UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30310
Summary Calendar

JAMES J. FETTERLY,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 94-0553 J/E)

(December 6, 1994)

Before POLITZ, Chief Judge, SMITH and WIENER, Circuit Judges.

POLITZ, Chief Judge:[*]

James J. Fetterly appeals the denial of federal habeas relief from his Louisiana state court conviction for forcible rape. We affirm.

Background

Fetterly was convicted of the forcible rape of his 18-year-old

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

stepdaughter who testified that Fetterly came to her room, told her to follow him, and when she resisted, made a fist and gave her "mean eyes." He led her to a camper parked in front of the house where they disrobed and had intercourse. She testified that she did not resist because she believed it would be useless to do so, adding that Fetterly had been molesting her since she was eight years old. During this decade of abuse, he made repeated threats to harm her and her family if she ever told anyone about his acts. The stepdaughter, believing that because she was then 18 she no longer had to live with her stepfather, this time reported the rape. Ten members of the twelve-member jury returned a verdict of guilty and the trial court imposed a sentence of 40 years imprisonment without benefit of parole, probation, or suspension of sentence.

After exhausting direct appeal and collateral review in the state court, Fetterly sought habeas relief, claiming insufficiency of the evidence, ineffective assistance of counsel, and cumulative errors rendering his trial unfair. The district court dismissed the petition and granted a certificate of probable cause and IFP status.

Analysis

Fetterly first contends that there was insufficient evidence to sustain the verdict. The critical inquiry is whether "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, viewing the evidence in the light

most favorable to the verdict."[1] In this inquiry, we resolve all questions of credibility in favor of the jury's verdict.[2] When, as here, a state appellate court has thoroughly reviewed the sufficiency of the evidence, we give that court's determination great weight in our federal habeas review.[3]

To establish the crime of forcible rape under Louisiana law, the state had to prove the following elements: "(1) anal or vaginal sexual intercourse regardless of the degree of penetration; (2) intercourse without consent of the victim; (3) a victim that was prevented from resisting by force or the threat of physical violence; and (4) who reasonably believed that resistance would not prevent the rape."[4] Fetterly first challenges the sufficiency of the evidence on the basis that the victim testified only about having "intercourse" rather than "sexual intercourse" with him. We reject this claim; a jury reasonably could understand from the testimony that the victim meant sexual intercourse.[5]

Fetterly argues that the victim's testimony did not establish that he used force or threats of violence during the alleged rape

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[1]**Jackson v. Virginia**, 443 U.S. 307, 318 (1979); **United States v. Anderson**, 987 F.2d 251 (5th Cir.), cert. denied, 114 S.Ct. 157 (1993).

[2]**United States v. Gallo**, 927 F.2d 815 (5th Cir. 1991).

[3]**Callins v. Collins**, 998 F.2d 269 (5th Cir. 1993), cert. denied, 114 S.Ct. 1127 (1994).

[4]**State v. Simmons**, 621 So.2d 1135, 1137-38 (La.Ct.App. 1993).

[5]See **United States v. Bermea**, 30 F.3d 1539, 1551 (5th Cir. 1994) ("[J]ury is free to choose among reasonable constructions of the evidence.").

or that the victim "reasonably believed" resistance would have been futile. Viewing the victim's testimony, sketched briefly above, in the light most favorable to the verdict, we conclude that a reasonable jury could find beyond a reasonable doubt that Fetterly threatened the victim and that the victim reasonably believed resistance would be futile.[6] To the extent Fetterly challenges the credibility of the victim's story, we must accept the jury's credibility choices.[7]

We also reject Fetterly's final challenge to the sufficiency of the evidence -- that the government changed its position about the alleged date of the crime prejudicing the defendant by reducing the effect of his "alibi" defense. We find no support for this contention either in fact or in law.[8]

In his ineffective assistance claim, Fetterly offers a laundry list of trial counsel's failures. Upon close scrutiny, none has merit. To state an ineffective assistance of counsel claim Fetterly must demonstrate that his attorney's performance was not reasonable under prevailing professional norms, and that this deficient performance rendered the trial unreliable and

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[6]We have held that a rape victim's testimony, standing alone, is sufficient to support a conviction for rape. **Peters v. Whitley**, 942 F.2d 937 (5th Cir. 1991), cert. denied, 112 S.Ct. 1220 (1992).

