IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
December 19, 2019

Lyle W. Cayce
Clerk

No. 17-50891

BOBBY JOE BUCKNER,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, DENNIS, and HO, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Bobby Joe Buckner was convicted of aggravated sexual assault of a child. He contends that one of the convicting jurors was biased by the juror's personal and family history. The district court denied his petition for federal habeas relief. We affirm.

I.

At Buckner's trial, several voir dire questions addressed the potential jurors' experiences relating to sexual assault or abuse. First, the trial judge asked the potential jurors whether they or someone they knew had been

accused of certain sexual crimes.[1] Defense counsel later asked the potential jurors whether they or someone they knew had been a victim of either child abuse or sexual abuse that "would affect your ability to sit in a trial and be fair and impartial."

The juror at issue here, R.H., did not respond to these questions. After the jury was selected but before the start of trial, R.H. privately disclosed to the judge and the attorneys that his father had been convicted of sexually assaulting his stepsister. R.H. explained that he was too embarrassed to answer during voir dire because he knew several other prospective jurors. He had hoped for a chance to speak privately, but jury selection concluded sooner than he had expected. He said the abuse was an "emotional issue" for him, but he repeatedly stated that he could be fair and impartial.

R.H. remained on the jury, which convicted Buckner and sentenced him to 50 years' imprisonment.[2] Buckner filed a motion for a new trial. The motion stated that Buckner's trial counsel learned, after trial, that R.H. "withheld material information during voir dire." Specifically, Buckner's counsel asserted in a supporting affidavit that not only had R.H.'s father sexually abused his stepsister, R.H.'s father had also abused R.H. Counsel also asserted that R.H. was the victim, in a separate incident, of kidnapping and attempted sexual assault. The affidavit is silent as to how Buckner's counsel learned this information and as to the particulars of the alleged incidents.[3] The affidavit

[1] "Is there anyone on the panel who either they, or a close, personal friend or a family member has ever been accused or charged with Aggravated Sexual Assault, Sexual Assault, Sexual Assault of a Child, Indecency with a Child, anything of that nature?"

[2] *See Buckner v. State*, No. 10-11-00277-CR, 2013 WL 3482134 (Tex. App.—Waco July 11, 2013, pet. ref'd) (unpublished).

[3] On the personal-abuse point, the affidavit states: "After trial, I learned that [R.H.] himself had been sexually abused by his father, and on another occasion had been kidnapped

stated that R.H.'s supposed omission was made "more egregious" by R.H. disclosing his stepsister's abuse without mentioning his own. In his motion for a new trial, Bucker argued that he was denied an impartial jury by R.H.'s failure to disclose this personal abuse and his belated disclosure of his stepsister's abuse.

This motion was denied by operation of law,[4] the Texas Court of Appeals affirmed Buckner's conviction and sentence on direct appeal,[5] and the Texas Court of Criminal Appeals ("TCCA") refused Buckner's petition for discretionary review and denied his state habeas application without written order. Buckner then filed a Section 2254 application raising several issues. In relevant part, he argued he was denied due process by the trial court's denial of his motion for a new trial. The district court concluded that the "implicit finding [of the state court] that the subject juror was impartial was not manifestly erroneous." It noted that Buckner had not submitted an affidavit from R.H. to support the assertion that R.H. had been the victim of sexual abuse, and therefore there was no actual evidence that R.H. was abused. The district court also noted that R.H. had stated repeatedly that, even though his father abused his stepsister, "he could reach a verdict based on the evidence." Thus, the district court concluded that because no juror "demonstrated bias

---

and the victim of an attempted sexual assault. If he had disclosed this information, I would have asked whether he could set his feelings aside about that and be fair and impartial in Mr. Buckner's trial, in an effort to challenge him for cause. If [R.H.] had persisted that he would be fair and impartial in Mr. Buckner's trial, I would have exercised a peremptory challenge against him."

[4] In Texas, if a motion for a new trial is not granted ten days after judgment is entered, the motion is considered denied. *See* TEX. CODE CRIM. PROC. ANN. art. 45.038(b).

