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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-625

Filed: 4 August 2020

New Hanover County, No. 16 CRS 59007

STATE OF NORTH CAROLINA

v.

JOSHUA LEWIS JOHNSON

Appeal by Defendant from Judgments entered 22 February 2019 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 29 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Joshua Lewis Johnson (Defendant) appeals from Judgments entered upon his convictions for Intentional Child Abuse Resulting in Serious Bodily Injury, Negligent Child Abuse Resulting in Serious Bodily Injury, and Assault on a Child Under

Twelve. The Record before us, including evidence presented at trial, tends to show the following:

Defendant and Erin Johnson (Erin) were married in August of 2011, and Erin gave birth to their son, Mike,[1] on 27 May 2012. On 12 November 2016, Erin left her house for work at approximately 5:30 a.m. for a twenty-four-hour shift at the United States Coast Guard Command Center in Wilmington, North Carolina. Defendant was in charge of taking care of Mike while Erin worked. Around noon on 12 November 2016, Defendant called Erin at work. On this call, which was recorded in accordance with Coast Guard policy, Defendant stated, "I think your son is dead[,]" to which Erin replied, "what happened?" Defendant then said, "you should have left him at mom's. He literally fucked up my whole office and I threw his ass across the room and now he is acting like his eyes are rolled back in the back of his head and he doesn't want to get up."

Erin told Defendant he needed to take Mike to the hospital and get him checked out. Defendant responded, "I don't know what the hell is wrong with him. He is fucking actually not coherent I don't know what the hell is wrong with him." Erin again asked Defendant to "take him to the hospital please?" Defendant, however, replied, "I am not taking him to the hospital, No. I will not." Erin then

[1] A pseudonym used to protect the privacy of the minor child.

asked Defendant to take Mike to Defendant's mother's home, but Defendant instead told Erin, "No you should have left him at fucking mom's last night. Bye."

After this phone call, Erin left work—telling her supervisor she had a family emergency and needed to go home—and drove straight home. When Erin arrived home, she found Mike on the floor in the master bathroom. Erin described Mike's condition when she found him:

> He looked like -- he looked like he had a stroke. He had one leg that was twitching and one leg that was straight. He was laying on the ground. And when I say laying on the ground, laying on the floor with his legs facing -- facing me and his -- and his eyes, one looked like rolling in the back of his head and one was shut. And I just knew something just wasn't right about the situation and that he needed to go to the hospital.

After seeing Mike, Erin asked Defendant what happened, and Defendant said he had fallen asleep on the couch and when he woke up, Mike was unresponsive lying on the bathroom floor. Defendant carried Mike to Erin's car, and Erin drove him to the emergency room at New Hanover Regional Medical Center (New Hanover Medical). Defendant did not accompany Erin and Mike to New Hanover Medical.

Once at New Hanover Medical, Mike was examined by Dr. John Tseng (Dr. Tseng). Dr. Tseng testified Mike could not move his right-side extremities, which was indicative of a head injury; he had abrasions on his forehead, left arm, and left chest; and his pupils were sluggish, which was also indicative of a head injury. Based on his examination, Dr. Tseng ordered a CAT scan for Mike, which revealed a skull

fracture along with epidural and subdural bleeding that was causing Mike's brain to shift. Dr. Tseng described these injuries as a "traumatic brain injury[.]" Dr. Tseng gave Mike mannitol to help decrease the intracranial pressure caused by the epidural and subdural bleeding. When Dr. Tseng asked Erin what caused Mike's injuries, she said Defendant "had woken up and found the child not moving on the right side of the floor."

