UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10043

(Summary Calendar)

JERRY FLOYD,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:93-CV-23)

(June 28, 1994)

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

PER CURIAM:[*]

Appellant, Jerry Floyd, was tried by jury in state district court and found guilty of attempted capital murder and aggravated robbery. Floyd was granted a new trial on the attempted capital murder charge, and the Texas court of appeals affirmed the trial court's judgment of conviction on the charge of aggravated robbery. Floyd exhausted his state court remedies on the aggravated robbery

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conviction and then brought a federal habeas claim pursuant to 28 U.S.C. § 2254. The district court dismissed Floyd's claim with prejudice, and Floyd appeals, contending that the district court erred because (a) the state indictment was invalid; (b) the trial court received testimony in violation of the rule of witness sequestration; and (c) the State improperly commented on his silence at trial. We affirm.

I

In 1982, Jerry Floyd entered a Skinny's store in Abilene, Texas, where he pointed a gun at the cashier and took the money that was in the cash register. Police officer Joe Lujan was in hot pursuit of the getaway car when Floyd fired two shots in his direction. Police eventually arrested Floyd with the getaway car and found a large number of coins in his pockets. Following his arrest, Floyd was identified by the store cashier as the perpetrator of the crime.

Floyd was charged by two separate indictments: one for attempted capital murder, and another for aggravated robbery. The trial court found him guilty of both charges, but granted a new trial on the attempted murder charge because the State had improperly commented on Floyd's failure to testify. Floyd was convicted of aggravated robbery and, because of two prior DWI convictions, was sentenced to life imprisonment.

Floyd appealed his conviction for aggravated robbery to the state appellate court, alleging that the trial court abused its discretion by allowing state witnesses to testify after violating

the rule of witness sequestration ("the Rule"). Floyd also alleged that the prosecutor's comments on his failure to testify constituted reversible error, and that the trial court should have granted a mistrial on both the aggravated robbery charge and the attempted capital murder charge. The appellate court held, with one judge dissenting, that the trial court did not abuse its discretion in allowing witnesses to testify in violation of the rule, nor did it err in holding that the prosecutor's comments on Floyd's failure to testify were harmless. Floyd filed four habeas petitions with the Texas Court of Criminal Appeals, which denied each petition without written opinion.

After exhausting his state court remedies, Floyd petitioned the district court for federal habeas relief. In a detailed set of findings and conclusions, the magistrate judge recommended dismissal with prejudice of Floyd's § 2254 claim. The magistrate reasoned, *inter alia*, that: the state court indictment was valid; the trial court's finding that Floyd suffered no prejudice from violation of the Rule was entitled to a presumption of correctness; and under the doctrine of invited response, the prosecutor's comments on Floyd's silence at trial did not violate Floyd's constitutional rights. The district court adopted the magistrate's findings, conclusions, and recommendation, and dismissed Floyd's petition with prejudice. Floyd appeals.

II

A

Floyd alleges that the district court erred in dismissing his claim for habeas relief because the state court indictment against him was invalid. Floyd contends that the indictment was invalid because: (1) it did not allege a crucial element of aggravated robbery))that Floyd took property without the "effective consent" of the owner; (2) there was a fatal variance between the name appearing in the first paragraph of the indictment))Jerry Floyd))and the name appearing in the jury's verdict and the enhancement paragraphs of the indictment))Jerry Dowell Floyd; (3) it failed to describe the gun used in the robbery as a deadly weapon; and (4) the enhancement paragraphs of the indictment were fundamentally defective in that misdemeanor convictions were counted as felonies for enhancement purposes, and were used for enhancement even though they were based on a plea of nolo contendere or were based on a judgment which was not signed by the court of conviction.

The sufficiency of a state indictment is not a ground for § 2254 relief unless "the indictment is so defective that it deprives the state court of jurisdiction." *McKay v. Collins*, 12 F.3d 66, 68 (5th Cir. 1994) (citing *Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980)). If state courts have held that an indictment is sufficient under state law, a federal court need not address the issue. *Id*. (citing *Millard v. Lynaugh*, 810 F.2d 1403, 1407 (5th Cir.), *cert. denied*, 484 U.S. 838, 108 S. Ct. 122, 98 L. Ed. 2d. 81 (1987)).

Floyd challenged his indictment in the trial court and in state habeas petitions. Based on the findings of the trial court,

the Texas Court of Criminal Appeals denied Floyd's claims for habeas relief. "By refusing to grant [Floyd] relief, . . . the Texas Court of Criminal Appeals has necessarily, though not expressly, held that the Texas courts have jurisdiction and that the indictment is sufficient for that purpose." *Alexander v. McCotter*, 775 F.2d 595, 599 (5th Cir. 1985). Under *Alexander*, the Texas courts had jurisdiction over Floyd's case, and we need not address his challenges to the state indictment.

B

Floyd also alleges that the district court erred by not granting his claim for habeas relief where witnesses for the prosecution testified in violation of the Rule.[1] State evidentiary rulings are matters for federal habeas review only when a "trial judge's error is so extreme that it constituted denial of fundamental fairness." *Evans v. Thigpen*, 809 F.2d 239, 242 (5th Cir. 1987) (quoting *Mattheson v. King*, 751 F.2d 1432, 1445 (5th Cir. 1985), *cert. dism'd sub nom.*, *Mattheson v. Phelps*, 475 U.S. 1138, 106 S. Ct. 1798, 90 L. Ed. 2d. 343 (1986)).

