UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4403
Summary Calendar

ROBERT LEE HALL,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(6-92-CV-88)

(August 2, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner-appellant Robert Lee Hall (Hall) appeals the denial of his petition for federal writ of *habeas corpus* under 28 U.S.C. § 2254. We affirm.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

The relevant facts are essentially straightforward. On April 29, 1986, Hall killed Vera Mays (Mays) by stabbing her at least seven times with a screwdriver, several of the stabs coming after she was prone. Three onlookers witnessed the murder and testified that they saw Hall carrying a bloody screwdriver. Hall admitted stabbing Mays, but alleged that he acted in self-defense because he thought she was reaching for a gun in her purse. He was tried to a jury, which on October 28, 1987, found him guilty of murder as charged in the indictment[1] and assessed punishment, enhanced by two prior felony convictions, at life imprisonment.

Hall appealed his conviction to the Texas Twelfth Court of Appeals, which affirmed the judgment of the trial court on November 14, 1988. Thereafter, the Texas Court of Criminal Appeals refused Hall's petition for discretionary review on June 7, 1989, and denied his application for state writ of *habeas corpus* on February 20, 1991. Having exhausted his state remedies, Hall then filed the instant section 2254 petition on February 12, 1992. A magistrate judge reviewed the record and recommended that relief be denied. Over Hall's objections, the district court adopted the magistrate judge's report and denied the petition. Hall brings this appeal.

---

[1] The indictment charged that Hall "intentionally and knowingly cause[d] the death of an individual, Vera Mays, by stabbing the said Vera Mays with a screwdriver, which in the manner of its use and intended use was then and there capable of causing death and serious bodily injury."

Discussion

I. Finding of Deadly Weapon

Based on the verdict form presented to the jury, Hall argues that the affirmative finding of use of a deadly weapon in the commission of the offense should be deleted from the state court judgment of conviction and sentence.[2] The verdict form permitted the jury to find Hall (1) not guilty, (2) guilty of voluntary manslaughter, (3) guilty of voluntary manslaughter with a finding that he used a deadly weapon, or (4) guilty of murder as charged in the indictment. Because the murder charge, of which the jury found him guilty, did not state that a deadly weapon was used, Hall argues that the jury did not make such a finding.

In *Polk v. State*, 693 S.W.2d 391 (Tex. Crim. App. 1985), the Texas Court of Criminal Appeals defined the three situations in which a court may make an affirmative finding that a deadly weapon was used in the commission of an offense. First, if "the deadly weapon or firearm has been *specifically* pled *as such* (using the nomenclature 'deadly weapon') in the indictment," the court may make an affirmative finding "where the verdict reads 'guilty as charged in the indictment'." *Id*. at 396 (emphasis in original). Second, the court may make an affirmative finding without specific pleading where "the weapon pled is per se a deadly weapon or a firearm." *Id*. And third, the finding may be made if a special issue is submitted to the jury and answered affirmatively. *Id*.

In the present case, only the first of these three

---

[2] Under Texas law, this finding may adversely affect eligibility for parole.

alternatives is potentially applicable because no special issue was ever presented to the jury and a screwdriver is not a deadly weapon per se under Texas law. *Cf. id*. at 395 (holding that a knife is not a deadly weapon per se). The jury found Hall guilty of murder as charged in the indictment, and the indictment charged Hall with "intentionally and knowingly caus[ing] the death of an individual, Vera Mays, by stabbing the said Vera Mays with a screwdriver, which in the manner of its use and intended use was then and there capable of causing death and serious bodily injury." The language in the indictment tracks the Texas Penal Code definition of "deadly weapon" verbatim.[3] We have no reason to believe the dictum stated in *Polk* that the charging instrument must use the nomenclature "deadly weapon" was meant to exclude the more descriptive language of the statutory definition as used in the present indictment.