Because New Hanover Medical did not have a pediatric neurosurgeon, Mike was airlifted to UNC Medical Center (UNC) where he stayed for a total of nine days and was treated by, among others, Dr. Molly Berkoff (Dr. Berkoff), a board-certified pediatrician. At trial, Dr. Berkoff was tendered and accepted as an expert witness in the field of pediatrics and child abuse. She testified:

> [On 12 November 2016,] I knew that [Mike] had been admitted to UNC hospitals after he had presented to New Hanover [Medical] with a brain injury and a skull fracture, so a broken part of his skull. And there were concerns at that point in time for whether or not he needed to have surgical intervention or other intervention to help with the brain injury that he had sustained. And at that point in time there were also concerns for child abuse or maltreatment due to the presence of other injuries that he had and including the brain injury. The other injuries were a bruising pattern that was not typical for a child his age.

Dr. Berkoff further explained Mike "had injuries inside of his head in the brain area and also injuries to the eye. He had retinal hemorrhages in both eyes." Dr. Berkoff also testified when children have subdural bleeding, sometimes "they need to have it removed or evacuated in the operating room." Dr. Berkoff testified, in the

case of Mike's subdural bleeding, "there was a substantial risk of death had he not been treated" because

> the blood in his head was compressing his brain. When that happens in children and in adults that can lead to your brain herniating, which means your brain is pushed down into the spinal cord area because there's no more space for it in your head because there's so much blood there which should not be there. And that can cause someone to die.

Because Mike's observed injuries raised potential child-abuse concerns, staff from New Hanover Medical contacted New Hanover County Sheriff's Office, who dispatched Deputy Matt Hook (Deputy Hook) to Defendant's home on 12 November 2016. When Deputy Hook arrived at the home, Erin and Defendant were both present. Deputy Hook interviewed and took written statements from both parents. Defendant's statement provided:

> I was watching my son this morning[, 12 November 2016]. I fell asleep on the couch. Then I woke up. The house was very disorganized, and I originally could not find my son. I found him in the bathroom and he was acting somewhat strange. I was calling his name and he would respond but not normally. I called my wife and told her something was wrong, to please come home.

On or about 14 November 2016, Defendant was arrested in connection with the injuries Mike sustained on 12 November 2016. On 13 January 2017, Katy Bell (Bell), a social worker with New Hanover Department of Social Services, met with Defendant to discuss Mike's placement in foster care. During this meeting, Bell mentioned Defendant's recorded phone call on 12 November 2016 and summarized

this phone call, saying she heard Defendant say "he had thrown [Mike] into a wall." Defendant corrected Bell and stated, "I said I threw him across the room not into a wall."

On 13 February 2017, a New Hanover County grand jury indicted Defendant on charges of Intentional Child Abuse Resulting in Serious Bodily Injury (Intentional Child Abuse), Negligent Child Abuse Resulting in Serious Bodily Injury (Negligent Child Abuse), and Assault on a Child Under Twelve. For the Intentional Child Abuse charge, the Indictment alleged in part Defendant "unlawfully, willfully, and feloniously did intentionally commit an assault that resulted in serious bodily injury, a traumatic brain injury" (TBI). As for the Negligent Child Abuse charge, the Indictment alleged in part Defendant "unlawfully, willfully, and feloniously did show a reckless disregard for human life by committing a grossly negligent omission, failure to provide prompt medical care to the child, . . . [and D]efendant's omission resulted in serious bodily injury, a traumatic brain injury."

The matter came on for trial on 18 February 2019. At the close of the State's evidence, Defendant moved to dismiss both the Intentional and Negligent Child Abuse charges due to insufficiency of the evidence (Motion to Dismiss). The trial court denied Defendant's Motion, concluding the State presented substantial evidence of each element of these two offenses. On 22 February 2019, the jury returned verdicts finding Defendant guilty of all three charges.

The trial court proceeded with a separate penalty phase necessary for the jury to consider the existence of aggravating factors alleged by the State. Relevant to this appeal, the State sought to prove two aggravating factors with regard to the Negligent Child Abuse offense—(1) the child was "very young" and (2) the offense was "especially heinous, atrocious, or cruel" (EHAC). *See* N.C. Gen. Stat. § 15A-1340.16(d)(7), (11) (2019). In its jury instruction on the EHAC factor, the trial court did not provide any instruction defining EHAC. Although Defendant objected to the submission of the aggravating factors, Defendant did not object to the trial court's actual jury instructions on these factors—including the failure to provide the jury a definition of EHAC.

