

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4585
Summary Calendar

LARRY MARTIN GRAY,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(CA5 91 55)

(June 25, 1993)

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:*

Larry Martin Gray was convicted by a Texas state jury of aggravated robbery and was sentenced to a term of imprisonment of forty years. Gray filed a pro se appeal, and his conviction and sentence were affirmed. Gray filed a petition for discretionary review that was denied and a motion for rehearing of the ruling

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

which was also denied. The U.S. Supreme Court denied Gray's petition for writ of certiorari. See Gray v. Texas, (U.S. February 21, 1989) (No. 88-6143). Gray filed an application for habeas corpus relief, and the trial court issued findings of fact and conclusions of law recommending denial of the application. The Texas Court of Criminal Appeals denied the application without a written order.

Gray filed a petition for federal habeas relief, alleging that his conviction was based on insufficient evidence, that prosecutorial misconduct occurred during the course of his trial, that his in-court identification was based upon impermissibly suggestive procedures, and ineffective assistance of counsel. The magistrate judge issued a report, recommending that Gray's claims based on prosecutorial misconduct be dismissed as procedurally barred and that the remaining claims be denied. The district court, after a de novo review of Gray's objections to the magistrate judge's report, adopted the magistrate judge's recommendation and denied the petition with prejudice. The district court issued a certificate of probable cause.

I

Gray argues that the evidence presented at trial was insufficient to show that he placed the victim of the robbery, James Stanley, in fear of imminent bodily injury and death by using and exhibiting a firearm. Gray contends that Stanley's testimony established that he did not fear that he would be harmed or killed.

In evaluating whether a state conviction is supported by sufficient evidence, this court must view the evidence in the light most favorable to the prosecution and then determine whether a rational trier of fact could have found the petitioner guilty beyond a reasonable doubt. Isham v. Collins, 905 F.2d 67, 69 (5th Cir. 1990). This standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. Id. A person commits aggravated robbery under Texas law if he commits theft, with the intent to obtain or control the property, and intentionally or knowingly threatens or places another in fear of imminent bodily injury or death with the use or exhibition of a deadly weapon. Tex. Penal Code Ann. §§ 29.02, 29.03 (West 1989).

"It is proper to allege alternative means by which a crime was committed conjunctively." Sneed v. Texas, 734 S.W.2d 20, 22 (Tex. Ct. App. 1987) (citation omitted). If the indictment alleges more than one means of committing the crime, the State is required to prove only one of the means in which the crime may be committed. Id.

The evidence reflected that Gray entered a Pizza Hut late one evening and pulled a gun on the assistant manager, James Stanley. Stanley testified that he was in fear of his life when Gray pointed the gun at him and that he cooperated with Gray based on that fear. Stanley stated on cross-examination that he did not believe that he would be harmed if he cooperated with Gray.

The evidence that Gray felt physically threatened by Gray's exhibition of the gun at the time of the robbery was sufficient to support the aggravated robbery conviction. The state appellate court found the evidence was sufficient, and such finding is entitled to "great weight." Duff-Smith v. Collins, 973 F.2d 1175, 1184 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3731 (U.S. Apr. 26, 1993) (No. 92-8047). The evidence was clearly sufficient to support the conviction.

Gray argues in his reply brief that the jury charge was improper because it was not stated in the disjunctive, resulting in the placement of a heavier burden of proof than was necessary on the respondent. Because Gray did not raise the jury-charge issue in his district court petition, we are foreclosed from considering the issue. U.S. v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

II

Gray argues that the district court erred in finding his prosecutorial-misconduct issues are procedurally barred because he failed to raise the issues on direct appeal. Gray contends that the state appellate court did not explicitly rely on state-law grounds in dismissing his claims.

