IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4280

Summary Calendar

PAULINO ALBERTO GUZMAN,

Plaintiff-Appellant,

v.

D. MITCHELL, CO., III, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(9:92-CV-169)

(March 8, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Proceeding pro se and in forma pauperis (IFP), Paulino Alberto Guzman, an inmate in the Texas Department of Criminal Justice (TDCJ), filed a civil rights action in federal district court against Dylan Mitchell and Dimintero Gonzalez, guards at the TDCJ's Eastham Unit. After a bench trial before a magistrate judge, Guzman's complaint was dismissed with prejudice, 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Guzman now appeals. Finding no error, we affirm the judgment of the magistrate.

I.

Paulino Alberto Guzman, a TDCJ inmate, filed suit under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Texas. Guzman alleged that Dylan Mitchell and Dimintero Gonzalez, guards at TDCJ's Eastham Unit, subjected him to the use of excessive force in violation of the Eighth Amendment after he accidentally stepped on Mitchell's foot. He further alleged that he sustained a broken collar bone as a result of the incident. Pursuant to 28 U.S.C. § 636(b)(1), the district court referred Guzman's case to a magistrate judge for certain pre-trial matters. Following a Spears[1] hearing scheduled by the magistrate, the parties consented to have the magistrate conduct all further proceedings in the case, pursuant to 28 U.S.C. § 636(c).

Guzman filed a motion for appointment of counsel, arguing that counsel should be appointed for him because he had limited access to law books and because he was housed in administrative segregation where the defendants controlled all of his movements. The magistrate denied his motion. Guzman then sought reconsideration of his motion, arguing that he was unable to conduct discovery adequately or to investigate witnesses because

[1] Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

he was housed in administrative segregation. The magistrate denied his motion for reconsideration.

Guzman also moved for representation by an inmate paralegal, a Mexican American, alleging that the inmate could assist Guzman and the court because Guzman had a limited knowledge of the English language. The magistrate, however, denied this motion.

Guzman filed a witness list for trial, in which he listed inmates Larry Skagg and James King. Although the magistrate ordered the production of the witnesses and issued writs of habeas corpus ad testificandum, the writ directing the production of Skagg was returned unexecuted.

Trial before the magistrate was held on March 8, 1993. After the presentation of Guzman's case, the magistrate entered judgment in favor of defendant Gonzalez. At the end of the trial, the magistrate determined that defendant Mitchell had not used excessive force and entered judgment dismissing Guzman's complaint. Guzman then filed a timely notice of appeal.[2]

II.

We review a judgment rendered by a magistrate pursuant to 28 U.S.C. § 636(c) as we would a judgment rendered by a district court judge. See 28 U.S.C. § 636(c)(3); James v. Hyatt Corp., 981 F.2d 810, 812 (5th Cir. 1993). Specifically, we review

[2] We note that because Guzman was permitted to proceed IFP in the district court and the district court did not decertify his status, he is entitled to proceed IFP on appeal. See FED. R. APP. P. 24(a).

issues of law de novo and findings of fact under the clearly erroneous standard. James, 981 F.2d at 812. If the magistrate's findings of fact are plausible in light of the record viewed in its entirety, we must accept them, even though we might have weighed the evidence differently if we had been sitting as the trier of fact. See Price v. Austin Indep. Sch. Dist., 945 F.2d 1307, 1312 (5th Cir. 1991). Thus, this court gives great deference to a magistrate's credibility findings, and we apply the clear error standard with particular care in cases involving demeanor testimony. See id.; see also FED. R. CIV. P. 52(a) ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"). We review for abuse of discretion the denial of a motion to appoint counsel for an indigent plaintiff asserting a § 1983 claim. Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982).

III.

Guzman first argues that the magistrate erred in denying his motion for appointment of counsel because he has little knowledge of the English language. He also contends that he depended on other inmates to present his pleadings and that he was in need of counsel to conduct discovery and to dispute the testimony of the witnesses. Moreover, he contends that counsel would have obtained evidence that there were several inmates on the "run" (the walkway in front of the cells) at the time of the incident

in question, evidence which would have contradicted defense testimony that only one inmate had been present.

Unless exceptional circumstances exist, a trial court is not required to appoint counsel for an indigent plaintiff asserting a § 1983 claim. Id. at 212. In determining whether exceptional circumstances exist, the court should consider (1) the type and complexity of the case; (2) whether the indigent was capable of adequately presenting the case; (3) whether the indigent was in the position to investigate the case adequately; and (4) whether the evidence would consist in large part of conflicting testimony requiring skill in the presentation of evidence and in cross-examination. Id. at 213.

