IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4306
Summary Calendar

DONNIE L. SLOAN,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(4:90-CV-134)

(April 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

This is the appeal of the district court's denial of Donnie Lee Sloan's petition for writ of habeas corpus challenging his conviction in Texas state court for aggravated robbery. We affirm because we conclude that the petition was properly dismissed by the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.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

Sloan was indicted in Texas for the offense of aggravated robbery. At his state court trial, the complainant testified that her house was for sale, and Sloan came to see it. He viewed it briefly and said that he would return with his wife. He came back in about a half an hour, unaccompanied, stating that he wanted to measure the bathtub. He made the measurements and then grabbed the complainant and forced her, screaming, onto the bed. He held a knife with a four-inch blade to her throat. When he stated that he would harm her children if she did not stop screaming, she stopped. He asked her if she wanted to have sexual intercourse and whether she had any guns or money in the house. She gave him a $5 bill from her purse and he left, telling her that he regularly did this sort of thing to teach women not to let strange men into their homes.

Sloan represented himself at trial (with backup appointed counsel) and did not testify. His theory of the case, about which he cross-examined the complainant, was that she had invited him to her home, that they agreed that she would exchange sex for drugs, and that she became angry with him when some problem developed with the drugs.

The jury found Sloan guilty of aggravated robbery and assessed punishment at 50 years imprisonment, all of which was affirmed by the state court of appeals. He did not file a petition for discretionary review with the court of criminal appeals but he did

file four state habeas applications, which were denied without written opinions.

In this action, Sloan has petitioned for a federal writ of habeas corpus based on his allegations of multiple constitutional violations. The magistrate judge recommended that relief be denied. Over Sloan's objections, the district court adopted the magistrate judge's report and dismissed the case.[1]

II

As to each of the issues raised by Sloan in his petition, this court looks to whether the petitioner has shown a federal constitutional violation and prejudice. 28 U.S.C. § 2254(a); Carter v. Lynaugh, 826 F.2d 408, 409 (5th Cir. 1987), cert. denied, 485 U.S. 938 (1988). Errors of state law and procedure are not cognizable unless they result in the violation of a federal constitutional right. Bridge v. Lynaugh, 838 F.2d 770, 772 (5th Cir. 1988); Jamerson v. Estelle, 666 F.2d 241, 245 (5th Cir. 1982).

II

A

Sloan argues that trial and appellate counsel were ineffective on various grounds discussed below. To demonstrate ineffectiveness of counsel, Sloan must establish that counsel's performance fell below an objective standard of reasonable competence and that he

[1]The district court substituted a Texas Court of Criminal Appeals case for a U.S. Supreme Court case as the citation for a proposition of Texas law in the magistrate judge's report and recommendation.

was prejudiced by his counsel's deficient performance. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). The petitioner must affirmatively plead the actual resulting prejudice, Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985) and show that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Fretwell, 113 S.Ct. at 844. Prejudice is established by a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Drew v. Collins, 964 F.2d 411, 422 (5th Cir. 1992)(quoting Strickland v. Washington, 466 U.S. 668, 694 (1984). Judicial scrutiny of counsel's performance is highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687 (1984).

(1)

Sloan first argues that counsel was ineffective for not filing a motion for new trial and a notice of appeal. Sloan, however, represented himself at trial, with only standby counsel appointed,[2] and he filed a motion for new trial and a notice of appeal. When appellate counsel was appointed, the appeal was pursued and decided

[2]At a conference held three weeks before trial and again immediately before the trial began, Sloan was examined by the judges about his desire and ability to represent himself and his knowledge of the elements of the offense. The court further admonished Sloan on both occasions of the dangers of self-representation.

on the merits. "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of `effective assistance of counsel.'" Id., 422 U.S. at 834 n.46.

