific constitutional right. Johnson v. Blackburn, 778 F.2d 1044, 1050 (5th Cir. 1985). The test is whether the erroneously admitted evidence is material in the sense of a crucial, critical, highly significant factor, in the context of the whole trial. Id. (quotations and citation omitted). Greenwood testified that she saw Richard in the courtyard between 11:30 and 11:45 p.m. the night of the murder. Defense counsel cross-examined Greenwood regarding her ability to see Richard in the courtyard. Testimony from other witnesses placed Richard in the parking lot of the apartment between 11:30 and 11:45 p.m. Although Greenwood's testimony placed Richard at the apartment closer to the time of the murder (12:50 a.m.), it is largely cumulative in the light of the other testimony placing Richard at the apartment. Greenwood's testimony

was not a crucial, critical factor in the context of the whole trial; therefore, Richard's claims that he was improperly denied the opportunity to rebut Greenwood's testimony do not entitle him to federal habeas relief. See Johnson, 778 F.2d 1050.

For the foregoing reasons, the decision of the district court is **AFFIRMED**.