IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5619
Summary Calendar

RICKY MERIWETHER,

Petitioner-Appellant,

v.

JOHN P. WHITLEY,
Warden Louisiana State
Penitentiary,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CV-327)

(November 22, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Ricky Meriwether was convicted by a Louisiana jury for aggravated rape and armed robbery. Subsequently, he received life imprisonment for the aggravated rape and ninety-nine years imprisonment for the robbery. The sentences were to run consecutively and neither sentence carried the possibility of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

parole. Meriwether appealed his conviction and, after exhausting his state court remedies, sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254. The magistrate judge and the district court judge denied the writ of habeas corpus, and Meriwether appealed. We affirm.

I. BACKGROUND

In January of 1990, Meriwether, James Spencer, and Anthony Benoit planned and carried out the armed robbery of a Westlake, Louisiana convenience store. Their plan involved abducting the store clerk and releasing her on a county road in order to delay her notification of the authorities. Armed with a handgun owned by Benoit, Spencer entered the store. Spencer then pointed the gun at the clerk, Delores Moody, and forced her to retrieve the money from the store's cash registers. Next, Spencer placed a bag over Moody's head and forced her to an automobile where Meriwether and Spencer were waiting. After driving around for fifteen to twenty minutes, Meriwether and Spencer (but not Benoit) raped Moody and then released her. The men then divided the stolen money equally. Eventually, Meriwether was indicted and convicted of aggravated rape and armed robbery.

During the trial, one of the jurors, Mona Verrette, realized that she knew the victim. The next day Verrette spoke with the trial judge in his chambers without counsel for any party present. Verrette told the judge that she did not realize that she knew the victim during voir dire because the victim's married

name had been used, and Verrette knew the victim by her maiden name; only when Verrette saw the victim did she recognize her.

Later, outside of the presence of the jury, the judge apprised counsel of the situation. Although Meriwether was ill and was not at the proceeding, his presence was waived by his attorney. The judge recounted to the attorneys that Verrette had informed him that she saw the victim "quite often" and knew the victim well. The judge also described that he:

> asked her [Verrette] if she had a fixed opinion as to the guilt or innocence of the accused and she replied that she did not. She obviously, though, was very emotionally upset. She was crying, and I asked her if she could decide the case, putting aside the acquaintanceship with the victim, . . . strictly on the evidence that she hears here in the courtroom and the law as I explain it to her at the end of the trial, and she replied that she could do that.

After these statements, Verrette remained on the jury. There is no indication that Meriwether's counsel objected or moved for a mistrial.

Pursuant to plea arrangements, both Benoit and Spencer testified against Meriwether. Later, when the evidence had been presented and counsel had finished argument, the jury was charged,[1] and following the receipt of the instructions, the jury convicted Meriwether.

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[1] The judge instructed the jury, in part that:

> [A]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the crime, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals and are guilty of the crime charged.

In the Louisiana Supreme Court, Meriwether challenged his conviction on several grounds, including those asserted in the instant appeal, but all of his claims of error were rejected. See State v. Meriwether, 412 So. 2d 558 (La. 1982). Meriwether next sought relief in the federal district court under the provisions of 28 U.S.C. § 2254; the district court denied Meriwether's petition.

II. STANDARD OF REVIEW

In considering a federal habeas corpus petition presented by a petitioner in state custody, federal courts must accord a presumption of correctness to state court factual findings. See 28 U.S.C. § 2254(d); Barnard v. Collins, 958 F.2d 634, 636 (5th Cir. 1992), cert. denied, 113 S. Ct. 990 (1993). We review the district court's findings of fact for clear error, but review any issues of law de novo. Barnard, 958 F.2d at 636.

III. ANALYSIS

In the instant appeal, Meriwether contests the district court's denial of the writ on four grounds. First, he alleges that his absence at the discussion concerning Verrette violated his due process rights. Second, Meriwether argues that the district court erred in ruling that there was no reasonable likelihood that the jury unconstitutionally applied the instructions regarding accomplice liability. Third, Meriwether claims that the district court erred in concluding that he failed

to establish a claim under Brady v. Maryland, 373 U.S. 83 (1963), for the improper withholding of exculpatory evidence. Fourth, Meriwether claims that the district court erroneously denied him an evidentiary hearing on his ineffective assistance of counsel claim and further erred in rejecting his claims of ineffective assistance. Each of these claims shall be addressed in turn.[2]