The facts and legal issues in this case are not complex, and Guzman's pleadings and testimony provided the lower court with a detailed statement of his version of the incident in question. Guzman did not require counsel to determine if there were any other inmates present on the runway during the incident. Further, the available inmate eyewitness listed by Guzman was produced for trial. Because this case did not thus involve exceptional circumstances, the magistrate did not err in denying Guzman's motion to appoint counsel.

Guzman also argues that the magistrate erred in denying his motion for inmate paralegal assistance at trial because he would have served as Guzman's interpreter and would have provided Guzman with a better understanding of the proceedings. Guzman does not point out any specific prejudice resulting from the

denial of the appointment of the paralegal. Although this court has not been provided with a trial transcript,[3] Guzman's testimony at the Spears hearing--of which we were provided a transcript--reflects that he was readily able to communicate with the court and to understand the proceedings. Therefore, the magistrate did not abuse her discretion in denying Guzman's motion for appointment of an inmate paralegal.

IV.

Guzman also contends that he was prejudiced at trial because prison officials, in violation of state law, failed to produce inmate Larry Skagg as a witness as Guzman had requested. We find Guzman's contention to be without merit.

A writ of habeas corpus ad testificandum was issued for Skagg, but the writ was returned unexecuted. The Texas statute cited by Guzman that prison officials allegedly violated, TEX. REV. CIV. STAT. ANN. art. 6166z4, provided that "where any person is charged by complaint or indictment with an offense against a prisoner, prisoners and ex-prisoners shall be permitted to testify." However, this statute was repealed by the Texas

[3] In his notice of appeal, Guzman requested that "all documents, motions, and transcripts and exhibits in this case be prepared" and forwarded to the district court or to this court. Although Guzman's request for the preparation of a transcript in his notice of appeal could be construed as a request that the district court order the preparation of a transcript of the bench trial at government expense, the magistrate did not rule on this request. Further, Guzman does not address on appeal the magistrate's failure to rule on his request, and he has not filed a motion with this court seeking a transcript of the bench trial.

Legislature in 1989 and was not reenacted. See TEX. REV. CIV. STAT. ANN. art. 6166z4, historical and statutory notes (Vernon Supp. 1994). Thus, Guzman has not demonstrated that the defendants had a statutory duty to produce Skagg as a witness.

Even if the defendants did have a duty to produce Skagg as a witness, Guzman has not shown that he was prejudiced at trial by Skagg's absence. Because the defendants did not rely on Skagg's testimony at trial, Guzman's Sixth Amendment right to confront an adverse witness was not implicated. See United States v. Colin, 928 F.2d 676, 679 (5th Cir. 1991) (explaining that confrontation rights were not at issue when the government did not use the testimony of a released material witness at trial). Moreover, a copy of Skagg's statement, which was attached to Guzman's complaint, reflects that Skagg's testimony corroborates the testimony of Guzman and King, both of whom testified at trial, and therefore was cumulative in nature. Guzman's claim that he was prejudiced by the defendants' failure to produce Skagg at trial is thus without merit.

V.

Guzman further argues that TDCJ Officer Jeff Taylor's testimony that excessive force was not used against Guzman was admitted in violation of Federal Rules of Evidence 701 and 702 because Taylor is not a medical expert. Again, we disagree.

As we noted earlier, Guzman has not provided this court with a transcript of the trial in accord with Federal Rule of

Appellate Procedure 10(b)(1). We therefore cannot determine whether he made a specific, timely objection to the admission of Taylor's testimony to preserve a claim of error on appeal. See FED. R. EVID. 103(a)(1). Hence, we can only correct this alleged error if it is plain error and affects Guzman's substantial rights. United States v. Olano, 113 S. Ct. 1770, 1777 (1993).

According to the magistrate's summary of Taylor's testimony as set forth in her memorandum opinion,[4] Taylor had been called to the scene shortly after the incident in question occurred. He testified that he had observed Guzman's injuries and that in his opinion excessive force had not been used because apart from Guzman's broken collar bone, there were no signs of scars, blood, or bruises.

Federal Rule of Evidence 702 provides that

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Taylor's testimony does not reflect that Taylor was purporting to testify as a medical or other type of expert, and thus Taylor's testimony did not violate Rule 702. Further, Federal Rule of Evidence 701 provides that a lay witness may give opinion testimony as long as his opinion is based on first-hand knowledge

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[4] Because we were not provided with a transcript of the bench trial, we relate the testimony given at trial based on the recitation of that testimony given by the magistrate in her memorandum opinion. Guzman does not contend on appeal that the magistrate's recitation of the trial testimony is incorrect.

or observation and his opinion is helpful to a determination of a fact in issue. See FED. R. EVID. 701. Taylor's testimony reflects that his observation that Guzman had no scars, blood, or bruises suggested to him that excessive force had not been applied, and thus Taylor's testimony was permissible under Rule 701. Even if the admission of this testimony was erroneous, Guzman has not alleged how he was prejudiced by this testimony. Further, because other testimony at trial supports the magistrate's judgment, the admission of Taylor's testimony can not constitute plain error. See United States v. Cardenas, 9 F.3d 1139, 1156 (5th Cir. 1993) (explaining that any error a judge makes in admitting evidence in a bench trial is harmless if there exists other admissible evidence to support the judgment); Government of the Canal Zone v. Jiminez G., 580 F.2d 897, 898 (5th Cir. 1978), cert. denied, 439 U.S. 990 (1979).