A federal habeas court will not review a state court's holding on a federal-law claim that rests upon a state-law ground that is independent of the merits of the federal claim and adequate to support the state court's judgment. Sawyers v. Collins, 986 F.2d 1493, 1499 (5th Cir. 1993). If a state court refuses to review a

federal claim because it is procedurally barred under state law, a federal court will not ordinarily review the federal claim. Id. "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim [are presumed] to rest upon the same ground." Id. (citation omitted).

In recommending denial of the portions of Gray's application for post-conviction relief based on prosecutorial misconduct, the state district court did not address the merits and stated that the grounds raised were errors subject to review on appeal. The state appellate court denied the application without written order, raising the presumption that the prosecutorial misconduct claims were denied on the basis of the procedural bar. No evidence rebuts that presumption. The failure to raise an issue on direct appeal may serve as a basis for a procedural default. See Clark v. Texas, 788 F.2d 309, 310 (5th Cir. 1986). Because Gray's claims are procedurally barred under state law, federal habeas review is not permissible unless Gray shows cause and prejudice or that the failure to review the claim will result in a miscarriage of justice. Smith v. Collins, 977 F.2d 951, 956 (5th Cir. 1992). To establish "cause," Gray must show that he was prevented from raising the issues on appeal by some external impediment. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct 1454, 1470, 113 L.Ed.2d 517 (1991). Gray was aware of the alleged prosecutorial misconduct at the conclusion of the trial and thus has not demonstrated cause

for the failure to raise the issues on direct appeal. Gray has not demonstrated that manifest injustice will occur if the claims are not reviewed because he has not alleged facts indicating his actual innocence. Id. at 1471. (federal court must address constitutional claim that is barred if it is supplemented with a colorable showing of factual innocence). The district court was correct in finding the issues dealing with prosecutorial misconduct are procedurally barred.

III

Gray argues that his in-court identification by witnesses should have been suppressed because the witnesses were shown a photographic line-up on the day before trial. Gray also contends that the previous photographic line-up shown to Kenneth Wrightner was impermissibly suggestive because he was wearing an orange jail uniform. Gray finally argues that the identification procedure was invalid because he was the only black man in the courtroom and the witnesses were permitted to view him in the courtroom, resulting in a one-man line-up.

The police showed James Stanley and Constance Green, Pizza Hut employees who were working on the night of the robbery, six pictures of men, including a photo of Gray, several months after the robbery occurred. The pictures, taken from the chest up, were of men of the same race with basically the same body build. Stanley and Green testified that the officer did not indicate that the suspect's picture was included in the line-up and that the

officer did not recommend that a certain photograph be chosen. Stanley and Green each selected the picture of Gray out of the line-up as the man who robbed the restaurant. Kenneth Wrightner, who was present when Gray entered the store and saw him leaving the restaurant while standing outside the restaurant, was shown a different pictorial line-up containing a more recent photograph of Gray. Wrightner was shown six pictures of men of the same race and similar builds, and he selected the picture of Gray without any suggestion from the officer. Wrightner testified that he did not place significance on the fact that Gray was dressed differently from the other individuals in the photographic line-up shown to him and that he did not recognize Gray's shirt as a part of a jail uniform. The witnesses acknowledged that they were shown photocopies of the same photographic line-ups again shortly before trial and that they were each able to identify Gray in the line-ups. The evidence does not reflect that the photographic line-ups shown to the witnesses on two different occasions were impermissibly suggestive on either occasion.

We would further point out that the identifications were reliable based on the totality of the circumstances. Each of the witnesses positively identified Gray at trial as the individual who robbed the store, based on their observations on the night of the robbery. The restaurant was well-lit, and Stanley and Green had a three-to-five minute frontal view of the perpetrator from a close range. Wrightner observed Gray in the restaurant and in the

parking lot. Finally, each of the witnesses gave a detailed description of the robber.

IV

Gray argues that the prosecutor acted improperly in showing the witnesses the photographic line-up on the day before trial without notifying Gray's counsel. The Sixth Amendment does not grant a suspect the right to counsel at photographic displays conducted by the government in an attempt to identify the perpetrator of a crime. U.S. v. Ash, 413 U.S. 300, 321, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). This argument is without merit.