Furthermore, the question whether tracking the language of the statutory definition, rather than employing the term "deadly weapon," is sufficient to satisfy *Polk* is strictly a matter of state law, not a matter of federal constitutionally required notice. All that the federal constitution requires is that the indictment place the defendant on notice of the charges levied against him. Judging the sufficiency of the indictment does not require the court to become mired in senseless legal formalism. For our purposes, the decision of the Court of Criminal Appeals not to review Hall's conviction and its order denying his petition for

[3] "'Deadly weapon' means . . . anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(11)(B).

state writ of *habeas corpus* demonstrate the court's acceptance of the language used. Indeed, the recitation of the statutory definition language provided Hall with far more information than had the indictment merely used the term "deadly weapon". Thus, Hall was clearly on notice of the court's intent to make the finding regarding the use of a deadly weapon.

II. Instruction on Sudden Passion

The trial court submitted an array of lesser included offenses to the jury including voluntary manslaughter.[4] Hall contends the application paragraph of the jury charge was defective because it did not require the government to disprove the presence of "sudden passion," a statutory element of voluntary manslaughter. Texas has a peculiar rule concerning sudden passion. When a defendant is charged with murder, *and* the evidence raises an issue as to whether he acted under the influence of sudden passion arising from an adequate cause, the negation of sudden passion becomes an implied element of the offense of murder. *Bradley v. State*, 688 S.W.2d 847, 851 (Tex. Crim. App. 1985). In such cases, the jury is to be instructed on the murder count that it must find beyond a reasonable doubt that the defendant did *not* act in sudden passion. Hall contends the trial court failed to include all elements of murder in its instructions because the jury charge did not ask the jury to determine that Hall did not act in sudden passion.

---

[4] We note that the court correctly excluded involuntary manslaughter. Involuntary manslaughter is essentially a negligent homicide offense, and there is simply no evidence in the record to support such a finding. Because the jury found Hall guilty of murder, the inclusion of voluntary manslaughter provided the jury with a lesser alternative.

Regardless of the state law merits of this claim, the failure of a convicting court to comply with state procedural rules is strictly a matter of state law and, accordingly, is not cognizable in federal *habeas corpus* proceedings. *See Smith v. Phillips*, 102 S.Ct. 940, 948 (1982). The proper forum to contest such error is either direct appeal in the state courts or state *habeas corpus* proceedings, both of which Hall has pursued to no avail. The alleged failure to follow state procedural rules must amount to a violation of due process that renders the trial as a whole fundamentally unfair before it can provide a basis for federal *habeas* relief. *Sawyer v. Butler*, 848 F.2d 582, 594-95 (5th Cir. 1988), *aff'd sub nom. Sawyer v. Smith*, 110 S.Ct. 2822 (1990).[5] Arguably, however, the principle of *Mullaney v. Wilbur*, 95 S.Ct. 1881 (1975), might have been violated here *if* sudden passion were raised by the evidence. *But see Patterson v. New York*, 97 S.Ct. 2319 (1977); *Martin v. Ohio*, 107 S.Ct. 1098 (1987). We need not decide that issue here.

In any event, where the evidence does not raise an issue of sudden passion, its absence does not become an element of murder, implied or otherwise. *See Bradley*, 688 S.W.2d at 851. *Cf.* 1 LaFave & Scott *Substantive Criminal Law* § 1.8(b) at 70,71, § 1.8(c) at 72. Hall's own testimony reveals his actions were prompted not by rage, but rather fear. At trial, Hall maintained that he acted

---

[5] We note that because Hall's sentence was enhanced as a habitual offendersQrequiring only that he be convicted of a third separate felony offensesQhe could have received precisely the same sentence had the jury found him guilty of voluntary manslaughter rather than murder.

in self-defense because he was afraid of Mays and thought she was carrying a pistol in her purse. Fearing one's victim does not equate sudden passion arising from an adequate cause. *Daniels v. State*, 645 S.W.2d 459, 460 (Tex. Crim. App. 1983). "[A]n accusedSQthough otherwise clearly entitled to a charge of self[-]defenseSQdoes not necessarily raise the issue of voluntary manslaughter [due to sudden passion] merely by indicating that at the moment of taking action to defend himself he was fearful of his attacker." *Id*. Evidence of the accused's fear is not enough to require a jury instruction on sudden passion "unless the cause of the accused's fear could produce fear that rises to a level of terror which makes a person of ordinary temper incapable of cool reflection." *Merchant v. State*, 810 S.W.2d 305, 310 (Tex. App.SQDallas 1991, pet. ref'd); *Daniels*, 645 S.W.2d at 460.

