UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8434
Summary Calendar

DONNY LEE BRETZ,

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 Western District of Texas
(MO-93-CA-054)

(January 6, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Donny Lee Bretz appeals the district court's denial of his petition for habeas relief. We affirm.

I.

Bretz was indicted for murder in connection with the stabbing death of Gayle Stifflemire. At trial, Ms. Stifflemire's mother, Georgia Converse, testified that, on October 25, 1984, she was at

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

her daughter's nightclub, and that Bretz, Gary Wauqua, and another man were there drinking. About 40 minutes after the three men left the bar, they returned, claiming to be in search of Bretz's missing jacket. After Ms. Converse told Bretz that his jacket was not there, Bretz and Wauqua went to the rest room. When they came out, Bretz hit Ms. Stifflemire and Ms. Converse with a pool cue. Bretz and Wauqua then left the bar.

A short while later, Bretz and Wauqua returned. This time Bretz hit Ms. Converse on the forehead with a shiny object, and Wauqua stabbed Ms. Stifflemire. Bretz then went behind the bar and took the cash register. Keith Hall testified that when Bretz and Wauqua emerged from the bar, Wauqua was carrying the cash register. Hall then drove the two men to an apartment, where they opened the cash register. Law enforcement officers soon arrived at the apartment to arrest Bretz and Wauqua.

Kenneth Boyd Jones testified that he also was in the bar that night and that, although he did not see who stabbed Ms. Stifflemire, he saw Bretz taking part in the altercation. In addition, Bretz himself told James Waller that he had stabbed "the old lady" after she refused to open the cash register as he had asked.

The jury was instructed that it could find Bretz guilty of Ms. Stifflemire's murder under any of three theories: (1) he personally stabbed her; (2) he was an accomplice to the stabbing under the law of parties; or (3) he was a party to a conspiracy to commit a felony, during which a co-conspirator committed another

felony. The defense objected to the latter two theories. The jury found Bretz guilty and imposed a 99-year prison term and a $10,000 fine. The judgment was affirmed on direct appeal.

After considering Bretz's federal habeas petition, the magistrate judge recommended that the district court deny him relief without an evidentiary hearing. Over Bretz's objections, the district court accepted the magistrate's recommendation and denied the relief sought by Bretz. This appeal followed.

II.

A.

Bretz contends first that he was convicted based on insufficient evidence. In particular, he maintains that there is "no evidence" that he personally stabbed Ms. Stifflemire. This argument, however, lacks merit because there is ample evidence that Ms. Stifflemire was killed as a result of Bretz and Wauqua's conspiracy to rob the cash register from her bar. The Texas law of parties provides that "[i]f, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy." V.T.C.A. Penal Code § 7.02(b).

Bretz also argues that his conviction is unconstitutional because he was indicted as a principal in Ms. Stifflemire's murder, but was convicted as an accomplice to the murder. This argument,

however, also lacks merit. As we have consistently held, "one who has been indicted as a principal may, on proper instructions, be convicted on evidence showing only that he aided and abetted the commission of the offense." **Brown v. Collins**, 937 F.2d 175, 182 (5th Cir. 1991) (internal quotations omitted). Bretz does not argue that the evidence was insufficient to sustain his conviction as a co-conspirator.

B.

Bretz contends next that he is entitled to habeas relief because the prosecutor's comments during the punishment phase of his trial rendered it fundamentally unfair. During his closing argument, after decrying the number of murders in the community, the prosecutor said: "You know that he has committed at least three." After the court sustained Bretz's objection, the prosecutor clarified his remark by noting that he was "referring to murder and criminal mischief and burglary." Evidence had been introduced at trial that Bretz had been convicted of the latter two offenses.

The prosecutor also stated that "one of the reasons that I feel so strongly about this situation is that I knew Gayle." The court sustained Bretz's objection to this remark and instructed the jury to disregard it. The prosecutor also argued that Bretz was as guilty as Wauqua because Bretz did not help Ms. Stifflemire after she was stabbed. Bretz maintains that this was an improper comment on his failure to testify in his own defense, and that it erroneously implied that he had no remorse about Ms. Stifflemire's

death. The court overruled his objection that these remarks constituted "arguing outside the record."

To be entitled to federal habeas relief on a claim of improper prosecutorial argument, a petitioner must show that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." **Darden v. Wainwright**, 477 U.S. 168, 180-83 (1986) (internal quotations omitted). The prosecutor's remarks in this case did not render Bretz's trial fundamentally unfair. The prosecutor's clarification regarding Bretz's prior convictions eliminated any prejudice that otherwise might have resulted; the jury was instructed to disregard the comment that the prosecutor "knew Gayle"; and the prosecutor's remark that Bretz failed to come to Ms. Stifflemire's aid after she had been stabbed was based on evidence presented at trial and did not refer in any way to his failure to testify.

C.

Bretz argues next that he is entitled to habeas relief based on a number of errors in the jury charge at the guilt-innocence phase of his trial. First, he asserts that the trial court erred in refusing to instruct the jury on the accomplice-witness rule with regard to Keith Hall. Second, he argues that the trial court erred in instructing the jury on the law of the parties because there was insufficient evidence that he conspired with Wauqua. Third, he contends that the trial court erred in instructing the jury about a conspiracy to rob because there was no evidence that the cash register belonged to Ms. Stifflemire. Fourth, he claims

that the trial court erred in instructing the jury on the law of parties because it was not alleged in the indictment. Fifth, he argues that the trial court erred in refusing to instruct the jury that Bretz should be acquitted if Wauqua acted under an independent impulse in stabbing Ms. Stifflemire.

In determining whether an erroneous instruction was so prejudicial that it supports a collateral attack on the constitutional validity of a state court judgment, the relevant question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." **Henderson v. Kibbe**, 431 U.S. 145, 154 (1977) (internal citations and quotations omitted). Moreover, "[t]he trial court is not required to instruct the jury on a defense theory if the evidence is insufficient as a matter of law for the defendant to prevail on that theory." **Sullivan v. Blackburn**, 804 F.2d 885, 887 (5th Cir. 1986), **cert. denied**, 481 U.S. 1019 (1987).

On direct appeal, the state court held that, even if Hall was an accomplice, the trial court did not commit reversible error in refusing to instruct the jury on the accomplice-witness rule because two witnesses corroborated Hall's testimony. We agree. In addition, we find that there was sufficient evidence that Bretz and Wauqua conspired to rob Ms. Stifflemire's bar to warrant instructions on the law of parties and the elements of a conspiracy to rob. Lastly, based on the strength of the evidence against

Bretz, his trial was not rendered fundamentally unfair by the trial court's refusal to instruct the jury that he should be acquitted if Wauqua stabbed Ms. Stifflemire as the result of an independent impulse.

III.

For the foregoing reasons, we affirm the district court's denial of the habeas relief sought by Bretz.

AFFIRMED.