Subsequently, the jury returned verdicts finding the existence of both aggravating factors for the Negligent Child Abuse offense. The jury also found an aggravating factor for the Intentional Child Abuse offense. For the Intentional Child Abuse offense, the trial court found the aggravating factor outweighed the mitigating factors[2] and sentenced Defendant in the aggravated range to a minimum of 240 months and a maximum of 300 months.[3] For the Negligent Child Abuse offense, the trial court found the aggravating factors outweighed the mitigating factors and

[2] The trial court found four mitigating factors—(1) Defendant was honorably discharged from the United States Air Force; (2) Defendant was supporting his family at the time of the incident; (3) Defendant has a community support system; and (4) Defendant had a positive employment history. *See id.* § 15A-1340.16(e)(14), (17), (18), (19).

[3] The trial court consolidated the Assault on a Child Under Twelve offense with the Intentional Child Abuse offense.

sentenced Defendant in the aggravated range to a minimum of 40 months and a maximum of 60 months, which sentence was to run consecutively to the Intentional Child Abuse sentence. Defendant gave Notice of Appeal in open court.

Issues

The dispositive issues on appeal are whether: (I) the trial court erred in denying Defendant's Motion to Dismiss the Negligent Child Abuse charge due to insufficiency of the evidence presented at trial; (II) there was a sufficient factual basis for the jury to find the aggravating factor that Defendant's conduct relative to the Negligent Child Abuse conviction was EHAC; and (III) Defendant's ineffective assistance of counsel (IAC) claim based on his trial counsel's failure to object to the trial court's instruction on the EHAC aggravating factor should be reviewed on direct appeal from his convictions.

Analysis

I. Negligent Child Abuse

Defendant contends the trial court erred in denying his Motion to Dismiss the Negligent Child Abuse charge for insufficient evidence because the State failed to present substantial evidence that Defendant's grossly negligent omission of failing to provide prompt medical care to Mike caused serious bodily injury to Mike separate from the TBI and associated injuries caused by Defendant's intentional act. We disagree.

We review the trial court's ruling on a defendant's motion to dismiss for insufficiency of the evidence de novo:

> A trial court, on a motion to dismiss for insufficient evidence, must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Whether evidence presented constitutes substantial evidence is a question of law for the court and is reviewed *de novo*. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In reviewing the denial of a motion to dismiss for insufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.

State v. Glisson, 251 N.C. App. 844, 847-48, 796 S.E.2d 124, 127-28 (2017) (citations and quotation marks omitted).

Section 14-318.4(a4) of our General Statutes provides:

> A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

N.C. Gen. Stat. § 14-318.4(a4) (2019). Accordingly, the essential elements of negligent child abuse inflicting serious bodily injury are: (1) the defendant was "[a] parent or any other person providing care to or supervision of"; (2) "a child less than 16 years of age"; (3) the defendant commits a "willful act or grossly negligent omission

in the care of the child"; (4) showing "a reckless disregard for human life"; and (5) "the act or omission results in serious bodily injury to the child." *Id.*

Here, the trial court defined "serious bodily injury" for purposes of both Negligent and Intentional Child Abuse as a "bodily injury that creates a substantial risk of death or that results in prolonged hospitalization." *See id.* § 14-318.4(d)(1); *see also State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 620 (2002) (explaining when considering the element of serious bodily injury on review of a trial court's denial of a defendant's motion to dismiss, our Court is "limited to that part of the definition set forth in the trial court's instructions to the jury").

