IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30629
Summary Calendar

WILBERT BRADLEY,

Petitioner-Appellant,

versus

BURL CAIN, Acting, Warden, and
RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-93-1049-B-M1)

(July 25, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Wilbert Bradley appeals the dismissal of his state prisoner's habeas corpus petition filed pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

I.

[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Bradley was convicted by a jury of attempted second degree murder. His conviction was affirmed on direct appeal. Bradley filed a motion for post-conviction relief in state court, which was denied on the merits, and the Louisiana Supreme Court denied Bradley's application for supervisory and/or remedial writs.

Bradley, proceeding pro se and in forma pauperis, filed a § 2254 petition, raising the sole issue of ineffective assistance of counsel. The state conceded that Bradley has exhausted his state remedies. The district court denied Bradley's petition on the merits.

II.

Bradley argues that his trial counsel was ineffective for failing to object to statements made by the prosecutor during voir dire and closing argument, and to portions of the jury charge that suggested that it could convict Bradley of attempted second degree murder if it found that he had a specific intent to kill or to inflict great bodily harm. He also argues that counsel was ineffective for misrepresenting to the jury, and for counsel's failure to know himself, the essential elements of attempted second degree murder.

To establish an ineffective assistance of counsel claim, Bradley must demonstrate that his attorney's performance was deficient to the prejudice of the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show deficient performance, Bradley must prove that his counsel's performance fell below an

objective standard of reasonableness. Id. at 687-88. We indulge in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988).

A.

Bradley suggests that the following portion of the jury charge was erroneous, and his counsel was ineffective for failing to object to it:

> Second degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. Thus, it is))in order to convict the defendant of second degree murder, you must find: number one, that the defendant kill))attempted to kill Lasonya Moore; number two, that the defendant acted with a specific intent to kill or inflict great bodily harm. Now, I need to make it more narrow for you than that. The recent cases indicate that in order to convict someone of attempted second degree murder, you have to be convinced beyond a reasonable doubt that the defendant had the specific intent to kill . . . . I need to read the statute to you. Attempt is: a person who, having a specific intent to commit a crime,))in this, specific intent to kill Lasonya Moore))does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the crime intended.

In order to convict of attempted second degree murder under LA. REV. STAT. ANN. § 14:30.1 (West 1995), the jury needed to find that he had a specific intent to kill. State v. Butler, 322 So. 2d 189, 192 (La. 1975); Scott v. Louisiana, 934 F.2d 631, 634 (5th Cir. 1991). We find that, taken as a whole, the jury charge provided a correct statement of the elements of attempted second degree murder by stating that "[t]he recent cases indicate that in order to convict someone of attempted second degree murder, you have to be

convinced beyond a reasonable doubt that the defendant had the specific intent to kill."

Bradley cites Scott v. Louisiana, 934 F.2d 631, 634 (5th Cir. 1991), and State v. Ball, 554 So. 2d 114, 115 (La. App. 2d Cir. 1989), two cases holding that failure to object to an instruction allowing conviction of attempted second degree murder where there was only the intent to commit serious bodily harm constitutes ineffective assistance under Washington. Scott and Ball are factually different from the case at bar, however. In each of them, the court unequivocally instructed the jury that it could convict with mere intent to cause serious bodily harm. In Scott, the relevant portion of the charge told the jury: "You must find . . . that the defendant acted with a specific intent to kill or to inflict great bodily harm." 934 F.2d at 634. Although the Ball court did not quote the offending instruction, the court's discussion indicates that, like the Scott instruction, it was unequivocal and baldly incorrect. 554 So. 2d at 115. Here, the court correctly stated the intent requirements for both second degree murder and attempted second degree murder, contrasting the two. The charge was accurate.

B.

Next we turn to the question of whether Bradley's counsel's failure to object to the prosecutor's statements regarding the intent requirement sank to the level of deficient performance. Bradley argues that his counsel was ineffective for failing to

object to statements made by the prosecutor during voir dire and closing argument that incorrectly suggested that Bradley could be convicted of attempted second degree murder if he had the intent to inflict great bodily harm. The prosecutor told the jury during voir dire that "[t]he offender has to have specific intent to kill or inflict great bodily harm. We have to prove that he intended to kill her." He made additional, similar remarks during voir dire, sometimes without mentioning the specific-intent-to-kill element. In closing argument, the prosecutor stated that

> attempted second degree murder is the attempt to kill a human being when the offender has a specific intent to kill or to inflict great bodily harm. The question is, did he attempt to kill her and did he have the intent to kill her when he made this attempt?

