

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40620
(Summary Calendar)

MICHAEL TAYLOR,

Petitioner-Appellant,

versus

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93 CV 729)

(February 7, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Michael Taylor, a Texas prisoner convicted of murder, appeals the district court's denial of his petition for a writ of habeas corpus. We affirm the judgment of the district court.

FACTS

Michael Taylor was convicted by jury of the murder of Kimberly Grammer and sentenced to a 65-year term of imprisonment. Taylor filed a habeas petition in federal district court after several unsuccessful petitions for direct appeal and for state habeas

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

corpus relief.¹ Over Taylor's objections, the district court adopted the report and recommendation of the magistrate judge and denied the petition on the merits. Taylor appealed the denial, and the district court granted a certificate of probable cause (CPC) to appeal. The state waived exhaustion of state remedies. See Fitzpatrick v. Proconier, 750 F.2d 473, 475-76 (5th Cir. 1985). Finding no reversible error, we affirm.

DISCUSSION

SUFFICIENCY OF THE EVIDENCE

Taylor asserts that the evidence was insufficient to support his conviction for murder. Taylor argues that the evidence was insufficient to prove that he caused Grammer's death. He argues that the state failed to prove that Grammer died as a result of blows from his hands and fists as alleged in the indictment. He contends that the pathologists were unable to determine the cause of Grammer's death. Taylor also asserts that the evidence was insufficient to prove that he knowingly caused Grammer's death.

The standard for testing the sufficiency of evidence in a federal habeas review of a state court conviction is whether, "after viewing the evidence in the light most favorable to the

¹ Taylor's conviction was affirmed by the 11th Court of Appeals of Texas in an unpublished opinion. The Texas Court of Criminal Appeals reversed and remanded for a determination whether the trial court's jury instructions were in error. Taylor v. State, 769 S.W.2d 232, 233-34 (Tex. Crim. App. 1989). On remand, the 11th Court of Appeals again affirmed Taylor's conviction. Taylor filed a second petition for discretionary review which the Texas Court of Criminal Appeals dismissed as improvidently granted. He filed two applications for state writs of habeas corpus, state papers, both of which were denied without written order.

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Guzman v. Lensing, 934 F.2d 80, 82 (5th Cir. 1991) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). This standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. Isham v. Collins, 905 F.2d 67, 69 (5th Cir. 1990).

The elements of murder under Texas law, at the time of the offense of June 29, 1985, were that the defendant (1) intentionally or knowingly, (2) caused, (3) the death of an individual. Tex. Penal Code Ann. § 19.02(a)(1) (West 1989). When, as here, a state appellate court has reviewed the issue of the sufficiency of the evidence, that court's determination is entitled to great weight in a federal habeas review. Porretto v. Stalder, 834 F.2d 461, 467 (5th Cir. 1987).

In evaluating the sufficiency of the evidence, it is not necessary that the evidence exclude every reasonable hypothesis of guilt, provided that a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. Gibson v. Collins, 947 F.2d 780, 782 n.1 (5th Cir. 1991), cert. denied, 113 S.Ct. 102, 121 L.Ed.2d 61 (1992). Further, a sufficiency-of-the-evidence claim may be resolved based on circumstantial evidence. Schrader v. Whitley, 904 F.2d 282, 287 (5th Cir.), cert. denied, 498 U.S. 903, 111 S.Ct. 265, 112 L.Ed.2d 221 (1990).

On habeas review by a federal court, a state court's factual findings are "`presumed to be correct'" unless one of the

conditions under 28 U.S.C. § 2254(d) applies. Sumner v. Mata, 449 U.S. 539, 550, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (Sumner I) (quoting § 2254); see 28 U.S.C. § 2254(d) (1988) (listing eight grounds under which federal courts can set aside state court findings on habeas review). The federal habeas corpus statute requires federal courts to respect credibility determinations made by the trier of fact. Pemberton v. Collins, 991 F.2d 1218, 1225 (5th Cir. 1993), cert. denied, 114 S.Ct. 637, 126 L.Ed.2d 596 (1993).

The record reveals the following facts: The night before the murder, Taylor and Grammer visited Joanne Lunsford and her brother, Bill Banks, at the trailer of Lunsford and Banks. Lunsford noticed during the visit that Grammer's face, arm, and legs were swollen, that she had been crying, and that she appeared afraid of Taylor. The next morning, Lunsford and Banks found blood spots by the door of their trailer and became concerned about Grammer. Later that day, Lunsford's neighbor, Billy Whitehead, drove them to Taylor's trailer to get Lunsford's car which had been parked there. They knocked at the trailer door but received no answer. As they were leaving, Taylor's ex-wife drove up with Taylor in the car. Taylor asked Lunsford and Banks if they had talked to Grammer; they replied by asking Taylor where she was. Taylor said she was "beat to death in the bathtub." Banks entered the trailer and heard heavy breathing. He saw Grammer in the bathtub, covered with blood. She did not respond when Banks washed off some of the blood off her face.