In challenging the trial court's ruling on his Motion to Dismiss, Defendant first points to the language of the Indictment, which alleged the "serious bodily injury" for both the Intentional and Negligent Child Abuse charges was the TBI suffered by Mike. Accordingly, Defendant contends the State cannot rely on the same injury for both charges. However, as *State v. Qualls* illustrates, the inclusion of the identification of Mike's serious bodily injury in the Indictment was "surplusage" and may be disregarded as such. *See* 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998) (holding where the indictment alleged the essential elements of felonious child abuse—"that the defendant was the parent or guardian of the victim, a child under the age of 16, and that the defendant intentionally inflicted any serious injury upon the child"—"the reference to the victim suffering a *subdural hematoma* rather than an *epidural*

hematoma was surplusage" and could be disregarded), *aff'd per curiam*, 350 N.C. 56, 510 S.E.2d 376-77 (1999). Rather, the question for this Court is whether the State presented substantial evidence showing Defendant's failure to provide prompt medical care to Mike resulted in a serious bodily injury, as defined by the trial court. *See Glisson*, 251 N.C. App. at 847, 796 S.E.2d at 127 (citation omitted).

Defendant asserts the State failed to present *any* evidence, much less substantial evidence, showing Mike suffered a serious bodily injury because all of the evidence suggested Mike's injuries were the result of Defendant's *intentional* act of throwing Mike across the room. Thus, Defendant argues because Mike's injuries occurred as a result of Defendant's intentional conduct, no separate evidence was presented showing Defendant's failure to provide prompt medical care resulted in any additional injury to Mike. We, however, disagree and find *State v. Mosher* instructive. *See* 235 N.C. App. 513, 761 S.E.2d 204 (2014).

In *Mosher*, the evidence tended to show the defendant was the stepfather of Amy and Noah, who were two and three years old, respectively, at the time of the incident giving rise to the defendant's two child-abuse charges. *Id.* at 513-14, 761 S.E.2d at 204-05. The defendant was home alone with Amy and Noah and began preparing a bath for the children. *Id.* at 514, 761 S.E.2d at 205. After turning on the water, the defendant placed the children into the bathtub. *Id.* The defendant testified he heard his dog fighting outside and went to check on the dog. *Id.* When

he returned, Noah was standing outside the bathtub, but Amy was still in the tub, screaming and trying to get out. *Id.* The defendant took Amy out of the tub and noticed the cold-water faucet was off. *Id.* at 514-15, 761 S.E.2d at 205. As a result, Amy suffered extensive burns on her body. *Id.* at 515, 761 S.E.2d at 205. An expert witness, however, testified Amy's injuries were more consistent with an intentional act whereby someone held the child under hot water. *Id.*

The defendant was charged and convicted of both intentional and negligent child abuse inflicting serious injury based on Amy's injuries. *Id.* at 517, 761 S.E.2d at 206-07. On appeal, the defendant argued the two charges were mutually exclusive because "if one's conduct is intentional, as required to establish the offense [of intentional child abuse], it is not any sort of negligence and that if one's conduct is any sort of negligence showing reckless disregard for human life, as required [for negligent child abuse], it is not intentional." *Id.* at 517, 761 S.E.2d at 207 (alteration and quotation marks omitted). Our Court disagreed, concluding "there was substantial evidence presented at trial permitting the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive." *Id.* at 517-18, 761 S.E.2d at 207. Specifically, the Court held, "the evidence at trial permitted the jury to find both that (1) [the d]efendant acted in reckless disregard for human life by initially leaving Amy and Noah unattended in a tub of scalding hot water; and (2) after a period of time, [the d]efendant returned to

the tub and intentionally held Amy in that water." *Id.* at 516, 761 S.E.2d at 206. Therefore, *Mosher* supports the proposition injuries seeming the same, resulting from separate acts or omissions, may give rise to both intentional and negligent child abuse charges.

Here, as in *Mosher*, we conclude evidence was presented from which a reasonable juror could conclude Defendant both (1) intentionally inflicted a serious bodily injury to Mike by deliberately throwing him across the room and (2) committed a negligent omission showing a reckless disregard for human life resulting in a serious bodily injury to Mike by failing to seek prompt medical care for Mike. *See id.* First, the State presented substantial evidence showing Defendant intentionally caused Mike's TBI by throwing him across the room, thereby constituting the offense of intentional child abuse. *See* N.C. Gen. Stat. § 14-318.4(a3).

