

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4628

GLEN DIXON,

Plaintiff-Appellee,

versus

JOHN P. WHITLEY,
WARDEN LOUISIANA STATE
PENITENTIARY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-1960)

(March 25, 1994)

Before POLITZ, Chief Judge, JONES, Circuit Judge and FULLAM*,
District Judge.

JOHN P. FULLAM, District Judge:**

* District Judge of the Eastern District of Pennsylvania, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellee, Glen Dixon, was convicted in state court on two counts of attempted first-degree murder, and was sentenced to an aggregate term of 80 years in prison. His conviction and sentence were upheld on direct appeal, and on collateral attack in the state courts. In this federal habeas corpus proceeding, however, the district court granted relief, and respondent appeals.

The jury which convicted appellee at his 1982 trial was instructed by the trial judge that, under Louisiana law, the accused would be guilty of attempted first-degree murder if he intended either to kill the victim or to cause serious bodily harm to the victim. This instruction was, as all parties now agree, contrary to Louisiana law. For many years, the Louisiana Supreme Court has made clear that there can be no conviction of first-degree murder, or attempted first-degree murder, without proof of an intent to kill; intent to cause serious bodily harm is not enough. State v. Butler, 322 S.2d 189, 192 (La. 1975); State v. Roberts, 213 La. 559, 35 S.2d 216, 217 (1948).

After exhausting his state-court remedies, appellee filed a petition in the district court for a writ of habeas corpus. The petition was referred to a United States magistrate judge, who recommended that the petition be granted. The magistrate judge

rejected the only issue raised by the respondent, namely, that the erroneous jury instruction was harmless error.

The respondent filed objections to the magistrate's Report and Recommendation, contending, for the first time, that appellee was procedurally barred from asserting the erroneous jury instruction as a ground for relief. The district court adopted the magistrate's recommendation, and granted the habeas petition without filing an opinion. The respondent has filed this timely appeal.

Our decision is squarely controlled by the recent decision by a panel of this court in Gray v. Lynn, 6 F.3d 265 (5th Cir. Oct. 20, 1993). In that case, as here, a defendant had been convicted of attempted first-degree murder by a jury which had been given the same instruction at issue in the present case. The court held that the failure of trial counsel to object to the erroneous instruction deprived the defendant of his constitutional right to effective representation by counsel. The court reasoned that an erroneous instruction on an essential element of the crime charged is necessarily prejudicial, since the jury must be presumed to follow the judge's instructions; and that permitting such a prejudicial error demonstrates ineffectiveness as defined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).

Applying this holding to the present case, we conclude that appellee was not procedurally barred from asserting the alleged error, since the erroneous instruction on an essential element of the crime constituted manifest prejudice, and the established

ineffectiveness of his trial counsel constituted cause for excusing the procedural error in failing to object at trial or to raise the issue on direct appeal.

We acknowledge that there may well be some errors in instructing juries, even concerning an essential element of the crime charged, which can fairly be regarded as harmless. For example, if the only rational conclusion supported by the evidence is that the defendant intended to kill the victim, it may well be that the erroneous addition of "or cause serious bodily harm" in the jury instructions would be unlikely to affect the jury's verdict. In the present case, however, as in Gray v. Lynn, supra, a rational jury could have concluded that the perpetrators displayed a willingness to cause serious bodily injury, rather than an intent to kill. Appellee and his associates were fleeing from a bungled burglary, in two pickup trucks, pursued at high speed by police vehicles. There was an exchange of gunfire, in which one of the robbers was killed. According to the trial evidence, no shots were fired from appellee's vehicle, but he, in some fashion, was able to transfer a firearm to the other vehicle, and thereafter, via CB radio, urged the occupants of the other vehicle to "stop" the pursuing officers. None of the pursuing officers was struck, but one of the tires of a police vehicle was struck by a bullet. While these circumstances might well warrant an inference that the person shooting at the police vehicle had an actual intent to kill, a jury might also reasonably draw the inference that there was merely an intent to disable the pursuing vehicles, or an intent to

cause serious bodily harm, or reckless indifference to the consequences.

Indeed, the record in this case presents a stronger argument for the grant of habeas relief than the Gray v. Lynn record. In Gray, the defendant pointed a weapon at the victim, at close range, and announced an intent to "blow [his] brains out". The defendant then struck the victim in the head, and later fired three shots at the victim at fairly close range. But none of the bullets struck the victim, and the court concluded that this evidence would have permitted the jury to conclude that intent to kill had not been established. Moreover, in Gray, although the trial judge erroneously instructed the jury, the closing argument of defense counsel had included a correct statement of the law of Louisiana on the need for proof of intent to kill. In our case, not only was the evidence of an actual intent to kill considerably weaker, but defense counsel and the prosecutor both argued to the jury in conformity with the erroneous charge.

The district court properly granted appellee's petition for habeas corpus. The decision appealed from will be affirmed.