UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50218
(Summary Calendar)

LEONARD ODELL CAZEY,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(W-93-CA-216)

(December 19, 1994)

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

PER CURIAM:[*]

Leonard Odell Cazey, a Texas state prisoner, appeals the United States District Court's dismissal of his petition for a writ of habeas corpus. Cazey contends that his conviction for attempted murder denied him federal rights. We affirm.

Cazey was indicted for attempted murder. The indictment included charges of a specific intent to commit murder with a

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

deadly weapon and two enhancement paragraphs concerning two previous felony convictions.[1] Cazey was convicted of attempted murder and sentenced to ninety-nine years imprisonment. On appeal, the state appellate court affirmed Cazey's conviction but vacated his sentence because the prosecutor's closing argument was improper. On resentencing, the jury determined that Cazey had used a deadly weapon during the commission of the offense, and that this was his third felony conviction. Based on those findings, the jury sentenced Cazey to life imprisonment.

Cazey challenged his conviction by filing seven state habeas corpus applications with the Texas Court of Criminal Appeals, which denied each petition.[2] Cazey then filed a federal habeas corpus petition, which the United States District Court denied on the merits after adopting the magistrate judge's report and recommendation. Cazey appealed the denial, and the district court granted a certificate of probable cause ("CPC") to appeal. He contends that 1) the evidence was insufficient to support his conviction for attempted murder; 2) the state indictment charging him with attempted murder was defective; 3) his sentence was improperly enhanced; 4) his counsel was constitutionally ineffective; and 5) his conviction raises double jeopardy and due

[1] Cazey had been convicted previously of felony driving while intoxicated ("DWI") and burglary.

[2] A habeas corpus petitioner must exhaust his remedies in the courts of the state. 28 U.S.C. § 2254(b) (1988). The State concedes that Cazey has exhausted his state remedies.

process issues.[3]

Cazey seeks habeas corpus relief, contending that his federal rights have been violated. A habeas corpus petitioner to whom the district court has denied relief may proceed on appeal only upon a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090 (1983).[4] Because the district court issued a certificate of probable cause, we address the merits of Cazey's petition. *See id.* at 893, 103 S. Ct. at 3395 (requiring review on the merits if CPC granted); *see also* 28 U.S.C. § 2253 (1988) (explaining certificate of probable cause procedure).

We review the district court's findings of fact on requests for habeas corpus relief for clear error; we review issues of law *de novo*. *Williams v. Collins*, 16 F.3d 626, 630 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 42, 129 L. Ed. 2d 937 (1994). "A finding of fact made by the district court is clearly erroneous only when the reviewing court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has

---

[3] Cazey contends on appeal that his conviction raises double jeopardy and due process issues. Cazey did not brief these issues, nor did he raise them before the district court. Although we liberally construe the briefs of *pro se* appellants, arguments must be briefed to be preserved. *Price v. Digital Equip. Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988). Generally, claims not argued in the body of the brief are abandoned on appeal, even when the appellant is proceeding *pro se*. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Further, this court does not address issues not considered by the district court. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Consequently, Cazey presents no reviewable double jeopardy or due process issues.

[4] This standard does not require the petitioner to show that he should prevail on the merits, only that the issues may be debated among jurists, a court could resolve the issues differently, or the issues deserve a higher court's consideration. *Id.* at 893 n.4, 103 S. Ct. at 3394 n.4.

been committed." *Id*.

Cazey contends first that the evidence presented to the jury was insufficient to support his conviction for attempted murder. "In a habeas action alleging insufficient evidence, we review the evidence in the light most favorable to the government to determine whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt." *Peters v. Whitley*, 942 F.2d 937, 941 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1220, 117 L. Ed. 2d 457 (1992). A state appellate court's determination on the sufficiency of the evidence for a conviction warrants great weight in a federal habeas review. *Porretto v. Stalder*, 834 F.2d 461, 467 (5th Cir. 1987).

To convict a defendant of attempted murder under Texas law, the state must prove that the defendant acted with the intent to cause the death of another, and that the performance of the act constituted more than mere preparation for the offense. *See* Tex. Penal Code Ann. §§ 15.01(a), 19.01(a) (West 1994). The prosecutor presented both the victim's testimony and objective evidence at trial. Ricky Green testified that he had driven his truck to a gate near Cazey's trailer home, on his way to his in-laws' trash dump, when Cazey came out of his trailer home and threatened to shoot Green if he went through the gate. Green testified that he told Cazey that he could go through the gate if he wanted to, and that Cazey then picked up a rifle and fired several shots at him. The evidence showed that there were multiple bullet holes located in and around the passenger-side door of Green's truck, and that

bullets had landed within inches of Green's body. Based on Green's testimony and the objective evidence, the state appellate court affirmed Cazey's conviction. We hold that this evidence is sufficient for a rational jury to convict Cazey beyond a reasonable doubt.

Cazey next argues that the indictment was insufficient to charge him with attempted murder. He argues specifically that the indictment failed to charge him with an offense because it did not allege that he fired his rifle *at the victim*, and that the indictment's charge that he fired "a gun" did not amount to a charge that he used a deadly weapon under Texas law. "The sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction." *Branch v. Estelle*, 631 F.2d 1229, 1233 (5th Cir. 1980); *see also Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985). Moreover, the question of whether a defective indictment deprived the trial court of jurisdiction is foreclosed to a federal court reviewing a habeas corpus petition when the state courts have held that the indictment is sufficient under state law. *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); *Liner v. Phelps*, 731 F.2d 1201, 1203 (5th Cir. 1984).