As it relates to the Negligent Child Abuse charge, the State presented substantial evidence showing Defendant, by failing to seek prompt medical care for Mike, showed a reckless disregard for human life and that this failure resulted in a serious bodily injury to Mike—namely, a bodily "injury that creates a substantial risk of death[.]" *See id.* § 14-318.4(a4), (d)(1). Specifically, Dr. Berkoff testified "there was a substantial risk of death had [Mike] not been treated" because

> the blood in his head was compressing his brain. When that happens in children and in adults that can lead to your brain herniating, which means your brain is pushed down into the spinal cord area because there's no more space for it in your head

> because there's so much blood there which should not be there. *And that can cause someone to die*. (emphasis added).

Although Mike's TBI was initially caused by Defendant's intentional conduct of throwing Mike across the room, Dr. Berkoff's testimony illustrates the failure to treat the TBI can itself "cause someone to die." This is so because Mike's brain continued to bleed, which further compressed his brain, and if not treated, this injury put Mike at "a substantial risk of death[.]" Accordingly, this testimony constitutes substantial evidence showing Mike suffered an additional serious bodily injury—an untreated brain bleed that "creates a *substantial risk of death*"—where Defendant's failure to seek medical attention for Mike exacerbated Mike's injuries and placed him at risk of death if not treated. *Id.* § 14-318.4(d)(1) (emphasis added). Thus, when viewed in the light most favorable to the State, the trial court did not err in denying Defendant's Motion to Dismiss where a juror could reasonably conclude Defendant's failure to promptly seek medical care itself caused a substantial risk of death to Mike. *See Glisson*, 251 N.C. App. at 847-48, 796 S.E.2d at 127-28 (citations omitted).

II. Aggravating Factor

Defendant next argues the trial court erred by submitting the EHAC factor to the jury on Defendant's Negligent Child Abuse charge. "When a defendant assigns error to the sentence imposed by the trial court, our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Choppy*, 141 N.C. App. 32, 42, 539 S.E.2d 44, 51 (2000) (alteration, citation,

and quotation marks omitted). "In determining whether evidence is sufficient to support the trial court's submission of the especially heinous, atrocious, or cruel aggravator, we must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Golphin*, 352 N.C. 364, 479, 533 S.E.2d 168, 242 (2000) (citation and quotation marks omitted).

"The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists[.]" N.C. Gen. Stat. § 15A-1340.16(a). A trial court may impose an aggravated sentence during the sentencing phase of a trial if a jury finds "[t]he offense was especially heinous, atrocious, or cruel." *Id.* § 15A-1340.16(d)(7). "In non-capital cases, the determination of whether EHAC exists is focused on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." *State v. Houser*, 239 N.C. App. 410, 421, 768 S.E.2d 626, 634 (2015) (citation and quotation marks omitted). "The entire set of circumstances surrounding the offense must be considered in making this decision." *State v. Hager*, 320 N.C. 77, 88, 357 S.E.2d 615, 621 (1987).

In addressing whether the EHAC factor exists, our courts have often looked to a defendant's conduct after the crime for which they are convicted. *See, e.g.*, *State v. Oliver*, 309 N.C. 326, 347, 307 S.E.2d 304, 319 (1983) (citation omitted). In *Oliver*,

