

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 27, 2021

Christopher M. Wolpert
Clerk of Court

ROBERT JOSEPH STILLWAGON,

Petitioner - Appellant,

v.

JIMMY MARTIN,

Respondent - Appellee.

No. 20-6165
(D.C. No. 5:19-CV-00352-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **BACHARACH**,
Circuit Judges.

This case grew out of Mr. Robert Joseph Stillwagon's conviction in Oklahoma for crimes committed against two stepdaughters. The crimes included indecent or lewd acts with a child under the age of 16 (Okla. Stat. tit. 21, § 1123) and attempted rape (Okla. Stat. tit. 21, §§ 1111, 1114). Mr. Stillwagon unsuccessfully appealed in state court and sought habeas relief in federal district court. He seeks to appeal the denial of habeas relief. To appeal, however, he needs a certificate of appealability; so he has asked us for one. *See* 28 U.S.C. § 2253(c)(1)(A). We deny this request and dismiss the appeal.

1. Standard for a Certificate of Appealability

In itself, the standard for a certificate of appealability is light, requiring only a showing that (1) reasonable jurists could debate the correctness of the district court’s ruling or (2) the issues are “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). But we must apply this light standard against the rigorous requirements for habeas relief.

When a state appeals court has rejected the same claims on the merits, federal law prevents relief unless the state court has

- ruled contrary to a Supreme Court precedent or
- unreasonably applied Supreme Court precedent.

28 U.S.C. § 2254(d)(1)–(2). So when deciding whether to grant a certificate of appealability, we must consider federal law’s deference to the pertinent state appellate opinion. *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

2. Mr. Stillwagon’s Four Appellate Arguments

In the desired appeal, Mr. Stillwagon states that he would raise four arguments: (1) the evidence was insufficient to convict, (2) the prosecutor committed misconduct, (3) trial counsel was ineffective, and (4) cumulative errors prevented a fair trial. None of these arguments are reasonably debatable or adequate to proceed under the deferential review accorded to the state appellate opinion.

A. Sufficiency of the Evidence

The convictions stemmed largely from testimony by the two stepdaughters. The state appellate court pointed out that the two stepdaughters had described conduct constituting (1) lewd and indecent conduct and (2) attempted rape. Mr. Stillwagon does not argue to the contrary.

He instead argues that no reasonable juror could have credited the stepdaughters' testimony because it was not believable or corroborated. The state appellate court concluded that (1) Mr. Stillwagon had waived the issue through inadequate briefing, (2) the stepdaughters' testimony had not been incredible or inherently improbable, and (3) corroboration was unnecessary.

On habeas review, a federal district court cannot "reject[] a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam). The federal district court can reject the challenge only if the state court's assessment of the evidence was "objectively unreasonable." *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). The court considers objective reasonableness based on the underlying test for sufficiency of the evidence. Under this test, we view the evidence in the light most favorable to the prosecution, considering whether any rational factfinder could have found guilt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Viewing the evidence favorably to the prosecution, a reasonable jury could have found guilt notwithstanding the purported discrepancies in the stepdaughters' testimony.

We rejected a virtually identical challenge in *Parker v. Scott*:

[I]t is axiomatic that the responsibility of adjudging the child's credibility belonged to the trier of fact, not to us. We do not have the benefit of observing the witnesses in the crucible of the courtroom during direct and cross-examination and thus are not in a position to second-guess the jury's credibility determinations. To the extent [Petitioner] claims that the child gave inconsistent statements at trial and in the other interviews, his counsel had the opportunity to cross-examine the child and the other witnesses to expose the alleged inconsistencies The jury was in a position to credit or discount the child's testimony and weigh the inconsistencies in light of her age and the passage of time.

394 F.3d 1302, 1315 (10th Cir. 2005).

Here too, Mr. Stillwagon is asking us to second-guess the jury's assessment of the children's credibility. But we must consider the stepdaughters' testimony in the light most favorable to the prosecution. *See* Part 2(A), above. And we must consider whether the state court rejection of Mr. Stillwagon's sufficiency-of-the-evidence challenge was objectively unreasonable. In this light, no reasonable jurist could conclude the state appellate court's conclusions regarding the sufficiency of the evidence based on the stepdaughters' testimony were objectively unreasonable.

Despite that testimony, Mr. Stillwagon argues that Oklahoma law required corroboration. This argument fails legally because a violation of

state law would not justify habeas relief. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). We instead consider only federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). And the Supreme Court has never required corroboration of child witnesses. *See Parker*, 394 F.3d at 1314 (“No direct Supreme Court precedent requires corroboration of child witness testimony.”). Given the absence of a Supreme Court opinion requiring corroboration, any reasonable jurist would reject Mr. Stillwagon’s habeas challenge on sufficiency of the evidence.

B. Prosecutorial Misconduct

Mr. Stillwagon also argues that the prosecutor committed misconduct in closing argument and in questioning the stepdaughters. The state appeals court rejected this argument, reasoning in part that the trial had ultimately been fair. (The court also concluded that Mr. Stillwagon had failed to adequately brief prosecutorial misconduct or to show plain error.) In our view, Mr. Stillwagon’s arguments are not reasonably debatable.

1. Closing Argument

Mr. Stillwagon contends in part that the prosecutor improperly asked the jury to compare the reactions by Mr. Stillwagon and his stepdaughters. This characterization is inaccurate. The prosecutor simply commented on the strength of the evidence and challenged defense counsel’s gloss on the evidence.

Mr. Stillwagon also complains that the prosecutor vouched for the stepdaughters' credibility. This characterization is inaccurate. The prosecutor said:

And I would submit to you that, if they were going to make up stories, they could have made up a lot better story and that right there tells you they're telling the truth. They are telling the truth. They have been consistent . . . since they were interviewed, since they made their disclosure. They have been consistent. They haven't changed what they have said has happened to them.

R., vol. 3 at 553. The state appellate court could reasonably decline to characterize this argument as vouching, so no jurist could question the state court's decision under the rigorous test for habeas relief.

Vouching typically “occurs when the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony.” *Hanson v. Sherrod*, 797 F.3d 810, 837 (10th Cir. 2015) (internal quotation marks omitted).

The prosecutor here did not say that she believed that the stepdaughters were telling the truth. She instead argued that their testimony was believable. The state appellate court thus acted reasonably in rejecting Mr. Stillwagon's claim of vouching. Given the reasonableness of this conclusion, no jurist could legitimately question the correctness of the district court's ruling under the test for habeas relief.

2. Questioning the Stepdaughters

Mr. Stillwagon also complains of the prosecutor's appeals to emotions when asking the stepdaughters "whether or not they missed Robert Stillwagon, whether they were worried if other witnesses were upset, whether or not they simply tolerated the alleged abuse as a part of being Stillwagon's stepchild, and whether or not they loved him." Def.'s Mot. for Certificate of Appealability at 27. These questions related to the witnesses' credibility, the timing of their disclosure of the abuse allegations, and their potential motivations to lie. The state appellate court thus acted reasonably in concluding that Mr. Stillwagon had "fail[ed] to show the prosecutor's alleged misconduct, individually or cumulatively, deprived him of a fair trial or sentencing." Appellant's App'x at 11. As a result, Mr. Stillwagon's habeas challenge is not reasonably debatable under the test for habeas relief.

3. Ineffective Assistance of Counsel

Mr. Stillwagon contends that trial counsel was constitutionally ineffective for (1) failing to object based on prosecutorial misconduct, (2) failing to impeach the stepdaughters with inconsistencies in their statements, and (3) presenting a bizarre and prejudicial closing argument.

To establish ineffective assistance, Mr. Stillwagon must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel's performance was

deficient, we engage in two forms of deference. We of course defer to the state appellate court's disposition. *See* Part 1, above. But we also consider “whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.” *Harrington v Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks omitted).

In our view, the state appellate court's reasoning is unassailable. We have elsewhere rejected the claim of prosecutorial misconduct, so an objection would have proven futile. He has not reasonably developed any of his other theories of ineffective assistance. *See Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999) (“We do not consider unsupported and undeveloped issues.”).

C. Cumulative Error

Mr. Stillwagon also challenges the fundamental fairness of his trial based on the cumulative effect of the evidentiary insufficiency, prosecutorial misconduct, and ineffective assistance of counsel. But we have rejected these claims of error, and “[c]umulative error cannot be predicated on non-errors.” *United States v. Oldbear*, 568 F.3d 814, 825 (10th Cir. 2009). So no jurist could reasonably question the district court's rejection of this claim.

* * *

We conclude that Mr. Stillwagon has not justified a certificate of appealability on any of his four proposed arguments. We thus decline to issue a certificate; and with no certificate, we dismiss this matter.

Entered for the Court

Robert E. Bacharach
Circuit Judge