Hall points to no evidence indicating Vera Mays instilled such terror in him that he was incapable of rational reflection. Indeed, his "own appraisal of his situation reveals that he had reflected on it, knew what he had to do and did it." *Daniels*, 645 S.W.2d at 460. We agree with the Texas Twelfth Court of Appeals that in Hall's case "no evidence of probative value was produced . . . which raised the sudden passion issue. . . . [T]he record . . . clearly shows that he was not under the influence of sudden passion as that term is defined in section 19.04 [voluntary manslaughter]. Hall's own testimony refutes the existence of sudden passion." Because there is no evidence that Hall was acting under the influence of sudden passion arising from an adequate

cause, he was not entitled to a jury instruction on the matter.[6]

III. Sufficiency of the Evidence

In judging the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the government and affirms if any rational trier of fact could have found all essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 99 S.Ct. 2781, 2789 (1979). For federal *habeas corpus* proceedings, we must refer to the substantive elements of the offense as defined by Texas state law, *Johnson v. Collins*, 964 F.2d 1527, 1531 (5th Cir.), *cert. denied*, 113 S.Ct. 4 (1992), keeping in mind that the state court's prior determination finding the evidence sufficient is entitled to weight in the federal forum. *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1127 (1994).

We have no doubt that the evidence adduced at trial was sufficient to support the conviction. As discussed above, at least three eyewitnesses testified that they saw Hall repeatedly stab Mays, and Hall never disputed these facts. While he argued that he was merely acting in self-defense, a rational jury could have rejected that claim, which they did. Thus, the evidence was sufficient to find Hall guilty of murder beyond a reasonable doubt.

---

[6] In the absence of sudden passion, the trial court's submission of the lesser included offense of voluntary manslaughter may have been a more beneficial charge than Hall actually deserved. In any event, an appellant may not complain of the erroneous submission of a beneficial charge. *See Aguirre v. State*, 683 S.W.2d 502, 513 (Tex. App.SQSan Antonio 1984, pet. ref'd).

IV. Improper Sentence Enhancement

Finally, Hall argues that his sentence was improperly enhanced based on two prior felony convictions for robbery. He claims these convictions could not be used to enhance his sentence because they were over eighteen years old. To support this contention, Hall cites several cases pertaining to the calculation of a defendant's criminal history category under the federal sentencing guidelines. The sentencing guidelines, however, bear no relevance whatsoever to the manner in which the state of Texas enhances criminal sentences under state law.

The Texas Habitual Offender Statute indicates that a defendant convicted of any felony with two separate prior felony convictions "shall be punished by confinement in the Texas Department of Corrections for life." TEX. PENAL CODE ANN. § 12.42(d). The law is well settled in Texas that the remoteness of the prior felony convictions does not affect their admissibility for purposes of enhancement. "[U]nlike the rule that a prior conviction too remote in time cannot be used for impeachment purposes, a prior conviction may be utilized for enhancement no matter how remote." *Joles v. State*, 563 S.W.2d 619, 621 (Tex. Crim. App. 1978) (quoting *Milligan v. State*, 554 S.W.2d 192 (Tex. Crim. App. 1977)); *Hicks v. State*, 545 S.W.2d 805, 810 (Tex. Crim. App. 1977); *Simmons v. State*, 493 S.W.2d 937, 940 (Tex. Crim. App. 1973). Thus, the trial court properly enhanced Hall's sentence as a habitual offender.

Conclusion

The judgment of the district court is, accordingly,

AFFIRMED.