In the instant case, the trial court held an evidentiary hearing on the violation of the Rule, and determined that Floyd was

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[1] Under the law in effect at the time of Floyd's trial, the rule of witness sequestration read: "At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause." TEX. CODE CRIM. PROC. ANN. art. 36.03 (Vernon 1981) (repealed and current version at TEX. R. CRIM. EVID. 613).

not prejudiced thereby. Similarly, the state appellate court concluded:

> The record reflects some minimal conversation about the case between witnesses, English, Ramirez, and Rodriguez in the hallway. The record fails to establish that any of the witnesses attempted to influence the testimony of another witness. There is evidence that Officer English merely told one of the witnesses to "just tell the story the way it happened." Each of the witnesses was a witness to a different aspect of the episode. The trial court did not abuse its discretion in overruling [Floyd's] objection.

Floyd v. State, 662 S.W.2d 683, 684 (Tex. App.))Eastland 1983, n.w.h.) (citations omitted). The magistrate judge below extended § 2254's presumption of correctness to the findings of the state appellate court and, therefore, rejected Floyd's claim. We acknowledge that a presumption of correctness applies to the factual findings of all state courts. *Sumner v. Mata*, 449 U.S. 539, 548, 101 S. Ct. 764, 769, 66 L. Ed. 2d. 722 (1981). Moreover, Floyd must affirmatively demonstrate why the Rule violation rendered his trial fundamentally unfair. *See Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1988) (denying habeas claim because appellant showed no prejudice). Although Floyd states that "[i]n all probability, [the officer's] testimony was altered or influenced or tailored to the state's needs, as a result of [the Rule violation]" he does not cite any record support for this assertion. Therefore Floyd has not demonstrated that his trial was fundamentally unfair, and his second claim is without merit.

C

Last, Floyd argues that the district court erred in denying his habeas claim because the state unfairly commented on his

silence and the trial court refused to declare a mistrial on such grounds.[2] Floyd also contends that the district court erred by introducing, *sua sponte*, the doctrine of invited response))which validated the State's comments on Floyd's silence.

The Fifth Amendment forbids a prosecutor from commenting on a defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d. 106 (1965); *accord United States v. Borchardt*, 809 F.2d 1115, 1119 (5th Cir. 1987) (noting that prosecutor may not comment directly or indirectly on defendant's silence at trial). Commenting on a defendant's silence at trial, however, will not be a ground for habeas relief unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, __ U.S. __, __, 113 S. Ct. 1710, 1718, 123 L. Ed. 2d. 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946)). Harmless error analysis applies to comments on a defendant's failure to testify, *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967), and such comments will not be a ground for reversal where the trial court's error was harmless beyond a reasonable doubt. *See Nethery v. Collins*, 993 F.2d 1154, 1159 and n.15 (5th Cir. 1993) (holding that comment on defendant's silence at trial was harmless error where court gave

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[2] The trial court declared a mistrial on the attempted capital murder charge against Floyd because the prosecution unfairly commented on Floyd's silence at trial. However, the trial court refused to grant a mistrial on Floyd's aggravated robbery charge because the prosecution's comment was only directed at the attempted capital murder charge. Floyd argues that a mistrial should have been granted in both instances.

curative instruction and there was overwhelming evidence of defendant's guilt (citing *Chapman* and *Brecht*)).

In the case at bar, the State, in the part of its closing argument directed at the capital murder charge, argued that:

> Now, when you shoot at somebody with a gun, I don't care what the circumstances are that you may now be able to look back and say "Well, he likely wasn't going to hit him." That's not the issue either. We don't know what was running through Jerry Floyd's mind and we never will, and there's no way we can unless he tells us . . .

Floyd, 662 S.W.2d at 684. Floyd's objection to this statement was sustained, and the trial court instructed the jury to disregard the prosecutor's comment. Immediately thereafter, the State further commented that: "But the point I was trying to make is, what was in the defendant's mind, we don't know. You have to infer from all the circumstances as to what he was trying to do. And again, the issue is, did he shoot at the police officer." *Id*. Floyd did not object to the second comment, and no curative instruction was given. The state appellate court found the comments harmless beyond a reasonable doubt because the statements did not relate to the aggravated robbery charge.

Although the State's comments were improper, the trial court cured the error by granting Floyd a new trial on the attempted capital murder charge. The State's comments did not relate to the aggravated robbery charge, for their subject matter and timing both relate to the attempted capital murder charge. Moreover, the evidence overwhelmingly indicates Floyd's guilt, as Floyd: (1) was identified by the robbery victim, both at the scene of the crime, and in court; (2) was identified by police as the passenger who

fired shots from the getaway car; (3) was arrested near the getaway car; and (4) was arrested with a large number of coins on his person. Given the court's curative instruction, the mistrial on the attempted murder charge, and most importantly, the overwhelming evidence of Floyd's guilt, we find that the State's comments on Floyd's failure to testify were harmless error.

We need not address Floyd's other contention))that the district court erred in raising the doctrine of invited response *sua sponte*))because as demonstrated above, even if the State's comments were not invited responses, they were harmless. Accordingly, we hold that Floyd's last claim is without merit.

III

For the forgoing reasons, we **AFFIRM**.