This claim of ineffective counsel fails for two reasons. First, Sloan waived his right to complain about a motion for a new trial and notice of appeal because he represented himself at the time that he filed them. Furthermore, it is undisputed that the necessary papers were filed and that the appeal was decided on the merits; accordingly, there is no prejudice to Sloan.

(2)

Sloan next argues that his appellate counsel was ineffective for not consulting him about the content of his appeal. A counseled appellant, however, does not have the right to direct his appeal, Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), or to insist that particular issues are raised. See Sharp v. Puckett, 930 F.2d 450, 452 (5th Cir. 1991). Moreover, the only indication that Sloan gives of an issue that he would have instructed appellate counsel to argue is ineffectiveness of trial counsel, which implicates no constitutional violation because Sloan

waived counsel at trial. See Faretta v. California, 422 U.S. 806, 835 (1975).

(3)

Sloan finally argues that his appellate counsel was ineffective for not filing a petition for discretionary review. As Sloan has no constitutional right to counsel on petition for discretionary review, his attorney's failure to apply for timely discretionary review does not constitute ineffective assistance of counsel. Wainwright v. Torna, 455 U.S. 586, 587-88, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982).[3]

B

Sloan makes several arguments relating to elements of the offense with which he was charged, aggravated robbery. In Texas, aggravated robbery is robbery in which the robber causes serious bodily injury or uses or exhibits a deadly weapon. Tex. Penal Code Ann. § 29.03 (West 1989). Robbery occurs when, in the course of committing theft and with the intent to obtain or maintain control of the property, a person intentionally or knowingly or recklessly causes bodily injury or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code Ann. § 29.02 (West 1989). Conduct "in the course of

[3]Sloan also argues on appeal that standby counsel poorly conducted "various parts or phases of the trial," though he cites only the closing argument. Sloan did not raise this issue in the district court. He may not raise it for the first time on appeal. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

committing theft" is defined as "conduct that occurs in an attempt to commit, during the commission, or in immediate flight after attempt or commission of theft." Tex. Penal Code Ann. § 29.01(1) (West 1989). Theft is the unlawful appropriation of property with the intent to deprive the owner of that property. The "owner" of property is a "person who has title to the property, possession of the property, whether lawful or not, of a greater right to possession of the property than the actor." Tex. Penal Code Ann. § 1.07(a)(24). Appropriation is unlawful when it occurs without the owner's effective consent. Tex. Penal Code Ann. § 31.03 (West 1989).

First, Sloan argues that the evidence against him was insufficient to support his conviction of aggravated robbery, particularly as to proof that the complainant owned the property that was stolen (the $5 bill) or that she had a greater right to it than he did. The complaining witness testified that Sloan grabbed her, forced her onto a bed, put the knife to her throat, demanded money, and threatened to harm her sleeping children. She then went to her purse and gave him all the money that she had in it, a $5 bill. A reasonable juror could have believed beyond a reasonable doubt that the complainant was the owner of the property of which Sloan deprived her. Therefore, the district court properly dismissed this claim.

Second, Sloan argues that the jury charge that applied the law to the facts was defective because it did not instruct the jury

that it must find a lack of "effective consent." The portion of the charge that applies the law to the facts does not mention effective consent. In order to determine whether the charge is defective, however, it must be examined as a whole. Tarpley v. Estelle, 703 F.2d 157, 159-60 (5th Cir.), cert. denied, 464 U.S. 1002 (1983). Just a few sentences before the portion of the charge that Sloan challenges, the court addressed effective consent and the other elements of the offenses incorporated into aggravated robbery. The charge as a whole, therefore, did not omit an essential element, and the district court properly dismissed this claim.

