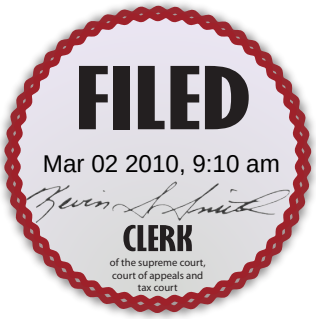

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IN THE
COURT OF APPEALS OF INDIANA

LARRY RINEARSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 34A02-0910-PC-1028
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Michael P. Krebes, Judge
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0609-PC-743

March 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his conviction and direct appeal for Class A felony voluntary manslaughter, Larry Rinearson unsuccessfully sought post-conviction relief. Rinearson now appeals arguing that the post-conviction court erred in determining that he received effective assistance of counsel when his trial counsel failed to request that the jury be instructed on the potential lesser-included offenses of involuntary manslaughter and reckless homicide. Concluding that defense counsel's strategy was reasonable, we affirm the post-conviction court.

Facts and Procedural History

The underlying facts in this case, taken from Rinearson's direct appeal, are as follows:

> [O]n April 12, 2003, Rinearson argued with his girlfriend, Tanna Pagan ("Pagan"), as he was moving out of her Kokomo, Indiana apartment. Pagan called a friend, Michael Green ("Green"), and asked for his assistance. A few minutes later, Pagan called Green, who was also friends with Michael DeWitt, Pagan's former boyfriend, and told him that Rinearson had calmed down and indicated that she did not want him to come over to her apartment. Throughout the night, Green called Pagan's apartment several times to make sure Pagan was still getting along with Rinearson. Green also called DeWitt, who, in turn, called Pagan at approximately 1 a.m. Upon receiving DeWitt's call, Rinearson asked Pagan to give him the phone, and Rinearson and DeWitt engaged in a heated argument. DeWitt challenged Rinearson to come to his house.
>
> After hanging up the phone, Rinearson told Pagan that he wanted to drive to DeWitt's home. On the way, Rinearson stopped at the home of his cousin, Armaine Stafford ("Stafford"), and the two grabbed two baseball bats, one wooden and one aluminum, from the vehicle's trunk. When Rinearson, Stafford, and Pagan arrived at DeWitt's house, Pagan exited the vehicle first and tried to talk to DeWitt, who had walked into the yard from the front porch. Rinearson approached DeWitt with the wooden baseball bat, and DeWitt yelled at Rinearson to "drop the bat and fight like a real man." Rinearson swung the bat at DeWitt, striking him in the side of the

> head. After DeWitt fell to the ground, Rinearson, Stafford, and Pagan returned to the car and left the scene. Upon returning to Pagan's apartment complex, Rinearson placed the two baseball bats in a dumpster. DeWitt suffered a cerebral hemorrhage and ultimately died several weeks later.
>
> On April 23, 2003, the State charged Rinearson with Aggravated Battery, a Class B felony. Following DeWitt's death, the State amended the charging information to include Voluntary Manslaughter, a Class A felony. On September 14, 2004, a jury convicted Rinearson on all counts. At sentencing, the trial court merged the convictions, entered judgment only on the voluntary manslaughter conviction, and sentenced Rinearson to thirty years imprisonment, with five years suspended and five years on probation.

Rinearson v. State, No. 34A02-0412-CR-1048, slip op. 2-3 (Ind. Ct. App. Sept. 9, 2005).

On direct appeal, Rinearson argued that (1) the trial court erred in admitting and excluding certain pieces of evidence, (2) the trial court erred in refusing his jury instruction on accident, (3) the evidence was insufficient to support his conviction for voluntary manslaughter, and (4) his sentence was inappropriate. We affirmed. *Id.* at 11.

In September 2006 Rinearson filed a petition for post-conviction relief, which was amended by counsel in December 2008. Rinearson argued that his trial counsel was ineffective for failing to request and tender jury instructions on the potential lesser-included offenses of involuntary manslaughter and reckless homicide. Appellant's App. p. 29. Following a hearing, the post-conviction court entered findings of fact and conclusions of law denying relief. Rinearson now appeals.

Discussion and Decision

Rinearson appeals the denial of his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind.