Sheriff's deputies arrived at Taylor's trailer and asked him the location of the hurt person; Taylor said that no one was hurt. When Deputy Geneva Harris asked Taylor where the victim was, Taylor said that she was in the bathtub with a bloody nose. Deputy Harris entered the trailer and saw dried blood on the floor. Grammer was breathing heavily and did not respond when Deputy Harris called her name. She was nude in the bathtub in about an inch and a half of cold reddish colored water. Her face was swollen, an eye was purple and swollen, her lips were "enormous and busted," her body was cut and bruised, and she was covered with blood. When Deputy Ronnie Miller asked Taylor what happened, Taylor responded that he had hit her with his fist and gestured by raising his fists. Blood and feces were on the passenger seat in Taylor's car.

Taylor testified as follows: He was unclear about what happened because he had taken "Mandrex," an illegal drug. At about 4:00 A.M. he awoke at Lunsford's trailer to find Grammer in bed with Banks. Although he and Grammer had an "open relationship," he was angry because Grammer had not told him she was going into Banks' bedroom. He told Grammer they were leaving, and he helped Grammer onto a barstool. Grammer was nude. Her balance was unstable; she fell off the barstool, her nose began to bleed, and she seemed to pass out. He fell as he carried her to his car. He admitted that he hit her a few times in the car, with the back of his hand. As he carried her into his trailer, he tripped over a dog chain and fell on her. Her head hit the step. He fell a few more times inside the trailer while carrying Grammer and noticed that

she was bleeding from her mouth. Taylor testified that there were blocks of time that he did not remember that night. He said that he knew that at some point he put Grammer in the bathtub and ran some cold water on her to wake her up, although he did not remember it clearly.

The trial testimony revealed the following evidence regarding the cause of Grammer's death: A physician who treated Grammer at the hospital testified that a CAT scan of Grammer's brain showed massive swelling as well as "lakes of hemorrhage throughout the brain." He testified that the cause of Grammer's death was "related to closed head injuries from blunt trauma." Although he acknowledged that from just "purely medical examination" it was impossible to determine what the blunt trauma was, he agreed that the injuries were consistent with injuries caused by a person's hand and fist. The doctor who performed the autopsy on Grammer testified that the cause of Grammer's death was multiple trauma injuries to Grammer's face which resulted in brain trauma and hemorrhage. He testified that the trauma was caused by a "severe blow, a force, being inflicted on the face." He presumed that the object used to inflict the blow was soft, such as a fist. Other injuries, to Grammer's hip and buttocks, were consistent with injuries caused by being dragged over a rough object. He testified that Grammer had been beaten to death.

On this record, we find that none of the 28 U.S.C. § 2254(d) grounds for setting aside the state court's factual findings are

applicable. The record discloses sufficient evidence to support the jury's guilty verdict.

STATEMENTS OF PURPORTED CONFESSION

Taylor argues that testimony containing improper references to his guilt was admitted before the jury without a prior hearing pursuant to Jackson v. Denno, 378 U.S. 368, 376-77, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Specifically, he objects to the admission of testimony about the statement he made to Lunsford, Banks, Billy Whitehead, and Deputy Harris, about having hit or beat Grammer.

In Jackson, 378 U.S. at 395-96, the Supreme Court held that the trial judge must determine the voluntariness of a confession out of the jury's presence before the confession may be admitted at trial. Jackson addresses a confession which involves state action. In the instant case, only the testimony of Deputy Harris arguably involved a state induced confession. Assuming, arguendo, that the trial judge erred in failing to hold a hearing on the voluntariness of this confession, habeas-corpus relief is not warranted if the error is harmless. See Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 1721-22, 123 L.Ed.2d 353 (1993). In a habeas proceeding, a trial-type constitutional error is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." Id. at 1722 (internal quotations and citation omitted).

The record contains evidence of Taylor's guilt which is independent of his purported confession. No evidence indicated

that the purported statement of confession was involuntary. Thus, even if error, the trial judge's failure to hold a hearing on the voluntariness of his purported confession was harmless. See id.; see also, United States v. Renteria, 625 F.2d 1279, 1283 (5th Cir. 1980) (noting in a direct criminal case that, if a confession is voluntary, failure to hold Jackson v. Denno hearing is harmless error).