[5] *See Buckner*, 2013 WL 3482134, at *7. The Texas Court of Appeals rejected challenges based on sufficiency of the evidence and admission of a doctor's testimony under a hearsay exception. Buckner did not raise the juror-bias issue at this stage.

such that [Buckner] was deprived of his right to an impartial jury," the state court's rejection of this claim "was not contrary to or an unreasonable application of federal law." The district court denied Buckner's federal petition and denied a certificate of appealability.

Buckner submitted a timely notice of appeal, raising only his claim of juror bias. We granted a certificate of appealability on the claim that he had been denied "due process when [the trial court] denied his motion for a new trial, which itself was based on a claim that he was denied an impartial jury because one of the jurors had failed to timely disclose a family history of sexual abuse and had not disclosed a personal history of sexual abuse."

II.

This is an appeal from the denial of Section 2254 relief. Under the Antiterrorism and Effective Death Penalty Act of 1996, this court reviews issues of law de novo and findings of fact for clear error, applying the same deference to the state court's decision as did the district court.[6] The district court was required to defer to state court decisions on questions of law and mixed questions of law and fact unless they were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[7] "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."[8]

[6] *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007).

[7] 28 U.S.C. § 2254(d)(1).

[8] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III.

"The Sixth Amendment guarantees an impartial jury, and the presence of a biased juror may require a new trial as a remedy."[9] A juror is biased if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[10] "A claim of alleged bias is ordinarily addressed in a hearing where the judge examines the juror and obtains assurances of the juror's impartiality."[11] Where a juror has a close connection to the circumstances at hand, however, bias may be presumed as a matter of law.[12]

On federal habeas review, state court findings concerning a juror's impartiality are factual determinations entitled to a presumption of correctness.[13] As noted above, the district court found that Buckner had not shown that the state court's implicit finding that R.H. was impartial was erroneous.

---

[9] *Hatten v. Quarterman*, 570 F.3d 595, 600 (5th Cir. 2009).

[10] *Id.* (quoting *Soria v. Johnson*, 207 F.3d 232, 242 (5th Cir. 2000)).

[11] *Id.* (citing *Brooks v. Dretke*, 444 F.3d 328, 330 (5th Cir. 2006)).

[12] *See Brooks*, 444 F.3d at 330.

[13] *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984); *see also Virgil v. Dretke*, 446 F.3d 598, 610 n.52 (5th Cir. 2006) ("Juror bias is a finding of fact."). We note that Buckner raised the juror-bias claim in his state habeas application, but the Texas courts did not specify reasons for denying relief. The motion for a new trial was denied automatically by the passage of time, and the fact findings made in the state habeas proceeding did not concern the issue of juror bias or the denial of the motion for a new trial. The TCCA then denied relief without written order. When "a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits" even without written explanation of the court's reasoning. *Harrington*, 562 U.S. at 99. "For such a situation, our court: (1) assumes that the state court applied the proper 'clearly established Federal law'; and (2) then determines whether its decision was 'contrary to' or 'an objectively unreasonable application of that law." *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003).

A.

Buckner argues that R.H.'s failure to disclose his family and personal history during voir dire demonstrates his bias. To obtain a new trial due to a juror's alleged failure to answer questions honestly during voir dire, the defendant must satisfy the test set out in *McDonough Power Equipment v. Greenwood*.[14] Under this test, the defendant must show that the complained-of juror failed to provide an honest answer to a material question and that a truthful response would have provided a valid basis to challenge the juror for cause.[15] To demonstrate actual bias, "admission or factual proof" of bias must be presented.[16]

Assuming for argument that R.H. failed to answer a question honestly, the second *McDonough* prong—whether a truthful response would have been a valid basis to challenge R.H. for cause—dooms Buckner's claim of actual bias. The question of cause turns on state law.[17] Under the applicable law and the facts in this case, a challenge for cause could have been made based on a claim of bias.[18] However, Texas courts have found that a juror who was the victim of a similar crime but who credibly states he will not be affected by that fact is

---

[14] 464 U.S. 548, 556 (1984).