A. Ex Parte Communication with the Juror

Meriwether claims that the district court erred in not allowing him or his counsel to be present at the meeting with the juror and in not "allowing" him to be personally present at the open-court discussion about the juror attended by his counsel. Specifically, Meriwether argues that the state trial court violated Article 831 of the Louisiana Code of Criminal Procedure which provides in part that "a defendant charged with a felony shall be present at the calling, examination, challenging, impanelling, and swearing of the jury, and at any subsequent proceedings for the discharge of the jury or of a juror." La. Code Crim. Proc. Ann. art. 831. In habeas proceedings, however, this court does not review the application of state law, for "`federal habeas relief does not lie for errors of state law.'"

[2] In a separate motion, Meriwether requests the appointment of counsel. In a § 2254 action, we will appoint counsel when the "interest of justice so require." 18 U.S.C. § 3006A(a)(2). This, however, is not such a case; Meriwether adequately presented his claims and he sufficiently highlighted the issues and facts in the record. In this case, no appointment of counsel is required, and accordingly, the motion for appointment of counsel is denied. See Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985).

Estelle v. McGuire, 112 S. Ct. 475, 491 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1990)). Instead, the Supreme Court has instructed that "[i]n conducting habeas review a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Id.

It is certainly true that due process provides a defendant with the "right `to be present in his own person whenever his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge.'" Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)). It is also true, however, that this right is limited, and, as the Supreme Court has noted, "[t]he defense has no constitutional right to be present at every interaction between a judge and a juror." United States v. Gagnon, 470 U.S. 522, 526 (1985) (internal quotation and citations omitted). Rather, a defendant has a due process right to be present "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. (internal quotations and citation omitted); accord Young v. Herring, 938 F.2d 543, 557 (5th Cir. 1991), cert. denied, 112 S. Ct. 1485 (1992). Finally, in challenging an ex parte communication, the burden is on the defendant to demonstrate that, based on all of the circumstances, the communication prevented him from receiving a fair and just hearing. Young, 938 F.2d at 557-59.

The Louisiana Supreme Court noted that "[t]here is no reason to believe that merely because Ms. Verrette and the victim knew each other . . . [that] it would influence the juror in arriving at a verdict." Meriwether, 412 So. 2d at 560. Given the presumption of correctness that we afford to state court determinations, "unless the state court finding lacks even fair support in record, we must presume that the state court correctly determined the effect of an ex parte communication on the jury." Young, 938 F.2d at 559.

Meriwether offers only amorphous statements about courts' general disfavor of ex parte communications with jurors. Further, Meriwether fails to explain how his absence at the district court's colloquy with Verrette in chambers or the judge's discussion with counsel about Verrette thwarted a fair and just hearing. There is nothing in the record or in Meriwether's brief to indicate that he was somehow prejudiced by the method in which the trial judge handled Verrette's situation. Simply, Meriwether fails to demonstrate how the ex parte communications deprived him of a fair and full hearing. Thus, we find no clear error in the district court's rejection of this claim.

B. Claims Regarding Jury Instructions

Meriwether also claims that the jury instructions given in his trial were constitutionally deficient. Specifically, he argues that the jury instruction on armed robbery impermissibly

excluded the requirement of specific intent. This, Meriwether argues, led to a reasonable likelihood that the "jury might have applied the instructions on liability of an accomplice so as to relieve the state of its burden of proof" on an element of armed robbery.[3]

There is no question that "`the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Sandstrom v. Montana, 442 U.S. 510, 520 (1979) (quoting In re Winship, 397 U.S. 358, 364 (1970)). We also note, however, that "the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." McGuire, 112 S. Ct. at 482. Instead, we focus on "whether the ailing instruction by itself so infected the entire trial process that the resulting conviction violates due process." Id. Additionally, in examining the challenged instruction, we do not look at it in "artificial isolation," but we consider it in the "context of the instructions as a whole and

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[3] The court instructed the jury that theft was:

> the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by some means of fraudulent conduct, practices or representations. A specific intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

The problematic part of the instruction is not this definition, but rather the absence of a specific instruction that Meriwether himself needed to have specific intent in order to be convicted as an accomplice.

the trial record." Id. Finally, when there is a question of whether a jury instruction is ambiguous and violates due process by relieving the state of the burden of proof on an element of a crime, the question before a reviewing court is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Id. at 482 & n.4; accord Flowers v. Blackburn, 779 F.2d 1115, 1119 (5th Cir.), cert. denied, 475 U.S. 1132 (1986).