PHOTOGRAPHS

Taylor argues that he was denied due process by the failure of the trial court to grant a mistrial after prejudicial photographs of the victim's children were brought before the jury. At trial, the state attempted to admit into evidence photographs of Grammer's children. Taylor's counsel objected to their admission, and the court sustained the objection. The prosecutor asked the witness to describe how Grammer was as a mother. Again, Taylor's counsel objected. The court sustained the objection and instructed the jury to disregard the question.² Taylor's counsel requested a mistrial on the basis that the prosecution was trying to inflame the jury by introducing inflammatory photographs of Grammer's children, which request the court denied.

We review state court evidentiary rulings in a habeas petition only if the error renders the entire trial fundamentally unfair. Skillern v. Estelle, 720 F.2d 839, 852 (5th Cir. 1983), cert.

² Juries are presumed to follow their instructions. Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

denied, 469 U.S. 873, 105 S.Ct. 224, 83 L.Ed.2d 153 (1984) (citations omitted). "Thus, even the erroneous admission of prejudicial [evidence] does not justify habeas relief unless it is material in the sense of a crucial, critical, highly significant factor." Id. (citations and internal quotations omitted). In the instant case, the objection to the admission of the photographs was sustained and the photographs were not admitted into evidence. The record does not reveal, and Taylor does not argue, that the jury viewed the photographs. Due to the overwhelming evidence of Taylor's guilt, the challenged photographs would not have been a crucial or highly significant factor in Taylor's conviction even had the jury seen them. See Skillern, 720 F.2d at 852. We find no reversible error.

CAUSE INSTRUCTION

Taylor argues that he was denied due process and a fair trial by the jury instruction on cause. The purportedly erroneous jury instruction provided that

[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient.³

A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different offense was committed.⁴

³ This language is the same as Texas Penal Code § 6.04(a) (West 1974 & Supp. 1994).

⁴ This language is the same as Texas Penal Code § 6.04 (b)(1) (West 1974 & Supp. 1994).

He argues that the trial court erred in giving an abstract instruction concerning causation and that the trial court erred in failing to apply Texas Penal Code § 6.04(a) to the facts. He also argues that the trial court erred in instructing the jury pursuant to Texas Penal Code § 6.04(b)(1) because this permitted the jury to bootstrap an assault to a murder.

To receive federal habeas relief, Taylor must show that the instruction was erroneous and "by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, ___, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); internal quotations and citation omitted). The instruction "`may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Id. In addition, a reviewing court must inquire "`whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Id. (quoting Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). Considering the strength of the evidence against Taylor, the purportedly erroneous instruction did not so infect the entire trial that the resulting conviction violated due process. Estelle, 112 S.Ct. at 482.

Taylor also argues that the trial court erred in instructing the jury pursuant to § 6.04(b)(1) without also instructing the jury pursuant to § 19.02(a)(2) and § 19.02(a)(3). Section 19.02(a) provided that a person commits murder if he

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

The jury was instructed pursuant to § 19.02(a)(1). Taylor has provided no statutory or jurisprudential authority for his assertion that the jury instructions should also have recited § 19.02(a)(2) and (3); nor has he provided any specific reasons for the necessity of the inclusion of § 19.02 (a)(2) and (3) in the instructions. Thus, his argument fails.

Liberally construed, see Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988), Taylor's brief also argues that the cause instruction deprived him of the opportunity to be considered for the lesser included offense of voluntary manslaughter.⁵ However, a lesser offense instruction on voluntary manslaughter was included in the jury instructions. That portion of the jury instruction provided as follows:

[a] person commits the offense of voluntary manslaughter if he intentionally or knowingly

⁵ As the magistrate judge noted, Taylor failed to specify voluntary manslaughter as the lesser included offense in his § 2254 motion; nor has he done so on appeal; nonetheless Taylor's objection at trial specified voluntary manslaughter as the lesser included offense.

causes the death of an individual, except that he causes the death under the immediate influence of sudden passion arising from an adequate cause.

As the magistrate judge noted, in the habeas context, this claim lacks merit because a defendant has no constitutional right to a lesser included offense instruction in a non-capital case. See Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988). The magistrate judge also noted that Taylor presented no evidence to support the inference that he acted under sudden passion in response to adequate provocation so as to support only a voluntary manslaughter conviction. We find that habeas relief was properly denied on this ground.

