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IN THE COURT OF APPEALS OF INDIANA

James Lewis Washington,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 8, 2021

Court of Appeals Case No. 21A-PC-385

Appeal from the Clark Circuit Court

The Honorable Daniel E. Moore, Judge

Trial Court Cause No. 10C01-1603-PC-4

Mathias, Judge.

[1] James Lewis Washington appeals the post-conviction court's denial of his petition for post-conviction relief. Washington raises a single issue for our review, which we restate as whether the post-conviction court erred when it concluded that Washington did not receive ineffective assistance of trial counsel during his trial for murder and robbery. We conclude that Washington's trial

counsel rendered constitutionally deficient performance when he failed to object to an erroneous jury instruction that stated the jury could disregard mitigating evidence of sudden heat if it found Washington guilty of murder. We further hold that Washington's counsel was constitutionally ineffective when he tendered an instruction, accepted by the trial court, that erroneously stated that the State had the burden of proving the existence of sudden heat beyond a reasonable doubt as an element of voluntary manslaughter. Finally, we conclude that his counsel's deficient performance prejudiced Washington because a properly instructed jury could have found Washington guilty of voluntary manslaughter instead of murder. Therefore, we reverse the post-conviction court's judgment and remand for a new trial.

Facts and Procedural History

[2] The facts underlying Washington's convictions for murder and robbery were stated by this court in his direct appeal:

> On December 1, 2012, Washington met Robert Eader (Eader) through Eader's neighbor. The next day, Washington went over to Eader's apartment during the day to sell him cocaine. After the transaction was complete, Washington left Eader's apartment but later returned around 11:30 p.m. with more cocaine, and accompanied by his girlfriend, Dana Eisenbach (Eisenbach). Washington sold Eader more than $300 worth of cocaine. Eader paid Washington, and he also shared some of the cocaine with Washington and Eisenbach. Before Washington left Eader's apartment, Eader asked him if he could front him more cocaine. Washington agreed, and he gave Eader an additional amount worth $40 on the understanding that Eader would pay him back later that night when he returned with even more drugs.

In the early morning of December 3, 2012, Eisenbach texted Eader and offered to sell him more crack cocaine. At around 4:00 a.m., Washington and Eisenbach drove back to Eader's apartment. Eisenbach waited in the car as Washington knocked on Eader's front door. Once Washington was inside Eader's apartment, Eader locked the door behind him. Eader had the money in his left hand and he sat down at small table. Washington then informed Eader that he did not have any more drugs to sell, but was there to collect his $40 debt. This upset Eader, so he attempted to push Washington out of his apartment. Washington pushed back and told Eader that he would not leave the apartment until he got paid.

A struggle ensued where Eader, who weighs 180 pounds, started throwing jabs at Washington, who weighs 330 pounds, and is twenty years his junior. In the process, Washington managed to grab Eader's right arm. With his free hand, Washington retrieved a knife from his pocket, and slashed Eader's throat. Washington then pushed Eader toward the wall. Fighting for his life, Eader used his left arm to strike back at Washington, but Washington was too strong for him. Washington slashed Eader's throat a second time and stabbed him in the chest. Eader slumped and fell over on his left side. Washington did not retreat from the fight, instead, he knelt down, held Eader's right arm, and slit Eader's throat for a third time, this time severing Eader's carotid artery. Thereafter, Washington grabbed some of Eader's money that had been dropped on the floor and went to the kitchen to wash his hands and pocket knife.

Meanwhile, a neighbor, Harold Lemon (Lemon) heard the commotion in Eader's apartment. He decided to go up to Eader's apartment to check up on him but found the front door locked. At the same time, Lemon noticed an unfamiliar vehicle parked in the parking lot. As Lemon went downstairs to get the description and license plate number, he saw a man he knew as Scuttles, later identified as Washington, exiting Eader's apartment, getting

into the vehicle, and driving off. Lemon called 911 and reported what he had witnessed. Thereafter, Lemon returned to Eader's apartment. This time the door was unlocked, and when he looked inside, he saw Eader lying on the floor covered in blood. Eader died as a result of the stab wounds. On the same day, Washington and Eisenbach drove to Missouri. Along the way, Washington threw his knife on the interstate and dumped his clothes at a gas station[.]

On December 5, 2012, Washington and Eisenbach resolved to return to Indiana because Washington wanted to turn himself in. Before turning himself in at the Clark County Jail in Jeffersonville, Indiana, Washington went to buy marijuana. When he arrived at the jail, Washington learned that there was no arrest warrant issued, so he and Eisenbach left. However, on the same day, the Jefferson Police Department issued an alert through dispatch to look for a vehicle matching Washington's. At approximately 5:30 a.m., Officer Robert Grinestaff of the Jefferson Police Department (Officer Grinestaff) was on patrol when he saw a vehicle matching Washington's license plate. Officer Grinestaff called for backup and the officers surrounded Washington's vehicle and subsequently arrested Washington and Eisenbach.

On December 6, 2012, the State filed an Information charging Washington with Count I, murder, Ind. Code § 35-42-1-1, and Count II, robbery, a Class B felony, I.C. § 35-42-5-1. A jury trial was held from October 15, 2013, through October 18, 2013. At the close of the evidence, the jury returned a guilty verdict on both Counts. On November 18, 2013, the trial court sentenced Washington to sixty-five years due to aggravating circumstances—his criminal history and the nature of the crime. . . .

Washington v. State, No. 10A05-1312-CR-626, 2014 WL 3511705, at *1–2 (Ind. Ct. App. July 15, 2014), *trans. denied* ("*Washington I*").

[3] On direct appeal, Washington argued that the State had failed to present sufficient evidence to overcome his claim of self-defense.[1] We addressed that issue as follows:

> Washington argues that there was insufficient evidence to support his murder conviction because the evidence supports the finding that he acted in self-defense. A valid claim of self-defense is a legal justification for an otherwise criminal act. *Birdsong v. State*, 685 N.E.2d 42, 45 (Ind. 1997). The defense is defined in Ind. Code § 35-41-3-2(a): "A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force."
>
> When a defendant raises a claim of self-defense, he is required to show that: 1) he was in a place where he had a right to be; 2) he acted without fault; and 3) he had a reasonable fear of death or great bodily harm. I.C § 35-41-3-2. Whether a defendant acted in self-defense is generally a question of fact which is entitled to considerable deference upon appellate review. *Taylor v. State*, 710 N.E.2d 921, 924 (Ind. 1999). . . .
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> * * *
>
> In the instant case, Washington characterizes Eader as the aggressor. In his self-serving testimony, Washington stated that he was in reasonable fear of death or bodily harm since he knew

[1] Washington also argued that his sentence was inappropriate. We affirmed his sentence.

> Eader was "a veteran" and he knew soldiers had been trained to "actually kill people with or without a weapon." (Transcript p. 358). Washington's self-defense claim however fails for several reasons. At trial, Washington testified that he had no intention of leaving Eader's apartment until he received his payment. When Eader tried to push him out of his apartment, Washington pushed him back and a scuffle ensued. Eader was the initial aggressor since he was the first to throw a punch at Washington. However, Washington's claim of self-defense was overcome by his subsequent actions. The record reveals that Washington and Eader were the same height[;] however, Washington was twice as heavy, and twenty years younger than Eader. Instead of punching, Washington pulled out a knife, restrained Eader by holding his arm, and repeatedly slashed Eader's throat and chest. The fact that Eader was the initial aggressor is not dispositive as to whether Washington's use of deadly force was a reasonable response. Although Washington was in a place where he had the right to be, did not provoke the violence, and might have had a reasonable fear of death or great bodily harm, the moment he took out his knife at the fist-fight and started using it, he was no longer using reasonable force. *See* I.C § 35-41-3-2(a).
>
> Because there existed sufficient evidence from which the jury could reasonably find that Washington did not validly act in self-defense, we find that State sufficiently rebutted the self-defense claim, and we find no reason to disturb the guilty verdict.

Id. at *2–3.

[4] In August of 2015, Washington filed his petition for post-conviction relief, which he subsequently amended. In his amended petition, he alleged that he had been denied the effective assistance of trial counsel when his counsel did not object to the trial court's jury instruction number 24 and when his counsel

tendered erroneous instruction number 24A, both of which the trial court provided to the jury. Instructions 24 and 24A both related to voluntary manslaughter as a lesser included offense to murder and, omitting formal elements, stated:

COURT'S FINAL INSTRUCTION NO. 24

> The law permits the jury to determine whether the Accused is guilty of certain charges which are not explicitly included in the information. These additional charges which the jury may consider are called included offenses. They are called included offenses because they are offenses which are very similar to the charged offense. Usually the only difference between the charged offense and the included offense is that the charged offense contains an element that is not required to be proven in the included offense, or that the charged offense requires a higher level of culpability than the included offense.
>
> *If the State proves each of the essential elements of the charged offense, then you need not consider the included offense(s)*[;] however[,] if you find the State failed to prove each of the essential elements of the charged offense, you must find the accused not guilty of the charged offense.
>
> If you do find the Accused not guilty of the charged offense then you may consider whether the Accused is guilty of the included offense(s). You must not find the accused guilty of more than one crime for each count.

COURT'S FINAL INSTRUCTION NO. 24A

> *If the members of the Jury find the Defendant not guilty of Count I, charging him with murder, or find themselves unable to reach a*

unanimous verdict on Count I, then I instruct you that you may wish to consider the lesser included offense of Voluntary Manslaughter.

Indiana Code 35-42-1-3 Voluntary Manslaughter.

a. A person who knowingly or intentionally kills:

1. Another human being while acting under sudden heat commits voluntary manslaughter, a Class "B" Felony. However, the offense is a Class "A" Felony if it is committed by means of a deadly weapon.

b. *The existence of sudden heat is a mitigating factor that reduces what would otherwise be murder under Section (1) of this chapter (35-41-1-1(1)[)] to Voluntary Manslaughter.*

Before you may convict a Defendant of Voluntary Manslaughter, *the State must have proved each of the following beyond a reasonable doubt*:

1. The Defendant.

2. Knowingly or intentionally.

3. Killed.

4. Robert Eader.

5. In *sudden heat* or passion.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant NOT GUILTY

> of Voluntary Manslaughter, a Felony, a lesser included of Count I.
>
> *If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant GUILTY of the crime of Voluntary Manslaughter*, a Felony, a lesser included of Count I.

Appellant's App. Vol. 2 at 37–39 (emphases added). And, in instruction number 25, the trial court informed the jury as follows:

> The term "sudden heat" means a mental state which results from provocation sufficient to excite in the mind of the defendant such emotions as anger, rage, sudden resentment, jealousy, or terror sufficient to obscure the reason of an ordinary person, and as such prevents deliberation and premeditation, excludes malice, and renders the defendant incapable of cool reflection prior to acting. Words alone are not sufficient provocation to precipitate sudden heat for purposes of determining whether a killing constitutes voluntary manslaughter as opposed to murder. In addition to the requirement of something more than mere words, the provocation must be sufficient to obscure the reason of an ordinary man, an objective, as opposed to subjective, standard.

Direct Appeal App. Vol. I at 216.

[5] Following an evidentiary hearing, the post-conviction court denied Washington's petition. In rejecting Washington's claim of ineffective assistance of trial counsel on the issue of the jury instructions on voluntary manslaughter, the post-conviction court adopted, nearly verbatim, our court's reasoning in *Washington I* that the State had presented sufficient evidence to negate Washington's claim of self-defense. Based on that same reasoning from

Washington I, the post-conviction court concluded that "there could not have been sufficiently appreciable evidence of sudden heat" and, therefore, that Washington "was not entitled to an instruction on voluntary manslaughter." Appellant's App. Vol. 2 at 85–86. Thus, the post-conviction court concluded that any erroneous instructions on voluntary manslaughter "did not prejudice [Washington] such that there is a reasonable probability that, but for counsel's unprofessional errors,[2] the result of the [trial] would have been different." *Id.* at 86. This appeal ensued.