Meriwether is correct in describing that in Louisiana, "[a]rmed robbery is a theft committed by taking property from another person by force or intimidation while armed with a dangerous weapon," and that "[a]n essential element of the crime of theft is the specific intent to permanently deprive the victim of the stolen property." State v. Bruins, 407 So. 2d. 685, 687 (La. 1981). Although the instructions in this case did not directly inform the jury that specific intent must be shown for Meriwether to be convicted of armed robbery, Meriwether is incorrect in concluding that, in light of the trial record as a whole, a reasonable likelihood exists that the jury applied the instructions in a manner that violates the Constitution.

The evidence in the trial showed that Meriwether and Spencer "cased" the store before the robbery to ensure that it was a suitable target. The evidence further showed that Meriwether discussed and planned the robbery with Spencer and Benoit on multiple occasions. Moreover, after the crime was committed, Meriwether took a an equal share of the stolen money. This

evidence, in conjunction with the total instructions on robbery, theft, and principals, makes it very unlikely that the jury applied the challenged instruction in a way that violates the Constitution.

Meriwether can take no solace in this court's decision in Flowers. In that case, we held that similar specific intent jury instructions were constitutionally infirm, by reasoning that "[a] reasonable juror in this case might have concluded that his examination of the specific intent needed to go no further than the a finding that either [the principal or the accomplice] acted with specific intent." Flowers, 779 F.2d at 1123. Since our decision in that case, however, the Supreme Court has clarified the test for examining jury instructions. See McGuire, 112 S. Ct. at 482 & n.4. The Court specifically disapproved of the notion that a reviewing court could examine how a reasonable juror might or could have understood the charge and "settle[d] on a single standard of review for jury instructions--`the reasonable likelihood' standard." Id. at 482 n.4. Here, in light of the instructions as a whole and the entire trial record, Meriwether fails to meet that standard.[4]

C. Brady Claims

[4] Meriwether also alleges the district court's failure to address the issue constituted error. We need not address this contention, because we find that Meriwether's claims surrounding the jury instructions fail on the merits.

Meriwether next argues that the district court erred in concluding that he did not have a valid Brady claim. As we recently noted, "Brady applies to situations involving the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." United States v. Stephens, 964 F.2d 424, 435 (5th Cir. 1992). In this case, Meriwether claims that the prosecution failed to disclose the plea agreements of Spencer and Benoit and the full extent of Spencer's and Benoit's criminal records.

In order to succeed on a Brady claim, the defendant must establish three things: "(1) the prosecution's suppression or withholding of evidence; (2) which evidence is favorable, and (3) material to the defense." Id.; accord United States v. Jackson, 978 F.2d 903, 912 (5th Cir. 1992). We have defined material evidence as that evidence where "`there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Stephens, 964 F.2d at 436 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). Moreover, it is well settled that, in certain circumstances, withholding evidence that would impeach the prosecution's witnesses may be material and may serve as the basis of a Brady claim. Giglio v. United States, 405 U.S. 150, 153-55 (1972); Edmond v. Collins, 8 F.3d 290, 293 (5th Cir. 1993).

Meriwether's initial contention is that the prosecution failed to disclose several criminal convictions of Spencer. This

claim is without merit. Although the State did not provide information about all of Spencer's convictions, it cannot seriously be contended that such evidence would have altered the outcome of the proceeding. The State provided Meriwether with the statement of Spencer. In this statement, Spencer admitted to a number of crimes, including armed robbery, arson, and burglary. Meriwether also had knowledge of Spencer's criminal past because they had been incarcerated together. At trial, Meriwether had ample opportunity to develop Spencer's criminal past, and on cross-examination, Meriwether elicited information about Spencer's record. It realistically cannot be argued that the evidence of one or two more convictions would have rendered Spencer's testimony incredible to the jury and caused them to acquit Meriwether. We have noted that "[t]he materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." Smith v. Black, 904 F.2d 950, 967 (5th Cir. 1990). In light of the catalog of Spencer's criminal activity (of which Meriwether was made aware), the State's failure to disclose additional criminal convictions did give rise to a Brady violation. See United States v. Ellender, 947 F.2d 748, 757 (5th Cir. 1991) (noting that materiality of impeachment evidence decreases when other impeachment evidence is available); Black, 904 F.2d at 968 (finding partial disclosure of impeachment evidence sufficient to diminish the value of Brady evidence).