The prosecutor's misstatements of the law seemed to be mere oral lapses and were immediately followed by the correct standard. For instance, in voir dire, he stated that "the offender has to have specific intent to kill or inflict great bodily harm." His next sentence, however, correctly stated the law: "We have to prove that he intended to kill her." Likewise, in closing, the prosecutor incorrectly defined attempted second degree murder as requiring the "specific attempt to kill or to inflict great bodily harm." But his next sentence correctly stated the standard: "The question is," the prosecutor said, "did he attempt to kill her and did he have the intent to kill her when he made this attempt?" Because the prosecutor's misstatements appear to be mere oral lapses, immediately and voluntarily corrected, Bradley's counsel was not deficient for failing to object to them.

C.

Bradley's third claim of deficient performance rests on his counsel's own comment during voir dire that ". . . the intent you have to find is specific intent to either kill or inflict great bodily harm." We cannot say that Bradley's counsel's performance was outside "the wide range of reasonable professional competence" based upon this slip of the tongue, in which he confused the specific intent required for attempted second degree murder with that of the underlying offense.

Even if Bradley's counsel's performance had been deficient, the prejudice prong of Washington would not have been met. At trial, Bradley testified that his fourteen-year-old girlfriend, Lasonya Moore, was shot by another man. The state offered the testimony of the victim and Bradley's two sisters, Gladys and Janice Bradley. Gladys testified that Bradley and Moore were in her living room talking when she, from another room, heard a gunshot. She saw that Moore had been shot in the arm. Bradley, holding a gun, told her not to call the police. Janice entered the room.

As Janice was leaving the house, Bradley started shooting again. Gladys testified that she heard three or four shots fired by Bradley. Janice testified that she heard gunshots while she was in the bathroom. As Janice left the bathroom, Moore told her she had been shot. Moore told Janice that Bradley shot her. After Janice left the house to call an ambulance, she heard one more shot. She did not observe anyone else come into the house with a

gun.

Moore testified that earlier in the day she saw a gun sticking out of Bradley's pants. They had a fight, Moore hit Bradley, and Bradley struck her several times. She went to Gladys's home, as did Bradley. Bradley pulled a gun and shot her in the arm. Moore testified that Bradley shot her four times, hitting her in the jaw, neck, shoulder, and arm.

To establish prejudice, Bradley must show that counsel's errors were so serious as to render the proceedings fundamentally unreliable or fundamentally unfair. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). He must show that, absent the deficient performance, there is a reasonable probability that the result of the proceeding would have been different. Ball, 554 So. 2d at 116.

In Johnson v. Blackburn, 778 F.2d 1044, 1049-50 (5th Cir. 1985), this court held that Johnson had failed to demonstrate prejudice as a result of counsel's failure to object to a purportedly erroneous jury charge. The charge instructed that for all three of the crimes at issue (second degree murder, voluntary manslaughter, and attempted second degree murder), "the accused is presumed to intend the natural and probable consequences of his voluntary acts, knowingly performed." Id. at 1046-47. We held that because Johnson raised an alibi defense at trial, and intent was not a contested issue, he failed to demonstrate prejudice from the failure to object to the charge. Id. at 1050. Similarly, intent was not a contested issue at Bradley's trial: The defense's theory of the case was that another man shot the victim, not that

Bradley shot her intending only to cause non-fatal bodily harm.

Furthermore, the evidence that Bradley intended to kill Moore was overwhelming. He shot her not once, but four times. Her wounds included three in the jaw, neck, and shoulder, indicating that Bradley was shooting to kill by aiming at her head and chest. After shooting Moore once in the arm, Bradley ordered Gladys not to call the police, revealing an intent to kill Moore rather than stop after causing her serious bodily harm. This intent was further clarified by his shooting her three more times. In light of this evidence and of the defense's theory of the case, Bradley cannot show a reasonable probability that the result would have been different had the intent requirement never been misstated. Therefore, no prejudice could have flowed from Bradley's counsel's performance, even if it had been deficient.

AFFIRMED.