VI.

Finally, Guzman contends that the magistrate erred in determining that the use of force against him was not excessive. We disagree.

In determining whether excessive force in violation of the Eighth Amendment has been employed, the proper inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 112 S. Ct. 995, 998 (1992) (internal quotation and citation omitted). An excessive force claim has

both subjective and objective components. Id. at 999. In other words, courts considering a prisoner's excessive force claim must determine whether the defendant officials acted with a "sufficiently culpable state of mind" and whether the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation. Id. In deciding whether the use of force was wanton or unnecessary, a court may consider "the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of forceful response." Id. (internal quotation and citation omitted). The absence of serious injury is relevant to but not dispositive of the excessive force claim. Id.

At trial, Guzman testified to the following facts. Officers Mitchell and Gonzalez approached him, handcuffed him, and ordered him to walk out onto the "run" outside of his cell. Guzman complied and turned his back to his cell, in accord with procedures. Mitchell then conducted a search of the cell, stepped out of the cell, and instructed Guzman to return inside. Guzman turned around and accidentally stepped on Mitchell's foot. Mitchell then "slammed" Guzman onto the concrete floor before Guzman had an opportunity to apologize. Guzman landed on his left shoulder and sustained a broken collar bone.

Guzman denied that he had bumped into Mitchell or had done anything to prompt Mitchell's "attack." Guzman also stated that he had not been arguing with Mitchell prior to this incident, but

he admitted that he had told Mitchell "not to mess with his shorts." Further, Guzman reported that Gonzalez's participation in the incident was limited to crossing Guzman's legs and holding them down and that Gonzalez had a "good attitude" towards him.

Inmate James King, who was housed one cell down from Guzman, testified that Mitchell had been harassing Guzman the day before the incident. King was on the "run" when Guzman's cell was being searched and reported that Guzman had done nothing to prompt the altercation.

Officer Gonzalez testified that Guzman had complied with the order to leave his cell. Although Gonzalez testified that Guzman did not say anything to Gonzalez during the search, Gonzalez also testified that Guzman was "mouthing off" to Mitchell. Gonzalez also stated that after Guzman had been instructed to return to his cell, Guzman turned around, stepped on Mitchell's foot, lowered his shoulder, and bumped into Mitchell's chest. Moreover, Gonzalez testified that he believed Guzman's actions were intentional. He also stated that Mitchell's reaction was to grab Guzman and take Guzman to the ground in the middle of the concrete walkway and that he had assisted Mitchell by grabbing and crossing Guzman's legs.

Officers Thomas Johnson and Wade Gilbert, on duty at the time of the incident in question, testified that they had observed Guzman "intentionally" drop down and bump Mitchell in the chest. These officers also stated that they observed Mitchell placing Guzman on the floor.

Mitchell himself testified that Guzman had cursed at Mitchell with respect to Guzman's shorts while Mitchell was searching the cell. Mitchell stated that when he stepped out of the cell, Guzman turned in Mitchell's direction, dropped his right shoulder, and hit Mitchell in the middle of his chest, momentarily knocking Mitchell off balance. Mitchell also stated that he regained his footing and grabbed Guzman, but that Guzman proceeded to struggle with him so that he had no choice but to take Guzman to the ground. Further, Mitchell testified that he did not recall any other inmates being present on the "run" during the incident.[5]

The magistrate determined that the testimony of the defense witnesses was more credible that the testimony of Guzman and King. The magistrate also determined that Mitchell's actions were restrained and reasonable under the circumstances, that he acted to regain control and restore order, and that his actions were not accompanied by a desire to wantonly and unnecessarily subject Guzman to pain. Further, the magistrate found that Gonzalez's actions were limited to holding Guzman's legs down.

The magistrate's credibility findings, which are entitled to great deference, are plausible in light of the testimony presented by the defense witnesses. Based on Hudson and the magistrate's credibility findings, Guzman failed to establish that he had been subjected to excessive force in violation of the

[5] Officer Taylor also testified that pursuant to procedures generally followed, only one inmate should have been on the "run" during the search of Guzman's cell.

Eighth Amendment. The magistrate therefore did not err in dismissing Guzman's excessive force claim.

VII.

For the foregoing reasons, we AFFIRM the judgment of the magistrate.