2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "'[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.'" *Id.* at 644 (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*). The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004).

We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

"Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *reh'g denied*. Because not all criminal defense attorneys will agree on the most effective way to represent a client, "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.* There is a strong presumption that counsel rendered adequate assistance and used professional judgment. *Id.*

Rinearson argues that defense counsel was ineffective for failing to request that the jury be instructed on the lesser-included offenses of involuntary manslaughter and reckless homicide.[1] For purposes of this appeal, we assume that both offenses are lesser-included offenses of Class A felony voluntary manslaughter, which is defined as the knowing or intentional killing of another human being while acting under sudden heat by means of a deadly weapon. Ind. Code § 35-42-1-3(a)(1).[2] Defense counsel testified at the post-conviction hearing that he "recall[ed] that [he] was concerned about lesser included offenses" but that he "[did] not recall specifically any discussion with [Rinearson] about those lesser includeds[.]" P-C Tr. p. 7. In addition, defense counsel testified that he did not discuss the issue with the trial court and accordingly did not

[1] Rinearson also argues that defense counsel was ineffective for failing to request that the jury be instructed on the lesser-included offense of Class C felony battery, but this argument was neither presented to the post-conviction court nor included in the petition for post-conviction relief. *See* Appellant's App. p. 28 (amended petition not listing Class C felony battery), 58 (post-conviction court's findings and conclusions not mentioning Class C felony battery). Therefore, it is waived. *See Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (holding that issue neither presented to post-conviction court nor listed in a petition for post-conviction relief is waived), *reh'g denied*, *trans. denied*. Waiver notwithstanding, the result in this case would be the same, that is, that defense counsel made a reasonable strategic decision.

[2] "The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter." I.C. § 35-42-1-3(b).

request that the jury be instructed on those lesser-included offenses. Defense counsel testified that Rinearson's theory of defense at trial was self-defense. *Id.* at 9. Defense counsel then admitted on cross-examination that if a defense counsel is trying to convince a jury that the defendant acted in self-defense but then submits lesser-included offense instructions on the charges, that tends to confuse the jury because it could either water down the case or affect the credibility of the defense itself. *Id.* at 11. The post-conviction court found:

> [Defense counsel] formulated a defense to the charges which was based on the concept of self-defense. [Defense counsel] determined that defense would be undermined by arguing the lesser included offenses applied. Thus, he made the strategic decision not to ask for instructions on lesser included offenses.

Appellant's App. p. 58 (Finding No. 2). As such, the court concluded:

> Trial Counsel's considered strategic decisions, even if in retrospect they are poor, does not, by itself, rise to the level of ineffective assistance of counsel. [Defense counsel's] strategic decisions were well considered and made. [Rinearson] had adequate representation.

Id. at 59 (Conclusion No. 3) (citation omitted).

Even though defense counsel could not recall at the post-conviction hearing (which was held nearly five years after Rinearson's trial) why he did not tender any lesser-included offense instructions, he readily agreed with the State that because Rinearson's defense was self-defense, providing such instructions to the jury could have diluted Rinearson's defense or affected the credibility of the defense. Defense counsel also recognized that as a general matter, it is a tactical decision to "go for broke" rather than submit lesser-included offense instructions and risk a compromise verdict. P-C Tr. p. 11-12. This supports the post-conviction court's finding that at the time of Rinearson's

2004 trial, defense counsel made the strategic decision not to pursue the possibility of lesser-included offenses, and such a finding is not clearly erroneous. Defense counsel's strategy was not so deficient or unreasonable as to fall outside of the objective standard of reasonableness. *See Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) ("[A] tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense. . . . It is not sound policy for this Court to second-guess an attorney through the distortions of hindsight. There is no reason to stray from this policy.") (quotation omitted); *Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) ("It is apparent from the record that appellant's trial counsel decided to rely solely on the defense of self-defense. If counsel had submitted an instruction on voluntary manslaughter [to the charge of murder], he would have weakened the self-defense case and diminished appellant's chances of acquittal. This Court finds no reason to second-guess the strategic decision of counsel."). We therefore affirm the post-conviction court.

Affirmed.

RILEY, J., and CRONE, J., concur.