[7]**Gallo**.

[8]An issue arose at trial as to the time the alleged rape occurred. Although the prosecutor argued that the crime took place "on or about" the 12th in closing arguments, the date of the crime was never seriously disputed by the parties.

fundamentally unfair.[9]

Fetterly faults his counsel for failing to file a motion for discovery of the state's evidence. No such motion was needed; the prosecution gave counsel access to its file. There was no prejudice.[10]

Similarly, Fetterly faults counsel for not objecting at trial to the introduction of extrinsic evidence of his prior misconduct with his stepdaughter. This inaction by counsel was quite reasonable for at least two reasons: (1) an *in limine* objection had been overruled and (2) Louisiana law clearly supported its admissibility.[11]

Fetterly next contends that his attorney should have interviewed the six or seven persons who were in the house at the time of the offense. He argues that their testimony must have been beneficial to his defense, otherwise the prosecution would have called them. To prevail on this challenge Fetterly "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."[12] Speculation is insufficient.

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[9]**Strickland v. Washington**, 466 U.S. 668 (1984); **Deville v. Whitley**, 21 F.3d 654 (5th Cir.), cert. denied, 115 S.Ct. 436 (1994).

[10]**Romero v. Lynaugh**, 884 F.2d 871 (5th Cir. 1989) (finding no ineffective assistance when actual discovery exceeds that available through motion), cert. denied, 494 U.S. 1012 (1990).

[11]**Louisiana v. Acliese**, 403 So.2d 665 (La. 1981) (allowing evidence of extrinsic offenses by defendant against same victim).

[12]**Nelson v. Hargett**, 989 F.2d 847, 850 (5th Cir. 1993) (citing **United States v. Green**, 882 F.2d 999, 1003 (5th Cir. 1989)).

Fetterly next faults counsel for not calling his wife to testify that she had the only keys to the camper where the rape occurred. Counsel interviewed Thelma Fetterly several times; she insisted she knew nothing and did not want to testify. She made no mention of camper keys. Counsel's decision was not unreasonable.

Fetterly further complains that counsel did not object to the wording of the indictment, the jury charge on criminal intent, the jury's access to written evidence, and the court's giving of additional written instructions on how to complete the verdict form. We perceive no prejudice from these alleged errors.

The contention that counsel should have objected to a verdict of guilty by only ten of the twelve jurors is without merit. The Constitution does not require either a jury of twelve or a unanimous verdict for a conviction in a state court.[13] Under Louisiana law, only ten jurors need concur for a verdict of guilty of forcible rape.[14]

In his final ineffectiveness claim, Fetterly argues that his counsel should have objected to the consideration of uncharged conduct at sentencing. We have held that the Constitution permits the trial judge to consider a wide range of factors at sentencing, including the past criminal history of the defendant, both charged and uncharged.[15] Further, the consideration of uncharged conduct

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[13]**Burch v. Louisiana**, 441 U.S. 130 (1970).

[14]La. Code Crim. Proc. art. 782(A) (West 1981).

[15]**Rousell v. Jeane**, 842 F.2d 1512 (5th Cir. 1988).

was proper under Louisiana law.[16] There was no viable objection available; therefore, counsel's failure to object was reasonable.

Fetterly's complaint about counsel not objecting to the severity of the sentence is not persuasive. The sentence was within the lawful range. Considering Fetterly's prior convictions for sexual abuse of young girls, and the evidence of the abuse of the victim and her younger sisters, we cannot say that the sentencing judge erred in imposing 40 years imprisonment.

Finally, we find no merit in Fetterly's contention that the claimed errors cumulatively resulted in a fundamentally unfair trial. We are not persuaded. The record does not satisfy the strictures of the narrow and rare cumulative-error violation of the due process clause of the fourteenth amendment.[17]

AFFIRMED.

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[16]**State v. Stewart**, 541 So.2d 336 (La.App. 1989).

[17]See **Derden v. McNeel**, 978 F.2d 1453 (5th Cir. 1992) (*en banc*) (setting out requirements for cumulative error violation), cert. denied, 113 S.Ct. 2928 (1993).