Cazey's indictment charged that "on or about the 11th day of November, A.D. 1988 . . . [Cazey] with the specific intent to commit the offense of murder, did . . . attempt to cause the death

of an individual, Ricky Green, by shooting with a gun . . . ." An indictment is sufficient under Texas law when it alleges the elements of the crime. *Alexander v. McCotter*, 775 F.2d 595, 599 (5th Cir. 1985). The state habeas court held that "[t]he charging paragraph, deadly weapon paragraph, and each of the two enhancement paragraphs were adequately phrased and sufficiently proved at trial." *Ex Parte Cazey*, No. 21,992-07. Accordingly, because the state court found the indictment sufficient, we may not review the sufficiency of Cazey's indictment.

Cazey also contends that the jury improperly used two prior felony convictions as the basis for enhancing his sentence. He argues first that a prior DWI conviction should not have been used to enhance his sentence because the cause number of the conviction set forth in the indictment differed from that which the prosecutor proved at trial. A variance between a prior conviction charged in an indictment's enhancement paragraph and the prosecutor's proof of the same prior conviction at the punishment phase of trial will not require reversal unless it causes surprise to the prejudice of the defendant. *Freda v. State*, 704 S.W.2d 41, 42 (Tex. Crim. App. 1986). An enhancement count in the attempted murder indictment charged that Cazey was convicted of felony DWI in the 20th District Court of Robertson County, Cause No. 12,532. At trial, the prosecutor introduced evidence that showed Cazey was convicted of felony DWI in Cause No. 12,542. Obvious typographical variances are unlikely to cause prejudicial surprise to a defendant. *Cole v. State*, 611 S.W.2d 79, 82 (Tex. Crim. App. 1981) (holding that a

transpositional error in cause numbers did not prevent defendant from locating prior record and presenting defense to enhancement allegation). Both the trial court and the state appellate court addressed this issue and found that Cazey did not show that the variance surprised him to his prejudice. We accord a presumption of correctness to the findings of the state courts unless the petitioner implicates particular statutory exceptions to 28 U.S.C. § 2254(d). *Williams v. Collins*, 16 F.3d 626, 631 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 42, 129 L. Ed. 2d 937 (1994).[5] Cazey does not contend that any of the § 2254(d) exceptions are applicable to this issue; consequently, we presume that the state court's findings are correct.[6]

---

[5] 28 U.S.C. § 2254(d) provides, in relevant part, that a federal court will presume that a state court's finding on a factual issue is correct unless a petitioner establishes:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction on the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced . . . , and the Federal Court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

[6] Cazey also argues that the absence of a statement of facts for his prior felony DWI conviction renders it unavailable to enhance his sentence, but he provides no authority for this assertion. Arguments must be briefed to be preserved. *Price v. Digital Equip. Corp.*, 846 F.2d 1026, 1028 (5th Cir. 1988). Consequently, Cazey has failed to preserve this issue for appeal.

Cazey next argues that the jury improperly enhanced his sentence with a prior burglary conviction for which he had received a full pardon. However, Cazey does not produce for the record any evidence that his pardon was grounded on innocence. Therefore, even if Cazey were pardoned for his prior burglary conviction, the state in subsequent cases may use the fact of the conviction to demonstrate that he is a repeat or habitual offender. *See Watkins v. Thomas*, 623 F.2d 387, 388 (5th Cir. 1980) (holding that convictions pardoned for reasons other than innocence may be introduced at sentencing and used to enhance sentence), *cert. denied*, 449 U.S. 1065, 101 S. Ct. 791, 66 L. Ed. 2d 608 (1980).[7]

Cazey further contends that his counsel was constitutionally ineffective for failing to examine properly two prospective jurors during voir dire examination. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that his attorney's performance was deficient and that the deficient

---

Cazey further argues that the felony DWI conviction should not have provided a basis for enhancement of his sentence because his counsel in that case was also a county judge and therefore had a conflict of interest. Cazey presents no facts from the record demonstrating why a conflict of interest existed. Because mere conclusional allegations cannot form the basis of habeas corpus relief, *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982), *cert. denied*, 461 U.S. 951, 103 S. Ct. 2419, 77 L. Ed. 2d 1310 (1983), Cazey presents no cognizable issue for review on this point.

[7] Cazey also argues that the burglary conviction should not have enhanced his sentence because he was not represented by counsel at a probation hearing connected with that conviction. The record, however, reveals that Cazey was represented by an attorney at the hearing. Therefore, Cazey's argument lacks a factual basis.

Cazey argues further that the burglary conviction should not have enhanced his sentence because his counsel was constitutionally ineffective in failing to appeal that conviction. This issue was not raised before the district court. We do not review issues raised for the first time on appeal unless the issues concern purely legal questions and manifest injustice would result if we failed to consider them. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991).

performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To establish deficient performance, a defendant must show that his counsel's performance was so lacking that it fell below an objective standard of reasonableness. *Id.* at 687-88, 104 S. Ct. at 2064. However, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional competence." *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). To establish prejudice, a defendant must show that his counsel's errors were so serious as to render the proceedings fundamentally unfair or unreliable. *Lockhart v. Fretwell*, ___ U.S. ___, ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993). Cazey contends that Cindy Lorraine Manley Corn was a "friend of the court" who had formerly worked for the "jail," and that Aline Carr Merryman was a "relation of family," but he provides neither a factual basis in the record nor an argument as to the legal import of these unsupported allegations. Consequently, Cazey has failed to demonstrate that his attorney's performance was defective.[8]

For the foregoing reasons, we AFFIRM on the merits the decision of the district court.

[8] Moreover, even assuming defective representation, Cazey does not show how it rendered the proceedings fundamentally unfair or unreliable. Cazey's contention accordingly fails both *Strickland* requirements.