

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4273
Summary Calendar

VINCENT SIMMONS,

Plaintiff-Appellant,

VERSUS

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-1115)

(February 28, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

Vincent Simmons challenges the district court's rejection of his habeas petition. We affirm.

I.

Simmons was convicted by a jury of two counts of attempted aggravated rape in state court. His conviction was affirmed on direct appeal and the state court rejected his habeas claims. The district court also denied habeas relief to Simmons on his federal

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

petition. He contends on appeal that the district court erred in denying relief on two of his federal claims: 1) The evidence was insufficient to support his conviction; 2) the trial court's charge was so inadequate that it rendered his trial fundamentally unfair.

II.

A.

The magistrate judge in his thorough January 19, 1993 report and recommendation carefully reviewed the record evidence, including the eyewitness testimony of three witnesses that supports Simmons' conviction. We agree with the magistrate's analysis of the record and for reasons stated in the magistrate's report we reject appellant's argument that the evidence is insufficient to support his conviction.

B.

Simmons argues next that the trial court committed reversible error when it failed to instruct the jury regarding the issue of alibi, his principal defense.

Simmons raised the alibi-instruction issue in his § 2254 petition filed in the district court. Although this argument could have been made more clearly, we conclude that it was adequate to preserve the contention on appeal. Although the district court did not address the issue, remand is unnecessary. The issue is one of law, and the record is adequately developed to address it. **See United States v. Higdon**, 832 F.2d 312, 313-14 (5th Cir. 1987), **cert. denied**, 484 U.S. 1075 (1988).

The effect of a defective jury charge in a state criminal trial must be viewed in the context of the entire jury charge and the trial as a whole; for reversal, the alleged error must be so prejudicial as to render the trial fundamentally unfair. **Tarpley v. Estelle**, 703 F.2d 157, 159-60 (5th Cir.), **cert. denied**, 464 U.S. 1002 (1983). This is an "extraordinarily heavy burden," **see id.** at 159, and "is even greater than the showing required to establish plain error on direct appeal." **Henderson v. Kibbe**, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). The burden on the habeas applicant is greater yet if the petitioner's claim, as in Simmons' case, is based on the failure to give an instruction. **Id.** at 155. Simmons fails to satisfy his burden.

Simmons presented evidence at trial that he was somewhere else at the time of the offense. The jury was therefore apprised of Simmons' theory of defense. Defense counsel raised the alibi defense in his closing argument. Further, the trial court was not required to give the alibi instruction. The trial judge instructed the jury regarding the elements of the offense, the burden of proof, the presumption of innocence, the definition of reasonable doubt, the evaluation of witnesses' credibility, and the jurors' role as sole judges and triers of fact. Counsel did not object to the charge actually given on grounds that it did not instruct the jury regarding Simmons' alibi defense.² Although an alibi

² Simmons generally contended in his § 2254 petition that counsel was ineffective because "[c]ounsel knew that the instructions were incorrect and erroneous and did not object to the instructions." Simmons' ineffectiveness argument is not briefed on appeal and is thus abandoned. **See Hobbs v. Blackburn**, 752 F.2d

instruction might have been given on Simmons' request, that it was not given does not render the trial fundamentally unfair.

AFFIRMED.

1079, 1083 (5th Cir.), **cert. denied**, 474 U.S. 838 (1985).