INEFFECTIVE ASSISTANCE OF COUNSEL

Taylor argues several bases for his assertion that his counsel was ineffective. To establish an ineffective-assistance-of-counsel claim Taylor must demonstrate both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, Taylor must show that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687-94. To establish prejudice he must show that counsel's errors were so serious as to render "the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). This Court indulges 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).

Taylor argues that his counsel was ineffective for failing to move for a directed verdict as the state failed to prove a prima facie case that he committed murder; specifically, that the state failed to prove that he caused Grammer's death. However, as discussed above the evidence was sufficient under federal constitutional standards to convict Taylor of murder. The evidence also was sufficient under state law standards even if the applicable Texas law required that the evidence exclude every reasonable hypothesis other than guilt. See Geesa v. State, 820 S.W.2d 154, 156-58 (Tex. Crim. App. 1991). Counsel is not required to make futile motions or objections. Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990).

Taylor argues that his counsel was ineffective for failing to object to testimony that implied that he admitted his guilt. Even if we assume, arguendo, that Taylor's trial counsel was deficient in not so objecting, the evidence of Taylor's guilt was overwhelming such that the admission of the statements did not render the trial unfair or the result unreliable; thus, Taylor has failed to show prejudice. See Lockhart, 113 S.Ct. at 844.

Taylor argues that his counsel was ineffective for failing to object to testimony regarding Taylor's bad reputation during the state's case in chief. Taylor testified at the trial. The testimony about which he complains was presented after he

testified, and it pertains to his reputation in the community for truth and veracity. As the state convincingly argues, Taylor had already put his reputation for truth in issue by testifying, and the state was therefore entitled to present evidence concerning his reputation. Prescott v. State, 744 S.W.2d 128, 130 (Tex. Crim. App. 1988). Counsel is not required to make futile motions or objections. Koch, 907 F.2d at 527.

Taylor argues that his counsel was ineffective for failing to object to statements, made by the prosecutor during argument, which violated his due process rights. In order to establish a claim of prosecutorial misconduct that violates the federal constitution, the defendant must show that the prosecutor's remarks to the jury were more than undesirable or even universally condemnable; they must be so egregious that they rendered the entire trial so fundamentally unfair as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 178-81, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), citing Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Our review of these comments reveals that, even if we assume, arguendo, that the comments were improper under Texas law and that failure to object to them constituted deficient performance, Taylor has not shown that the purported deficiency rendered his proceeding fundamentally unfair or the result unreliable. Lockhart, 113 S.Ct. at 844.

For the foregoing reasons, we are not persuaded by Taylor's ineffective-assistance-of-counsel argument. Accordingly, this ground presents no basis for habeas relief.

REASONABLE DOUBT INSTRUCTION

Taylor argues that the trial court's reasonable doubt instruction deprived him of a fair trial. Although the jury instruction did not include an explicit definition of reasonable doubt, it did provide that:

[a] grand jury indictment is a means whereby a Defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the issue of guilt of the Defendant. The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the Defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. In case you have a reasonable doubt as to the Defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him.

This issue was not raised in the district court. Generally, we need not address issues not considered by the district court. "Issues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). A constitutionally deficient reasonable-doubt instruction cannot be harmless error.

Sullivan v. Louisiana, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

At the time of Taylor's trial, Texas law did not require that the trial court define reasonable doubt. Barnes v. State, 876 S.W.2d 316, 328 (Tex. Crim. App.), cert. denied, 115 S.Ct. 174 (1994). The instant instruction is not clearly defective under the authority Taylor cites in support of his argument on appeal. See, e.g., Geesa, 820 S.W.2d at 163-65 (adopting requirement of definitional reasonable doubt instruction but limiting the retroactive applicability of the new rule); Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992), cert. denied, 113 S.Ct. 2928, 124 L.Ed.2d 670 (1993) (an error of state law rises to the level of a federal due process violation only if it renders the state procedures fundamentally unfair). Taylor has cited, and we have found, no statutory or jurisprudential authority which indicates that the instruction violates the federal constitution. Our refusal to consider the issue will not result in manifest injustice. Therefore, we do not address this issue.

FUNDAMENTALLY UNFAIR TRIAL

Finally, Taylor appears to argue that he was denied a fundamentally fair trial because of the cumulative effect of the above-described errors. We disagree. None of his alleged errors undermine the constitutional validity of his conviction. Taylor has not demonstrated that his trial was fundamentally unfair. See Derden, 978 F.2d at 1458.

CONCLUSION

The judgment of the district court denying federal habeas relief is AFFIRMED.