UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50517
Summary Calendar

ARNOLDO RAMIREZ VELA,

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
(SA-93-CA-73)

(April 28, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Arnoldo Ramirez Vela, a state prisoner in Texas proceeding *pro se* and *in forma pauperis*, appeals the denial of habeas relief. We **AFFIRM**.

I.

Vela was convicted, in Texas state court, of aggravated robbery and sentenced to 99 years of imprisonment; his conviction was affirmed on direct appeal. And, state habeas relief was

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

denied. Subsequently, Vela sought federal habeas relief under 28 U.S.C. § 2254. The magistrate judge recommended that relief be denied on the merits. Over West's objection, the district court adopted the magistrate judge's recommendation and dismissed West's habeas petition with prejudice. The district court granted a certificate of probable cause.[2]

II.

A.

Vela contends that the evidence was insufficient to sustain his conviction. A habeas petitioner is entitled to relief on an insufficient evidence claim only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt". ***Jackson v. Virginia***, 443 U.S. 307, 324 (1979). When, as here, a state court has reviewed the issue of sufficiency of the evidence, that court's determination is entitled to great weight in federal

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[2] In tandem with his reply brief in this court, Vela filed a motion for appointment of appellate counsel, claiming that he is unable to present effectively his claim and that the resources of the prison's law library places him at an extreme disadvantage. No constitutional right to counsel exists in habeas actions. ***Pennsylvania v. Finley***, 481 U.S. 551, 555 (1987). Vela's filings indicate that he is capable of briefing the issue presented in this appeal without any such assistance; the interests of justice do not require the appointment of counsel. *See* ***Schwander v. Blackburn***, 750 F.2d 494, 502 (5th Cir. 1985). Accordingly, the motion for appointment of counsel is **DENIED.**

habeas review. ***Porretto v. Stalder***, 834 F.2d 461, 467 (5th Cir. 1987).

Under Texas law, two criminal acts are implicit in the offense of aggravated robbery: (1) a theft (whether attempted, in progress, or completed); and (2) an assault. ***Ex parte Santellana***, 606 S.W.2d 331, 333 (Tex. Crim. App. 1980); *see* TEX. PENAL CODE ANN. § 29.03. In his federal petition, Vela contends that the State failed to prove the essential element of theft.

Vela does not challenge the district court's factual findings; findings we are bound to accept unless they are clearly erroneous. ***Gomez v. Collins***, 993 F.2d 96, 98 (5th Cir. 1993). We need not reiterate completely the district court's thorough summary of the facts in this case. Simply put, after Vela and his brother physically forced their way into the victim's home, they removed three rifles from their normal location and loaded them with ammunition. No other property had been moved or tampered. Vela contends that the fact that he and his brother controlled the three rifles for a short period of time is insufficient evidence to establish that he had an intent to commit theft because the rifles were removed in an attempt to protect him and his brother from unknown, armed men who Vela maintains had been pursuing them prior to their forced entry into the home.

Although theft is an integral part of the offense of aggravated robbery, the actual completion of a theft is not necessary for conduct to constitute robbery. ***Blount v. State***, 851 S.W.2d 359, 364 (Tex. Ct. App. 1993). Thus, the State need not

prove that the property sought was actually obtained; it is sufficient to show an intent to obtain or maintain control of the property. ***Id.***

In the present case, there was sufficient evidence from which a reasonable jury could infer that Vela and his brother had the intent to maintain control of, and did, in fact, control, the rifles. Vela acknowledges this fact. Although Vela presented a hypothesis of innocence, the jury was free to choose any reasonable construction of the evidence. *E.g.*, ***Story v. Collins***, 920 F.2d 1247, 1255 (5th Cir. 1991). The jury's rejection of Vela's version regarding the armed men was a credibility determination that should be respected by this court. ***Pemberton v. Collins***, 991 F.2d 1218, 1225 (5th Cir.) (federal habeas corpus statute obligates federal courts to respect credibility determination made by the trier of fact), *cert. denied*, 114 S. Ct. 637 (1993). Based on the evidence, a rational jury could determine that Vela committed aggravated robbery.[3]

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[3] Vela contends for the first time in his reply brief that the State admits that his control over the rifles did not begin until the homeowner fled her home; therefore, "there was no weapon used during the course of committing a theft." Similarly, Vela also raises for the first time in his reply the contention that he "was convicted for being a criminal in general, because ... the State trial [c]ourt relied on an extraneous offense dealing with the alleged cocaine that was found days [after] petitioner and his Brother was [sic] arrested ...." This court does not ordinarily address issues raised for the first time in a reply brief. *E.g.*, ***United States v. Heacock***, 31 F.3d 249, 251 n.18 (5th Cir. 1994); *see* ***Stephens v. C.I.T. Group/ Equip. Fin., Inc.***, 955 F.2d 1023, 1026 (5th Cir. 1992). Vela presents no reason to abandon this general rule.

B.

An introductory sentence of the district court's order states that "a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt and ... therefore, petitioner is entitled to habeas corpus relief." In his opening brief, Vela requests that we review the apparent inconsistency of this sentence with the district court's resolution of his petition. And, in his reply brief, Vela contends that this sentence created a "split opinion" and that the court, by including this inconsistent sentence in its order, effectively granted him habeas relief. As discussed, to the extent that Vela makes a new claim in his reply brief, we are not required to address it. In any event, the erroneous inclusion of "not" in the sentence had no effect on the district court's final disposition of Vela's petition for habeas corpus.

Although the district court's order arguably was ambiguous, the clearly expressed intent of the court can be discerned from an examination of the entire record. *Cf.* ***United States v. McAfee***, 832 F.2d 944, 946 (5th Cir. 1987) (ambiguous or silent oral pronouncement at sentencing). In the analysis portion of its order, the district court set forth unambiguously its reasons for denying habeas relief. Furthermore, in the conclusion to its order, the court ordered explicitly that the magistrate's recommendation be accepted and that Vela's application for habeas relief be denied.

III.

For the foregoing reasons, the denial of habeas relief is **AFFIRMED**.