V

Gray argues that his attorney was ineffective during the course of the trial because of his failure to object to prosecutorial misconduct. We disagree.

Gray argues that his counsel was ineffective because he failed to object to a series of leading questions by the prosecutor which addressed central issues in his case. Although some of the questions may have been leading in nature, the failure to object to leading questions is ordinarily a matter of trial strategy which will not be questioned by the Court. Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993). Further, Gray has not demonstrated how the questions and the responses received rendered the result of his trial unreliable or fundamentally unfair.

Gray contends that his counsel was ineffective because he failed to object to the prosecutor's statement during opening

argument that the burden is on the State to prove the charge against the defendant to a moral certainty and further erred by adopting that standard of proof in counsel's opening.

The prosecutor's statement placed a greater burden of proof on the State than necessary because proof beyond a reasonable doubt is all that is required. U.S. v. Lane, 693 F.2d 385, 391 (5th Cir. 1982). Because the statement was favorable to the defense, counsel acted reasonably in not objecting to the statement and in adopting the standard.

Gray further contends that his counsel erred in not objecting to the prosecution's statement of the elements to be proved which were not in conformity with the jury charge given. Specifically, Gray is complaining because the prosecutor told the jury that the State must prove that Gray committed theft of property while intentionally or knowingly threatening or placing another in fear of imminent bodily harm or death, by using a weapon. The jury charge in one section erroneously stated there must be proof of intent to place the victim in fear of bodily harm and death. However, the prosecutor's statement was in conformity with the elements of aggravated robbery under Texas law, and there was no basis for counsel to object to the statement. Tex. Penal Code Ann. §§ 29.02, 29.03 (West 1989).

Gray contends that his counsel erred in not requesting the jury to return a verdict of not guilty. Gray cites the Court to a statement made by his counsel during the punishment phase of the

trial. Because the jury had already determined Gray's guilt, counsel did not err in acknowledging Gray's wrongdoing in seeking a lenient penalty. Gray contends that counsel was ineffective because he did not object to the prosecutor characterizing the aggravated robbery as "just short of capital murder." The prosecution correctly characterized aggravated robbery, a first degree felony, as directly below capital felonies with respect to its gravity in the classification of serious offenses against the state. Tex. Penal Code Ann. § 12.04 (West 1974), § 29.03(b) (West 1989). Counsel was not deficient in failing to object to the statement.

Gray also argues that counsel should have objected to the prosecutor advising the jury that the state would seek a lengthy sentence because the statement indicated that Gray had prior convictions or that the evidence of guilt was overwhelming. The prosecutor during voir dire was merely advising the potential jurors of the possible sentence that could be imposed in the case and inquiring whether they had a problem with imposing such a sentence. The statement was not objectionable.

Gray contends that his counsel was ineffective in failing to object to the prosecution's use of perjured testimony at trial. Gray argues that Kenneth Wrightner's testimony that he observed Gray standing by the cash register in the restaurant for a few minutes is false because he gave a contradictory statement to police on the night of the robbery. In cross-examining Wrightner,

Gray's counsel pointed out the inconsistency in the testimony and Wrightner's statement that Gray passed him as he walked out the restaurant in an effort to impeach Wrightner. Wrightner admitted the inconsistency and gave an explanation for his error.

To show a due process violation as a result of the use of perjured testimony, a petitioner must show that the testimony given was false, that the falsity was material in that it would have affected the jury's verdict, and that the prosecution used the testimony knowing that it was false. May v. Collins, 955 F.2d 299, 315 (5th Cir.) cert. denied, 112 S.Ct. 1925 (1992). Gray has not shown that his counsel failed to object to the admission of false testimony that affected the outcome of the verdict. Nor has Gray demonstrated that the other testimony which he cites is perjurious. Counsel did not err in failing to object to the admission of perjured testimony.