Meriwether also argues that his due process rights were violated because the State did not disclose the precise nature of the plea bargains made with Spencer and Benoit. At trial, Spencer testified that in exchange for his testimony, he was to have an aggravated rape charge reduced to forcible rape, and he was to receive a total of thirty years incarceration for all pending charges (two armed robberies, three burglaries, and three other offenses). Similarly, at trial, the jury was told on multiple occasions that Benoit was receiving "total immunity" for his testimony.

In this light, we find that Meriwether's additional Brady complaints wanting. Even assuming that his allegations are true, the evidence complained of by Meriwether was not material. Meriwether was well aware that both Benoit and Spencer were testifying against him pursuant to plea arrangements. Moreover, this information was brought out to the jury throughout the trial. There can be no argument that the jury was not aware that the two men were testifying in exchange for the benefit of immunity or reductions in their sentences. Thus, we find that the jury had more than sufficient evidence to assess the credibility of Spencer and Benoit, and we therefore agree with the district court's conclusion that Meriwether's Brady contentions on this matter fail.

D. Ineffective Assistance of Counsel

Meriwether's final claim is that his counsel was constitutionally deficient in failing to adequately question and to cross-examine Benoit and Spencer and in neglecting to object to the ex parte hearing with Verrette or to request her removal from the jury.[5]

In order to succeed on an ineffective assistance of counsel claim, a defendant must show both that the attorney's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for the attorney's unprofessional errors, a different result would have occurred. United States v. Kinsey, 917 F.2d 181, 183 (5th Cir. 1990) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)). Further, the reasonableness of an attorney's conduct is evaluated "under the professional norms prevailing [at] the time counsel rendered assistance." Black v. Collins, 962 F.2d 394, 401 (5th Cir.), cert. denied, 112 S. Ct. 2983 (1992). Finally, in evaluating the reasonableness of an attorney's conduct, an appellate court must be highly deferential to counsel's decisions since "it is extremely difficult for reviewing courts to place themselves in the counsel's position and evaluate the choices he or she should have made." Id.

[5] Meriwether also mentions that his counsel was defective for failing to obtain an accomplice instruction. This claim, however, is not developed in his brief, and therefore will not be considered. See Yohey v. Collins, 985 F.2d 222, 225 (noting that even in pro se pleadings, "only the issues presented and argued in the brief are addressed").

Meriwether's argument that his counsel was constitutionally infirm for failing to more thoroughly cross-examine Benoit and Spencer about their prior criminal records and plea arrangements is groundless. As noted above, the jury was presented with a good deal of evidence about Spencer's criminal record and both men's plea arrangements. Counsel's decision not to delve into the details of the criminal past of Meriwether's associates is clearly a strategic decision and this court "is careful not to second guess a legitimate strategic choice." Yohey, 985 F.2d at 228. Simply, this decision does not constitute ineffective assistance of counsel.

Similarly, we find no ineffective assistance in counsel's handling of the ex parte communications with Verrette. In order to prevail in an ineffective assistance of counsel claim, Meriwether is required to show that counsel's errors affected the result. He has not done so here. As noted above, Meriwether fails to demonstrate that Verrette's presence on the jury or the ex parte nature of the proceeding in which her acquaintance with the victim was explored, affected the outcome of the trial. Therefore, we reject his claim of ineffective assistance of counsel. See Jernigan v. Collins, 980 F.2d 292, 296 (5th Cir. 1992) (holding that a defendant has the burden of proof on an ineffective assistance of counsel claim), cert. denied, 113 S. Ct. 2977 (1993).

We also reject Meriwether's claim that the district court erred in failing to order an evidentiary hearing on his

ineffective assistance of counsel claims. An evidentiary hearing is required in an ineffective assistance of counsel claim only "if the petitioner's allegations cannot be resolved absent an examination of the evidence beyond the record; if the record is clearly adequate to fairly dispose of the claims of inadequate representation, further inquiry is unnecessary." Byrne v. Butler, 845 F.2d 501, 512 (5th Cir.) (citations omitted), cert. denied, 487 U.S. 1242 (1988); accord Lavernia v. Lynaugh, 845 F.2d 493, 501 (5th Cir. 1988). After reviewing the record, we agree with the district court that Meriwether's allegations could be resolved on the basis of the record; thus, we find no error in the district court's decision not to hold an evidentiary hearing.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.