

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEP 11 1990

ROBERT L. HOECKER
Clerk

JOHNNY L. HARDEMAN,
Petitioner-Appellant,

v.

JACK COWLEY, Warden; ROBERT H. HENRY,
Attorney General,
Respondents-Appellees.

No. 89-7046
(D.C. No. 88-616-C)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This is an appeal by Johnny L. Hardeman from the district court's order denying his petition for a writ of habeas corpus. Hardeman contends the district court erred in finding that: (1) there was sufficient evidence to support his conviction; (2) none of the evidentiary error at trial resulted in fundamental

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

unfairness; and (3) there was no ineffective assistance of counsel. We affirm.

We review sufficiency of the evidence in a habeas proceeding to determine whether there is evidence in the record from which a rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979). We agree with the district court that sufficient evidence supports the conviction. The evidence at trial clearly established a motive, established that Hardeman was seen with the deceased shortly before her murder, and adequately showed the time and manner of death. The lack of direct eyewitness testimony that Hardeman actually committed the murder is not necessary; the state may prove its case circumstantially. The district court did not err in rejecting Hardeman's sufficiency of the evidence challenges.

We next turn to Hardeman's evidentiary challenges. We will upset a conviction on evidentiary grounds only if the rulings rendered the trial so fundamentally unfair as to constitute a denial of federal constitutional rights. See Gillihan v. Rodriguez, 551 F.2d 1182, 1192-93 (10th Cir.), cert. denied, 434 U.S. 835 (1977). Hardeman contends that the state trial court erred in admitting evidence that the deceased would have testified that Hardeman was involved in the Morgan murder. We disagree. Such testimony was clearly admissible to show Hardeman's possible motive for the murder of the deceased. We cannot say this error was "fundamental."

We likewise reject Hardeman's contention that the state trial court improperly discounted the recantation of witness Chaplin. As we noted in United States v. Ahern, 612 F.2d 507, 509 (10th Cir. 1980), cert. denied, 449 U.S. 1093 (1981), recantations are looked upon with "downright suspicion." The state court held a full evidentiary hearing on the recantation and determined it was without merit. We are bound to treat such fact findings as determinative unless grounds for their being set aside are advanced. See 28 U.S.C. § 2254(d). No such grounds are advanced, and we find none in the record. The district court did not err in rejecting this ground for relief.

Hardeman also challenges two prosecutorial actions as violating Brady v. Maryland, 373 U.S. 83 (1963). The first is the admission of a footprint cast taken from the area in which the body was found. The cast apparently did not match Hardeman's foot size. Testimony also revealed, however, that the footprint could not be definitively attributed to the time of the murder. Hardeman contends that he was not told of this footprint cast before trial. We do not find that Hardeman objected to the admission of this information. In any event, the footprint cast was fully discussed in trial, and Hardeman's counsel cross-examined the issue intensively. We agree with the district court that Hardeman was not substantially prejudiced by either the admission of this cast, or by its withholding from pretrial notification, if such in fact did occur. The cast simply is not very probative of either guilt or innocence. In any event, the jury had all the evidence before it. We find no constitutional

error in the trial court's handling of the footprint cast. We similarly find no error in the prosecution's withholding of the names of two other initial suspects in the murder.

In summary, we find that none of the alleged evidentiary errors, either by themselves or in total, are sufficient to have rendered Hardeman's trial fundamentally unfair.

Hardeman's last ground for relief is ineffective assistance of counsel. We note that Strickland v. Taylor, 466 U.S. 668 (1984), cautions that counsel is presumed to have rendered adequate assistance. Hardeman's principal complaint about appellate counsel's performance is counsel's failure to raise the "other crimes" evidence in the Morgan murder. As we noted above, the use of that evidence was proper to show Hardeman's possible motive for murdering the deceased. We cannot say that the appellate counsel fell below the Strickland standard by failing to raise the "other crimes" evidence. Hardeman has not challenged his counsel's performance otherwise. We find no ineffective assistance.

We GRANT the motion to proceed in forma pauperis. We DENY the certificate of probable cause because we find that Hardeman has not made a substantial showing of a denial of an important federal right. See Barefoot v. Estelle, 463 U.S. 880 (1983).
APPEAL DISMISSED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge