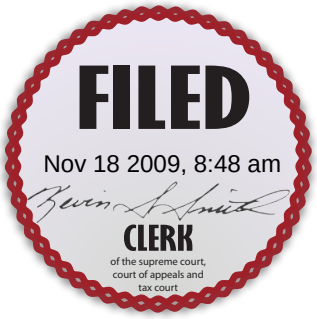

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IN THE
COURT OF APPEALS OF INDIANA

CURTIS TYRONE LOVE,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 20A05-0906-PC-338
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0706-PC-17

November 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Curtis Love appeals from the post-conviction court's denial of his petition for post-conviction relief ("PCR"). Love contends that he received ineffective assistance of trial and appellate counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Love's murder conviction were related by this court in our resolution of his direct appeal as follows:

> The facts most favorable to the conviction reveal that in February 2001, seventeen-year-old Vasani Cy Mankhwala (Cy) moved to Elkhart with his father, Ephraim Mankhwala, and Cy's two younger brothers. Living on Morton Avenue, Cy quickly became friends with Marvin Gates and Netfa Miller, and they spent a lot of time together making rap music. The three were also friends with Love, who lived next door to Gates on Morton Avenue.
>
> In the late afternoon of June 29, 2001, Cy and his friends gathered in Gates's backyard. Cy, Gates, and Miller rapped while others, including Love, listened. At some point, a brief verbal argument erupted between Cy and Love. The argument ended when Gates's older brother told them to quiet down. Thereafter, Love became abnormally quiet, and he left on Cy's bicycle around 9:00 p.m. When Love failed to return, Cy, Gates, and Miller went to Miller's house to work on their music. Gates left Cy and Miller around 11:00, as Miller and Cy continued their music.
>
> Around midnight, Miller and Cy walked through the neighborhood to Main Street on an errand for a friend. As they were walking back on Morton Avenue towards Miller's house, they encountered Love riding a bike. They greeted each other and exchanged "love and taps". Transcript at 266. Miller then proceeded to his house around 12:30 or 1:00 a.m., as Cy and Love went together towards Cy's house, which was about a block away.
>
> Shortly after 1:00, Cy entered his house and ran upstairs to his twelve-year-old brother's room. He woke up his brother to ask if a friend could borrow his bike. His brother said no. When Cy came back downstairs, Ephraim told his son that it was late and he needed to stay in. Cy replied that he would be right back. Around this same time, Ephraim noticed movement outside the window. Ephraim pulled the window sheers back and saw Love trying to hide from Ephraim's view. Ephraim thought nothing of it at the time, as Love was a friend of Cy's. Soon thereafter, Ephraim went to bed.
>
> At approximately 3:15 a.m., Elkhart Police Officer Norm Friend was on routine patrol in the area when he encountered a body, later identified as Cy's,

lying in the middle of Chase Street, just off of Main Street. Cy was not wearing a shirt and was lying face down in a large pool of partially dried blood. It was apparent to Officer Friend that Cy was dead and riga mortis [sic] had already begun to set in. A blood-covered knife blade with no handle was found a short distance from the body. And the blade, which appeared to be from a steak knife, was bent. In addition to having received multiple blunt-force injuries to the head and face, Cy had been stabbed twenty-one times about the head, face, neck, back, arms, and legs. Of particular note, Cy's lungs had been punctured five separate times, causing "relatively rapidly lethal" injuries. *Id*. at 363. Cy also received a stab wound to the back of his neck, which punctured the spinal cord and would have rendered him paralyzed.

The investigation soon revealed Cy's bicycle lying in a nearby alley that ran perpendicular to Chase Street and parallel to Main Street. The bike was approximately 340 feet from the body. A shirt was lying next to the bike. Officers also discovered a trail of blood drops along a quarter-block area. The blood trail began at a picket fence that was partially knocked over at 1909 S. Main Street, one of the residences behind which the bike was found. The trail continued south on the sidewalk along Main Street and then west onto the sidewalk along Chase Street, where the body was found. In addition to the sidewalk and street, blood was discovered on the back of a white pickup truck parked just off of Chase Street at 1919 S. Main Street. Detectives recovered random samples of blood found at the scene. Many of the samples revealed Cy's DNA, such as on the fence, along the sidewalks, and on the knife blade. Love's blood and DNA, however, were also discovered within a short distance of the body, on the tailgate of the pickup truck and the sidewalk along Chase Street.

In the beginning of July, Love's uncle, John David Love, received a phone call from Love's mother who lived in California. As a result, John immediately left a family barbecue to locate Love "to find out what was going on." *Id*. at 396. He found Love a while later, and the two drove around and talked. John informed his nephew that he had been "hearing some stuff," and Love then confided in John. *Id*. at 397. Love told his uncle that he had gotten into a "misunderstanding with a friend" that resulted in an argument. *Id.* Love said that his friend pulled a knife and, after a scuffle, Love got possession of the knife and stabbed his friend with it. Love indicated to his uncle that this occurred "in an alley off of Main." *Id*. at 398. Love further explained that he did not think he had killed his friend but that he felt it was "his life or the guy [sic] life." *Id*.

On July 4, 2001, police executed a search warrant at the home where Love was living with his aunt. Two steak knives were recovered from the kitchen, the blades of which matched that found at the murder scene.

> The State charged Love, on June 3, 2005, with murder. Love's three-day jury trial concluded on May 17, 2006, with the jury finding him guilty as charged.

Love v. State, WL 1052917, slip op. at 1-2 (Ind. Ct. App. April 10, 2007) (footnote omitted and first "[sic]" added). At trial, Love's trial counsel had argued during closing that voluntary manslaughter was "the same definition as murder … but you're doing it under sudden heat. In other words, you're mad as hell. And if somebody drew a knife on you, you might be mad as hell too." Tr. p. 499. Moreover, during final instructions, the trial court had instructed the jury on voluntary manslaughter. On direct appeal, Love's appellate counsel did not challenge the voluntary manslaughter instruction and this court affirmed Love's murder conviction, concluding that the State had presented sufficient evidence to sustain it. *Love*, slip op. at 4. On June 1, 2007, Love, *pro se*, filed a PCR petition. On May 29, 2008, Love filed an amended PCR petition. On April 28, 2009, the post-conviction court denied Love's PCR petition in full.

DISCUSSION

PCR Standard of Review

Our standard for reviewing the denial of a PCR petition is well-settled:

> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.… Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

Hall v. State, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted).

Ineffective Assistance of Counsel Standard of Review

Love contends that his trial counsel was ineffective for failing to ensure that the jury was properly instructed regarding voluntary manslaughter and that his appellate counsel was ineffective for failing to raise the instruction issue on appeal. We review claims of ineffective assistance of counsel based upon the principles enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. 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." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999). "The standard of review for a claim of ineffective assistance of appellate counsel is identical to the standard for trial counsel[.]" *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000).

Voluntary Manslaughter Instruction

Both of Love's ineffective-assistance-of-counsel claims are premised on the allegedly erroneous voluntary manslaughter instruction given to the jury following his trial. The more

fundamental question, however, is whether a voluntary manslaughter instruction was justified in the first place. "A person who … knowingly or intentionally kills another human being … commits murder, a felony." Ind. Code § 35-42-1-1 (2000). However, "[a] person who knowingly or intentionally … kills another human being … while acting under sudden heat commits voluntary manslaughter, … a Class A felony if it is committed by means of a deadly weapon." Ind. Code § 35-42-1-3 (2000).

The Indiana Supreme Court has held that voluntary manslaughter is a lesser-included crime of murder. *Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008).

> If there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.

Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995). "If the evidence does not so support the giving of a requested instruction on an inherently or factually included lesser offense, then a trial court should not give the requested instruction." *Id.*

So, the first question we must answer is whether the evidence presented by the parties raised a serious evidentiary dispute regarding whether Love acted in sudden heat. If not, the trial court should not have instructed the jury on voluntary manslaughter at all, and any error it might have committed in so instructing the jury could only be considered harmless. "Where there is no evidence of sudden heat, an incorrect instruction on voluntary manslaughter is not reversible error." *Burris v. State*, 590 N.E.2d 576, 581 (Ind. Ct. App. 1992) (citing *Hensley v. State*, 499 N.E.2d 1125, 1127 (Ind. 1986)), *trans. denied*.

> Killing in the sudden heat of passion is the element that distinguishes voluntary manslaughter from murder, but there must be sufficient provocation to induce such passion to render the defendant incapable of cool reflection. Therefore, the evidence of anger alone does not support giving the instruction on voluntary manslaughter. Additionally, words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat warranting an instruction on voluntary manslaughter.

Matheney v. State, 583 N.E.2d 1202, 1205 (Ind. 1992) (citations omitted). "Sudden heat requires sufficient provocation to engender … passion which is demonstrated by anger, rage, sudden resentment, or terror that is sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Jackson v. State*, 709 N.E.2d 326, 328 (Ind. 1999) (citing *Horan v. State*, 682 N.E.2d 502, 507 (Ind. 1997)).

Here, while the record contains evidence that Love and Cy had a verbal argument during the afternoon of June 29, 2001, several hours before Cy was last seen alive, this evidence is clearly insufficient to generate a serious evidentiary dispute regarding sudden heat, as it described an exchange of words alone. The record, of course, also contains evidence of statements Love made to his uncle John, seemingly referring to the events surrounding Cy's death. John testified that Love admitted to stabbing a "friend," but only after that friend had allegedly brandished a knife and Love had disarmed him in a scuffle. Love further explained that he had felt at the time like "it was his life or the guy[']s life." Trial Tr. p. 398.

We conclude that Love's version of events excludes the possibility that he was acting in sudden heat and that a voluntary manslaughter instruction was therefore not warranted in

this case. Love's statement that he felt it was his life or Cy's, while it would support a claim of self-defense, does not suggest sudden heat. In other words, Love told John that he stabbed Cy because he felt he was in danger, *not* because he was so angry or terrified that his reason was obscured. Moreover, the statement, insofar as it relates Love's beliefs during the incident, further belies the notion that he was so consumed by passion at the time as to be rendered incapable of reason. In the end, the concepts of self-defense and sudden heat are logically incompatible, as one cannot "reasonably believe" that deadly force is necessary to prevent serious bodily injury to himself if his reason is obscured. *See* Ind. Code § 35-41-3-2 (2000) (providing that a person is justified in using deadly force if that person reasonably believes that the force is necessary to prevent, inter alia, serious bodily injury to that person). Love's trial counsel's suggestion during closing that Love might have been "mad as hell" does not change the fact that the record contains no evidence that Love was, in fact, acting in sudden heat when he killed Cy. In the absence of any serious evidentiary dispute regarding sudden heat, the trial court should not have instructed the jury on voluntary manslaughter. Consequently, to the extent that the trial court erroneously instructed the jury regarding voluntary manslaughter, any such error was harmless, and Love's counsels cannot have been ineffective for failing to raise it.

We believe that this case is factually indistinguishable from *Burris v. State*, 590 N.E.2d 576 (Ind. Ct. App. 1992), *trans. denied*, in which we similarly affirmed the post-conviction court's denial of PCR. In *Burris*, as here, the petitioner sought PCR on the grounds that his trial and appellate counsels had failed to challenge an allegedly erroneous

voluntary manslaughter instruction. *Id*. at 578-79. At trial,

> Burris' defense was "sort of a combination of defense of accident and self defense." He testified that the decedent came to his home in a rage, apparently upset over Burris' treatment of the decedent's niece over [a] tire-slashing incident which, according to Burris, occurred a couple of weeks earlier. Burris testified that he no longer was upset about the incident but wanted his tires replaced. According to Burris, the decedent burst into Burris' home with a gun, they fought over the gun in the doorway and it accidentally discharged into the decedent.

Id. at 580. We concluded that Burris's evidence was insufficient to warrant a voluntary manslaughter instruction, in that "Burris' version of the events exclude[d] the possibility that he acted under sudden heat." *Id*. at 581. As we did in *Burris*, we conclude here that a defendant's version of events that indicates, at most, that he was acting in self-defense excludes the possibility that he was acting under sudden heat.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and VAIDIK, J., concur.