Standard of Review

[6] Washington appeals the post-conviction court's denial of his petition for post-conviction relief. Thus, he appeals from a negative judgment. *See, e.g.*, *McDowell v. State*, 102 N.E.3d 924, 929 (Ind. Ct. App. 2018), *trans. denied*. In such appeals, the appellant must show that the evidence unmistakably and unerringly leads to a conclusion opposite the one reached by the post-conviction court. *Id.* In making this determination, we consider only the evidence and reasonable inferences supporting the court's judgment. *Id.* Further, the post-conviction court entered findings of fact and conclusions of law in accordance with Post-Conviction Rule 1(6). Though we do not defer to the court's legal conclusions, we review its factual findings for clear error—that which leaves us with a

[2] The post-conviction court assumed that Washington's allegations of deficient performance by his trial counsel were correct.

definite and firm conviction that a mistake has been made. *State v. Cozart*, 897 N.E.2d 478, 482 (Ind. 2008).

[7] Washington's petition for post-conviction relief alleged ineffective assistance of trial counsel. That allegation required Washington to show (1) his counsel's performance fell below an objective standard of reasonableness, and (2) but for his counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). We address each of Washington's arguments under *Strickland* in turn.

Deficient Performance

[8] We first address Washington's argument that his counsel's failure to object to instruction 24 and tendering of instruction 24A fell below an objective standard of reasonableness. The post-conviction court did not address this prong of the *Strickland* analysis in its judgment, and the State does not respond to it on appeal. Therefore, we will review Washington's argument on this issue under our *prima facie* standard of review. *See, e.g.*, *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020). *Prima facie* error means error "at first sight, on first appearance, or on the face of it." *Id.* (quotation marks omitted).

[9] The facts relevant to this issue are not disputed. Washington's trial counsel did not object to instruction 24. That instruction is conspicuously erroneous. It instructed the jury that, if the jury found that the State proved the offense of

murder, "then you need not consider the included offense[]" of voluntary manslaughter. Appellant's App. Vol. 2 at 37. But, as our supreme court has held, to find a defendant guilty of voluntary manslaughter, "the State must prove the elements of murder *and* there must be some evidence of the sudden-heat mitigating factor . . . ." *Brantley v. State*, 91 N.E.3d 566, 572 (Ind. 2018) (emphasis added). That is, sudden heat "mitigate[s] murder," and to mitigate murder the jury first needs to find that the State proved murder. *Id.* at 573.

[10] Thus, contrary to instruction 24, the jury's job at Washington's trial was not complete once it found that the State had proved the elements of murder. Had Washington's trial counsel objected to instruction 24's erroneous language, the trial court would have been obliged to sustain the objection. *See, e.g.*, *Isom v. State*, 170 N.E.3d 623, 643 (Ind. 2021). Therefore, Washington's trial counsel rendered ineffective assistance when he failed to object to instruction 24. *See id.* at 642–43.

[11] Washington's trial counsel also rendered ineffective assistance when he tendered instruction 24A, which is also erroneous. In particular, instruction 24A stated that the State bore the burden of proving the existence of sudden heat as an element of voluntary manslaughter beyond a reasonable doubt. We have previously recognized that "'[a]n instruction [on voluntary manslaughter] assigning the burden of affirmatively proving sudden heat to the State is erroneous as a matter of law.'" *Massey v. State*, 955 N.E.2d 247, 255 (Ind. Ct. App. 2011) (quoting *Eichelberger v. State*, 852 N.E.2d 631, 636 (Ind. Ct. App. 2006), *trans. denied*) (alterations original to *Massey*). "[O]nce a defendant

presents evidence of sudden heat," to obtain a conviction for murder rather than voluntary manslaughter "the State bears the burden of disproving [sudden heat] beyond a reasonable doubt." *Id.* (quoting *Eichelberger*, 852 N.E.2d at 636) (emphasis removed). Washington's trial counsel tendered an instruction on voluntary manslaughter that misstated Indiana law in these respects, and, thus, his assistance fell below an objective standard of reasonableness.

Prejudice

[12] We thus turn to the second *Strickland* prong: whether, but for trial counsel's deficient performance, there is a reasonable probability that the outcome at Washington's trial would have been different. The post-conviction court's denial of Washington's petition focused on this prong, as does the State on appeal. In particular, the post-conviction court adopted our rejection of Washington's claim of self-defense in his direct appeal and concluded, based on that same analysis, that there was no serious evidentiary dispute on the mitigating factor of sudden heat to justify jury instructions on voluntary manslaughter. The post-conviction court's reasoning continued that, because the trial court should not have instructed the jury on voluntary manslaughter, Washington could not have been prejudiced by the erroneous instructions. The post-conviction court's conclusion is contrary to law for two reasons.

[13] First, the post-conviction court's analysis conflates self-defense and voluntary manslaughter,[3] which are not identical. "[T]he self-defense defense completely excuses conduct based on the rational decision that force is necessary to protect oneself, whereas a person acting in sudden heat is incapable of rational thought." *Brantley*, 91 N.E.3d at 572. Moreover, the two claims "are not inherently inconsistent and, in appropriate circumstances, juries may be instructed on both." *Id.* at 573. Such circumstances "are not conflicting since the nature of each defense is different . . . ." *Id.* And, even where "the same evidence," such as evidence of terror, "can either mitigate murder or excuse it altogether[, i]t's the jury's call" to weigh the evidence and assess witness credibility in arriving at its verdict. *Id.* at 573–74. Thus, the post-conviction court's conclusion that, by negating Washington's claim of self-defense, the State also negated a serious evidentiary dispute on sudden heat is contrary to law.

[14] Second, the post-conviction court's conclusion that the trial court erred in finding there to be a serious evidentiary dispute on sudden heat is also contrary to law. In support of the post-conviction court's judgment on appeal, the State asserts that Washington should never have received an instruction on voluntary

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[3] For that matter, the post-conviction court's analysis conflates our appellate review of the record, which review was deferential to the jury's rejection of Washington's self-defense claim, with the trial court's threshold determination that there was a serious evidentiary dispute on sudden heat. *See, e.g.*, *Larkin v. State*, 173 N.E.3d 662, 668 (Ind. 2021) (stating that a jury instruction on a lesser included offense requires the trial court to determine that "'a serious evidentiary dispute' exists between the elements" that distinguish the greater and the lesser offenses).

manslaughter because "he provoked [Eader] by refusing to leave [Eader's] home." Appellee's Br. at 12. But the evidence before the jury did not necessitate that conclusion. Rather, the evidence before the jury made clear that Eader threw the first punch in a drug deal gone bad, and the fight that resulted in Eader's death immediately followed that punch. We have held before that such circumstances are "ample evidence of possible sudden heat." *Roberson v. State*, 982 N.E.2d 452, 457 (Ind. Ct. App 2013). Thus, the post-conviction court's conclusion is clearly erroneous.

[15] Finally, we have addressed similar erroneous jury instructions on post-conviction review before, and we have had no difficulty concluding that prejudice exists:

> Here, the jury was asked to first consider whether [the defendant] was guilty of murder, and if so, the jury was instructed to cease its deliberations at that point without considering the issue of whether [the defendant] had acted under sudden heat. In other words, the jury was given an incomplete instruction regarding murder, and it was precluded from considering whether [the defendant] had acted under sudden heat when the killing occurred if it found the State had proven the basic elements of murder. Indeed, where there is evidence of sudden heat in the record, a jury should be clearly instructed to first consider whether the State has disproved sudden heat and to be asked to choose whether the defendant is guilty of either murder or voluntary manslaughter, simultaneously . . . .
>
> We conclude it was deficient performance for trial counsel not to point out to the trial court the errors in [the incorrect] instructions . . . . We further conclude that [the defendant] was prejudiced by this performance. The evidence of sudden heat in

> this case was not inconsiderable. It is readily conceivable that[,] had the jury been properly and clearly instructed regarding the State's burden of disproving the existence of sudden heat in order to convict [the defendant] of murder, . . . it might have opted to convict him of voluntary manslaughter instead. [The defendant] did not have to establish that the jury definitely would have convicted him of voluntary manslaughter instead of murder had it been properly instructed; he only had to establish a reasonable probability of such a result. He met that burden.

Id. at 460-61 (citation and footnote omitted). So too here: it is readily conceivable that a properly instructed jury may have opted to convict Washington of voluntary manslaughter instead of murder on this record. Therefore, the post-conviction court erred when it concluded that Washington was not prejudiced by his trial counsel's deficient performance. We reverse the post-conviction court's judgment, vacate Washington's convictions, and remand for a new trial on the State's charges.

[16] Reversed and remanded for a new trial.

Tavitas, J., and Weissmann, J., concur.