[15] *See United States v. Bishop*, 264 F.3d 535, 554 (5th Cir. 2001) (citing *McDonough*, 464 U.S. at 556). Although *McDonough* was a federal civil case on direct appeal, this Court has applied its standards in reviewing state criminal cases on federal habeas review. *See Montoya v. Scott*, 65 F.3d 405, 418–19 (5th Cir. 1995) (assuming without deciding that a *McDonough* theory of juror bias would warrant federal habeas relief); *see also Austin v. Davis*, 876 F.3d 757, 786 & n.262 (5th Cir. 2017) (citing *Montoya* and again assuming *McDonough* applies in a federal habeas proceeding), *cert. denied* 138 S. Ct. 2631 (2018).

[16] *Bishop*, 264 F.3d at 554.

[17] *See Montoya*, 65 F.3d at 419.

[18] *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) (allowing a challenge for cause if a juror is biased or prejudiced).

not biased.[19] In addition, in cases in which potential jurors have disclosed the grounds for possible bias but have stated that they could be fair, we have held that the defendant was not denied an impartial jury.[20]

First, information about R.H.'s family history would not have supported a challenge for cause.[21] That R.H. came forward to disclose his family history of abuse—and explained that he initially failed to disclose it out of embarrassment—indicates he was not biased.[22] During the meeting in chambers, R.H. repeatedly stated that he had intended to disclose this family history privately, but was never given the opportunity. R.H. did not express a view adverse to any party and he repeatedly stated he would be fair and impartial.[23] There is no indication that R.H. concealed this family history due to bias or an effort to secure a place on the jury.[24]

Second, to the extent Buckner alleges R.H. personally suffered abuse, he has not presented evidence this occurred.[25] As the district court noted, "[t]he

---

[19] *See, e.g.*, *Williams v. State*, No. 05-06-00447-CR, 2006 WL 3742904, at *4 (Tex. App.—Dallas Dec. 21, 2006, pet. ref'd) (unpublished).

[20] *See Green v. Quarterman*, 213 F. App'x 279, 281 (5th Cir. 2007) (unpublished) (finding counsel was not ineffective for failing to challenge jurors who had stated that they or their family members had been victims of similar offenses, given their assurance that they could be fair).

[21] *See McDonough*, 464 U.S. at 556.

[22] *Cf. Bishop*, 264 F.3d at 555 ("Failure to disclose a conviction . . . due to embarrassment, also does not suggest bias.").

[23] He stated that he did not believe his family history of abuse would impair his judgment and that the "facts are the facts." He acknowledged it was an emotional issue but said, "no, it does not impair."

[24] *Cf. United States v. Colombo*, 869 F.2d 149, 150 (2d Cir. 1989) (remanding to determine whether juror's brother-in-law was a lawyer for the Government, where juror allegedly told another juror that she had not revealed this because she wanted to be on the jury).

[25] *See United States v. Moore*, No. 92-8589, 1994 WL 395070, at *5 (5th Cir. June 28, 1994) (unpublished but precedential under 5TH CIR. R. 47.5.3) ("Moore's affidavit setting forth his subjective belief about events over which he has no personal knowledge is thus

allegations in the affidavit are not supported by an affidavit from the juror—there is no sworn statement from the *juror* that they withheld the fact of their own abuse from defense counsel or the trial court." And while counsel's affidavit is sworn, it fails to provide any explanation of how counsel learned of R.H.'s alleged past abuse. Buckner's assertion in his reply brief that counsel learned of this information from a court coordinator also fails to explain how the court coordinator learned this alleged fact and thus suffers from the same deficiencies. Thus, the affidavit was insufficient under state law to support a motion for a new trial.[26]

The only remaining issue related to actual bias is whether a post-conviction evidentiary hearing was required. While the attorneys and the trial judge questioned R.H. in chambers, there was no post-conviction hearing, which is how a claim of bias is ordinarily addressed.[27] But there is no due process right to an evidentiary hearing on every allegation of juror bias.[28]

Buckner, a pro se prisoner, argues he cannot provide direct evidence of

---

inadequate to state a claim for habeas relief."); *McGowen v. Thaler*, 675 F.3d 482, 502 (5th Cir. 2012) (holding prisoner failed to make a showing of actual innocence where his new evidence consisted, in part, of affidavits, "most of which are based on hearsay").

[26] When a motion for a new trial is based on an allegedly untruthful juror, Texas law requires an affidavit from a "person who was in a position to know the facts," or the motion "must state some reason or excuse for failing to produce the affidavits." *Baldonado v. State*, 745 S.W.2d 491, 493 (Tex. App.—Corpus Christi 1988, reh'g denied).