after murdering the victim, the defendant bragged that he had killed someone who was begging for his life and "kind of liked . . . it." *Id.* (quotation marks omitted). Our Supreme Court concluded this evidence was sufficient to support the submission of the EHAC factor to the jury because the "defendant showed no remorse." *Id.*; *see also Hager*, 320 N.C. at 89, 357 S.E.2d at 621-22 (upholding submission of the EHAC factor where, *inter alia*, the defendant's comments about his assault "suggest that [the] defendant enjoyed committing the offense"); *State v. Pinch*, 306 N.C. 1, 35, 292 S.E.2d 203, 228 (1982) (upholding submission of the EHAC factor to the jury where the "[d]efendant seemed to enjoy the killings, and he showed no remorse for what he had done at that time. In fact, [the] defendant callously evaluated his conduct in his subsequent announcement to his companions that he had 'just blown away two dudes' "), *overruled on other grounds by, inter alia, State v. Benson*, 323 N.C. 318, 326, 372 S.E.2d 517, 521 (1988); *Choppy*, 141 N.C. App. at 43, 539 S.E.2d at 52 (upholding submission of the EHAC factor where, *inter alia*, the defendant's comments after the assaults showed he "took pleasure in the assaults—evidence that is highly probative of whether the crimes were especially heinous, atrocious or cruel" (citation omitted)).

Here, the State presented Defendant's recorded phone call to the jury, in which Defendant stated, "I think your son is dead." Defendant also told Erin, "you should have left him at mom's. He literally fucked up my whole office and I threw his ass across the room[.]" When Erin asked Defendant to take Mike to the hospital,

Defendant responded, "I am not taking him to the hospital, No. I will not." Erin then requested Defendant take Mike to Defendant's mother's home, but Defendant instead told Erin, "No you should have left him at fucking mom's last night. Bye." This evidence shows a lack of remorse on behalf of Defendant for his actions and for not taking Mike to the hospital for medical treatment. *See, e.g.*, *Oliver*, 309 N.C. at 347, 307 S.E.2d at 319. In addition, when Bell later summarized this phone call to Defendant—stating she heard Defendant say "he had thrown [Mike] into a wall"—Defendant corrected Bell and stated, "I said I threw him across the room not into a wall." Defendant's callous evaluation of his conduct further supports submission of the EHAC factor. *See Pinch*, 306 N.C. at 35, 292 S.E.2d at 228. Accordingly, the trial court properly submitted the EHAC factor to the jury.

III. Ineffective Assistance of Counsel

Lastly, Defendant contends he received ineffective assistance of counsel where his trial counsel did not object to the trial court's jury instruction on EHAC. In its instruction to the jury, the trial court did not provide any instructions defining or limiting EHAC. While our Court has held it is error for the trial court not to define EHAC in its instructions, see *Houser*, 239 N.C. App. at 420-21, 768 S.E.2d at 633-34 (citations omitted), we cannot say on this Record whether Defendant's failure to object was objectively unreasonable or whether, if so, there was a reasonable probability the jury would have reached a different conclusion on the EHAC factor or that the trial

court would have weighed the other existing factors differently. *See Strickland v. Washington*, 466 U.S. 668, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984) (holding for a defendant to succeed on an IAC claim, a defendant "must show that counsel's representation fell below an *objective standard of reasonableness*" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (emphasis added)); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. 1, §§ 19, 23).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted).

> The preference for the assertion of ineffective assistance of counsel claims in postconviction proceedings rather than on direct appeal inherent in numerous decisions by this Court and the Supreme Court stems from the fact that evidence concerning the nature and extent of the information available to the defendant's trial counsel at the time that certain decisions were made and the fact that information concerning any discussions that took place between the defendant and his or her trial counsel, while needed in evaluating the validity of the ineffective assistance of counsel claim under consideration, are generally not contained in the record presented to a reviewing court on direct appeal.

State v. Pemberton, 228 N.C. App. 234, 242, 743 S.E.2d 719, 725 (2013).

On the Record before us, the threshold question remains as to whether Defendant's trial counsel's failure to request further jury instructions on the EHAC

factor constituted a reasonable trial strategy. In cases such as this, IAC claims "should be asserted through the filing and litigation of a motion for appropriate relief, during the course of which an adequate factual record can be developed, rather than during the course of a direct appeal." *Id.* (citations omitted). We therefore dismiss Defendant's IAC claim without prejudice.

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court did not err by denying Defendant's Motion to Dismiss and by submitting the EHAC aggravating factor to the jury. We dismiss Defendant's IAC claim without prejudice.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges DILLON and BERGER concur.

Report per Rule 30(e).