Third, Sloan argues that the trial court instructed the jury on "attempt," "bodily injury," and "serious bodily injury," improperly allowing the jury to convict him on uncharged theories of robbery, and that he was actually prosecuted under three statutes--aggravated robbery, robbery, and theft. The instruction referred to these matters, however, merely as elements of the offense of aggravated robbery as defined by the Texas statutory scheme and this argument was properly dismissed.[4]

[4]In his reply brief, Sloan argues for the first time that the statute under which he was prosecuted is unconstitutionally vague. This argument is abandoned because it was not made in the body of his brief. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). An issue may not be raised for the first time in a reply brief, even by a pro se appellant. Knighten v. Commissioner, 702 F.2d 59, 60 & n.1 (5th Cir.), cert. denied, 464 U.S. 897 (1983).

C

Sloan next argues that the state refused to furnish him with his trial record. He admits, however, that appellate counsel had the record when he prepared Sloan's brief on appeal. An appellant whose counsel has the trial record has no constitutional right to a copy for himself. Smith v. Beto, 472 F.2d 164, 165 (5th Cir. 1973).

D

Sloan argues that, at the five points discussed below, the trial judge impermissibly allowed the admission of prejudicial evidence or prohibited the admission of favorable evidence. To receive federal habeas relief on a claim that state evidentiary law has been violated, a petitioner must show that an erroneous admission of evidence is "material in the sense of a crucial, critical, highly significant factor." Bailey v. Procunier, 744 F.2d 1166, 1169 (5th Cir. 1984). This court does not sit "as a super state supreme court to review error under state law." Bailey v. Procunier, 744 F.2d 1166, 1168 (5th Cir. 1984). An evidentiary error by the state court will only justify federal habeas relief if it is "so extreme that it constitutes a denial of fundamental fairness under the Due Process Clause." Id.

First, Sloan argues that the bailiff improperly commented on the willingness of a witness to testify. The court offered to instruct the jury to disregard the bailiff's comment but Sloan stated that it would not be necessary to make such an instruction.

Even if this were error under state law (and we do not find that it is), it did not render the trial "fundamentally unfair" so as to warrant habeas relief and was not a "crucial, critical, highly significant factor." The district court, therefore, properly dismissed this claim.

Second, Sloan argues that prosecution witnesses were improperly allowed to bolster each others' testimonies. He argues that the state was allowed to bolster the complaining witness's testimony with the testimony of Officer Harrison French[5] by asking him about a shirt that he found in Sloan's tool box that matched the complaining witness's description of the shirt her attacker wore.[6]

This claim also does not rise to the level of a constitutional violation because the admission of the testimony (even if otherwise

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[5]Sloan also argues that Officer Dean Hill was allowed to bolster the complainant's testimony, but we do not consider that issue because he did not raise it in the district court. Self, 751 F.2d at 793.

[6]The rule against bolstering provides "that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it." United States v. Price, 722 F.2d 88, 90 (5th Cir. 1983) (internal quotation not indicated); accord Sledge v. State, 686 S.W.2d 127, 129 (Tex. Crim. App. 1984). While bolstering testimony may be merely unnecessary, it becomes reversible error when it "suggests to the jury that it may shift to a witness the responsibility for determining the truth of the evidence." United States v. Price, 722 F.2d at 90. Here, Officer French's testimony was merely "factual testimony by a witness with personal knowledge of the subject matter," United States v. Moore, 997 F.2d 55, 59 (5th Cir. 1993), and was not used improperly to bolster the complaining witness's testimony.

error), was not crucial or critical or highly significant. The subject of the testimony--the shirt and cap--are probative only of Sloan's identity, which was not at issue, since Sloan's defense was that he was at the house, but for a drug deal instead of a robbery. Admission of evidence supporting the contention that Sloan was at the complaining witness's home therefore could not have rendered the trial fundamentally unfair.

Third, Sloan argues that the state improperly introduced his prior criminal record during the guilt-innocence phase of the trial. Reference to Sloan's appearance before a parole board was mentioned several times during the trial in Sloan's cross-examination of the complaining witness and in his direct examination of a defense witness.

Sloan made no contemporaneous objection to any of this testimony regarding his parole proceedings and the state court of appeals held that he waived any error.[7] Furthermore, it was Sloan himself who elicited the first response that informed the jury that he had a prior conviction, though no one told the jury the nature of that conviction. Even if Sloan had not waived this argument and even if admission of the evidence were erroneous under state law, Sloan has shown no constitutional violation and prejudice. After all, in response to Sloan's own question, Chatman and the

[7]During a later recess, Sloan also moved that Chatman's testimony be stricken as nonresponsive. The motion was denied on the grounds that striking it would only call attention to it, and that Sloan himself brought up the parole revocation hearing.

complainant told the jury the information about which Sloan now complains.

Fourth, Sloan argues that the trial court committed error in admitting into evidence a "pen packet" that referred to his prior offenses as "armed robbery" and "robbery by firearms." According to Sloan, this was error because "armed robbery" and "robbery by firearm" are not crimes under Texas law. In other words, Sloan challenges the terms that it used to describe his convictions. He does not question the fact of the convictions. Defects that impair the "very integrity and reliability of a conviction," such as the denial of right to counsel, render a conviction inadmissible. Smith v. Collins, 964 F.2d 483, 486 (5th Cir. 1992). Defects that do not undermine the factual reliability of a conviction do not render it inadmissible. Id. The defect that Sloan identifies falls into the latter category.

Finally, Sloan argues that the trial court should not have prohibited him from asking the complainant whether she was promiscuous and whether she was in the habit of exchanging sex for drugs. Sloan, however, was allowed to question the complainant about her conduct at the time of the robbery. The state court of appeals held that, because the possibility of embarrassment or harassment greatly outweighed the probative value of such questioning, the trial court did not abuse its discretion.

Sloan has not shown how this evidentiary ruling implicated any federal constitutional right and, particularly because he was

allowed to question the witness about her conduct, it was not a crucial, critical, highly significant factor.

E

Sloan next asserts that the trial court lacked jurisdiction because no valid criminal complaint supported the indictment.[8] Unless waived, an information must be supported by a complaint. Tex. Penal Code Ann. § 21.22 (West 1989); Chapple v. State, 521 S.W.2d 280, 281 (Tex. Crim. App. 1975). An indictment does not have the same requirement. Tex. Penal Code Ann. §§ 21.02 - 21.19 (West 1989).[9] Because Sloan was charged by indictment and not by information, the district court properly dismissed this claim.

F

Sloan complains that the prosecutor improperly commented during closing argument on his decision not to testify. Sloan has the burden to show that an improper prosecutorial comment rendered the trial fundamentally unfair, Rogers v. Lynaugh, 848 F.2d 606, 608-09 (5th Cir. 1988), but he does not say what the allegedly

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[8]According to Sloan's brief, "there would be a stink raised all the way to the Supreme Court" if he were allowed to be charged in this way.

[9]Furthermore, Sloan raised this issue in a state habeas application that was denied without written order. A defect in a state indictment is not a ground for habeas relief unless the indictment was so defective that the convicting court had no jurisdiction. Neal v. Texas, 870 F.2d 312, 316 (5th Cir. 1989). Where, as here, the highest court of the state has held, expressly or implicitly, that the indictment was sufficient under state law, the inquiry on federal habeas petition is at an end. Alexander v. McCotter, 775 F.2d 595, 598-99 (5th Cir. 1985).

objectionable comment was.[10] Therefore, Sloan has not carried his burden, and the district court properly dismissed the claim.

III

For the reasons set forth above, the judgment is

A F F I R M E D.

[10]Our review of the closing argument does not reveal such a comment, and the magistrate judge also found none. Moreover, the state found none but speculated that perhaps one could argue that the prosecutor's remark that the jury had "nothing more than the testimony of" the complainant to go on was such a comment. If this is the comment of which Sloan complains, it seems to have been merely an attempt to focus the jury's attention rather than a comment on Sloan's not testifying.