[27] *Brooks*, 444 F.3d at 330 (citing *Smith v. Phillips*, 455 U.S. 209, 215 (1982), for the proposition that "in most cases the remedy for claims of juror bias is a post-event hearing").

[28] *Haxhia v. Lee*, 637 F. App'x 634, 636–37 (2d Cir.), *cert denied*, 137 S. Ct. 97 (2016) ("[E]ven if the facts here were analogous to those in [*Smith v. Phillips*], *Smith* does not require a court to hold a hearing in investigating prejudicial occurrences, and it does not specify what actions short of a hearing may be appropriate under a different set of circumstances. It is possible that the trial court's response to Haxhia's objections were a sufficient 'determination' under *Smith*."); *Sims v. Rowland*, 414 F.3d 1148, 1155 (9th Cir. 2005) (*Smith* "do[es] not stand for the proposition that any time evidence of juror bias comes to light, due process requires the trial court to question the jurors alleged to have bias.")).

R.H.'s history or bias without an evidentiary hearing. Yet Buckner had counsel at the trial court, and that attorney supplied only a one-sentence hearsay statement—unaccompanied by an investigation or explanation of its source—regarding R.H.'s personal abuse. The district court did not err in concluding that Buckner failed to show that the state court's denial of his claim of actual bias was contrary to or an unreasonable application of clearly established federal law.[29]

B.

The next question is whether R.H.'s assurances of impartiality should have been disregarded and his bias presumed, given his alleged personal and family history of sexual abuse. Justice O'Connor, concurring in *Smith v. Phillips*, described "extreme situations that would justify a finding of implied bias."[30] Thus, while the question of an individual juror's bias is a factual determination entitled to deference on review, the Supreme Court has not "precluded the use of the conclusive presumption of bias" in "extreme" or "extraordinary cases."[31] "In the exceptional circumstances that may require application of an 'implied bias' doctrine, the lower federal courts need not be deterred by 28 U.S.C. § 2254(d)" and "state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes."[32]

The Government first argues that, for Section 2254 purposes, there is no "clearly established" Supreme Court precedent recognizing "implied bias."

[29] *See* 28 U.S.C. § 2254(d)(1).
[30] 455 U.S. at 222 (O'Connor, J., concurring).
[31] *Id.* at 223.
[32] *Id.* at 220 n.10.

Although this Court has discussed implied bias in several prior cases, we recently noted in *Uranga v. Davis* that it was unclear whether this court has recognized the implied-bias doctrine as clearly established federal law.[33] In *Uranga*, the petitioner argued that implied bias was clearly established federal law based on *Brooks*,[34] while the Government countered that an earlier decision, which found that the Supreme Court had not "embraced the implied bias doctrine," controlled.[35] *Uranga* acknowledged a circuit split but declined to settle the issue because the facts of the case were "outside of the extreme genre of cases . . . that would be sufficient to trigger the application of the implied bias doctrine."[36]

In enumerating some of these "extreme situations" where a hearing may be inadequate to uncover juror bias, Justice O'Connor stated:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of "no bias," the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.[37]

In *Uranga*, the prosecution introduced evidence of the defendant's prior offenses at the punishment stage of his trial.[38] This included a dashcam video

---

[33] *Uranga v. Davis*, 893 F.3d 282, 288 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1179 (2019).

[34] *Id.*

[35] *Id.* (citing *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994)).

[36] *Id.*

[37] *Smith*, 445 U.S. at 222 (O'Connor, J., concurring).

[38] *Uranga*, 893 F.3d at 286–87.

recording of the defendant driving across a residential lawn to elude pursing police.[39] After this recording was played for the jury, one juror realized that it was his lawn that Uranga had driven across.[40] The trial court conducted a hearing, but the juror was allowed to remain after he indicated that this fact would not influence his decision.[41] The *Uranga* court held that this factual situation did not rise to the level of the examples provided in Justice O'Connor's concurrence in *Smith*.[42] One judge dissented, relying on the panel's original determination that the facts warranted a finding of implied bias because the damage was "personal to the juror, as it affected the premises of his home" and because the juror had not previously known how the damage was caused or who was responsible.[43]