Gray argues that his counsel was ineffective in failing to object to the introduction of hearsay testimony by Officer Scott because counsel could not cross-examine the sources. The alleged hearsay testimony occurred during the following colloquy:

Q. And, can you tell the jury how you developed that suspect?

A. By working with a detective on the Texarkana, Arkansas, side and talking to some people that had been put in jail and on the street, we came up with a suspect.

The testimony was introduced to establish why the police considered Gray to be a suspect and not to establish the

truthfulness of the statements of the informants. Therefore, the testimony did not constitute hearsay. Tex. R. Crim. Evid. 801.

Gray argues that his counsel erred in failing to object to the prosecution bolstering a witness's hearsay testimony. The testimony of Officer Mike Scott which Gray contends was objectionable reflected that Stanley, Green, and Wrightner identified Gray in the photographic line-up in Scott's presence. Scott's statement of his observations did not constitute hearsay testimony and, therefore, counsel did not err in failing to object to the testimony.

Gray contends that his counsel was ineffective because he did not object to the prosecutor's explanation during closing argument why the victims were able to recall Gray's features. The prosecutor pointed out that if a person points a gun at you, you will remember the incident and the individual's face. Gray contends that the prosecutor gave the appearance of being an expert witness and that his argument bolstered the testimony of the identification witnesses. Gray's argument is meritless. Certainly, Gray has not demonstrated that the prosecutor's remark was so inflammatory as to deprive him of a fair trial.

Gray argues that his counsel was ineffective for failing to object to the prosecutor expressing his personal opinion regarding Gray's guilt during the voir dire and closing argument. The first remark that Gray complains about is the prosecutor's statement during voir dire that he believed Gray's guilt would be supported

by the evidence. Such a statement has been held to be permissible and, thus, counsel did not err in failing to object. See U.S. v. Strmel, 744 F.2d 1086, 1089 (5th Cir. 1984). In the other statements cited by Gray, the prosecutor stated that Gray had been identified and was guilty beyond a reasonable doubt. The prosecutor was merely stating his belief based on the evidence, and his statements did not bolster the credibility of the witnesses. In any event, Gray has not demonstrated that the statements deprived him of a fair trial.

Gray argues that his counsel was ineffective in failing to object to the prosecutor presenting false facts to the jury during the penalty phase of the trial by stating Gray committed five robberies when he had been previously convicted of four robberies. The prosecutor erroneously stated that Gray had five previous robbery convictions because Gray had been previously convicted of only four robberies. The error was obviously unintentional because the parties had just entered into a stipulation correctly listing Gray's past convictions and the stipulation was admitted into evidence. The statement did not constitute prosecutorial misconduct. Gray has not demonstrated that the failure to object rendered his trial unfair, especially in light of the fact that the jury had the benefit of the stipulation.

Gray argues that his counsel was ineffective in failing to object to the prosecutor's argument to the jury that it should consider its duty to the community in the course of its

deliberations. The argument made by the prosecutor was a permissible plea for law enforcement and was not objectionable. U.S. v. Caballero, 712 F.2d 126, 132 (5th Cir. 1983). Therefore, counsel was not deficient in his failure to object.

Lastly, Gray argues that his counsel was ineffective in failing to object to the prosecutor's bolstering the credibility of the grand jury that indicted him during the voir dire. The prosecutor was merely explaining the grand jury system to the jury. The prosecutor specifically advised the jury that the grand jury indictment did not constitute evidence against the defendant and that it was not to be considered as evidence. The statement was not objectionable and certainly had no effect on the reliability of the outcome of the trial.

In sum, Gray has failed to demonstrate an ineffective assistance of counsel claim.

VI

For the reasons set out above, the judgment of the district court denying federal habeas relief to Larry Martin Gray is

A F F I R M E D.