In this case, R.H.'s *family* history does not warrant a presumption of bias. The case law does not signal willingness to imply bias where a juror's family member was the victim of conduct similar to the defendant's.[44] That R.H. *himself* was allegedly a victim of conduct similar to Buckner's presents a closer question. We have stated that, "looking to other cases embracing the

---

[39] *Id.* at 287.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 288–89 (noting that the damage to the lawn was minimal and could be repaired for less than $500, that the juror indicated that he did not intend to pursue charges for the damage, and that the juror indicated he could fix the damage himself). The *Uranga* court also distinguished *Brooks*, where this court found implied bias. *See Uranga*, 893 F.3d at 288–89. In *Brooks*, a juror was arrested on a firearms offense during the sentencing phase of the defendant's trial. The juror's offense would be subject to prosecution by the same district attorney's office that was prosecuting the defendant, which justified a finding of implied bias. *Brooks*, 418 F.3d at 431–35.

[43] *See id.* at 289–90 (Haynes, J., dissenting).

[44] *See United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000) (rejecting an implied bias claim where a juror, in a kidnapping and sexual assault case, had a daughter who had been raped ten years before).

implied bias doctrine, we find that most have done so because the juror had a close relationship with one of the important actors in the case or was otherwise emotionally involved in the case, usually because the juror was the victim of a similar crime."[45] Further, "some courts have cautioned that bias should not be inferred unless the facts underlying the alleged bias are such that they 'would inherently create in a juror a substantial emotional involvement, adversely affecting impartiality.'"[46]

At bottom, however, the unsupported affidavit of Buckner's counsel is not actual evidence of R.H.'s personal abuse. Even if it were, and we were accordingly convinced R.H. was a victim of a crime similar to Buckner's, these scant facts do not reveal circumstances so inevitably attended by emotional involvement that protestations of fairness cannot sufficiently cure the resulting bias. R.H. did not disclose any personal history during voir dire or afterward, the trial court was presented with this allegation but opted not to explore it in a hearing, and R.H. stated he was "emotional" about the case. This conceivably makes this a situation in which a juror, who was a victim of a similar crime, has a substantial—and undisclosed—emotional involvement with the case. But while there is case law holding that such a situation can warrant a presumption of bias,[47] there is also case law holding that a juror who is a prior victim of the defendant can be impliedly biased, and cases like

[45] *Solis v. Cockrell*, 342 F.3d 392, 398–99 (5th Cir. 2003) (footnote omitted).

[46] *Id.* (quoting *Powell*, 226 F.3d at 1188–89).

[47] *See Dyer v. Calderon*, 151 F.3d 970, 979–82 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998) (imputing bias in murder trial when juror deliberately failed to disclose that her brother had been murdered and that she had been the victim of numerous burglaries and crimes); *see also Green*, 213 F. App'x at 281 (unpublished) (citing *Solis*, 342 F.2d at 399) (declining to impute bias where, "[u]nlike other cases in which courts have found bias because a juror failed to disclose he was a victim of a similar crime, the jurors in this case all disclosed their experiences" and there were no additional factors of inherent emotional involvement).

Uranga show that the doctrine inevitably eludes simple categorization. If the connection is too attenuated, it is not enough to be related to the defendant or a victim[48] or even to be personally harmed by the defendant's conduct.[49] In the absence of additional supporting details of R.H.'s alleged abuse, we find no factors, save perhaps for R.H.'s family history, that would create inherent emotional involvement. Thus, we can only conclude that this case, like *Uranga*, is outside the "extreme genre of cases" that would warrant revisiting whether this Court recognizes the implied-bias doctrine as clearly established law.

IV.

We affirm the denial of Section 2254 relief.[50]

[48] *See Andrews*, 21 F.3d at 620 (declining to presume bias where the victim's grandson had, prior to the victim's death, been married to the juror's daughter but where there was no evidence that the juror even knew he had at one time been related to the victim); *United States v. Wilson*, 116 F.3d 1066, 1087 (5th Cir. 1997) (declining to presume bias because "friendship with the victim of a defendant's alleged crime does not, standing alone, justify a finding of bias").

[49] *See Uranga*, 893 F.3d at 286.

[50] Buckner's motion for appointment of counsel, which was carried with the case, is denied.