MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Marco Antonio Pacheco-Aleman,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

October 30, 2023

Court of Appeals Case No. 23A-CR-91

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge

Trial Court Cause No. 49D30-2103-MR-8214

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

[1] Marco Pacheco-Aleman appeals his conviction for the murder of his wife, Karen Castro-Martinez. We find Pacheco-Aleman's arguments without merit and, accordingly, affirm.

Issues

[2] Pacheco-Aleman raises three issues on appeal, which we reorder and restate as:

I. Whether his trial counsel was ineffective for failing to raise a hearsay objection to certain testimony.

II. Whether the trial court abused its discretion by failing to instruct the jury on voluntary manslaughter as a lesser-included offense of murder.

III. Whether the State presented sufficient evidence to support Pacheco-Aleman's conviction.

Facts

[3] Pacheco-Aleman lived with his wife, Karen, and their son, M.M., in an apartment on the third floor of an apartment building in Indianapolis. Their neighbor, Keile Funes, lived in the apartment next door.

[4] On March 13, 2022, the family visited Pacheco-Aleman's sister, Ela. Toward the evening, Pacheco-Aleman left Ela's alone and went to the family's apartment; however, he was locked out. At approximately 6:20 p.m., Pacheco-

Aleman called Karen and told her to come unlock the apartment. He called her seven more times over the next fifteen minutes.

[5] On Funes's way to the basement laundry room, she passed Pacheco-Aleman in the hallway. Funes testified that Pacheco-Aleman was drunk, "look[ed] . . . really odd," and sounded "very altered or upset towards" Karen. Tr. Vol. II p. 122, 124. Funes "got frightened when [she] saw him with that attitude." *Id*. at 124. Funes could still hear Pacheco-Aleman yelling over the phone from the basement laundry room.

[6] Karen and M.M. arrived home at the apartment at approximately 7:00 p.m., and Funes heard Karen and Pacheco-Aleman arguing. Funes overheard Karen tell Pacheco-Aleman "that if he was the owner of the apartment[,] why wouldn't . . . he just knock the door down." *Id*. at 115.

[7] According to Funes, Karen unlocked the door, and the family went inside the apartment, where the argument continued. A short time later, Funes heard a gunshot, and Karen "yelled that she did not want to die." *Id*. at 124. Funes also heard M.M. "desperate[ly]" and repeatedly screaming, "Dad, call the ambulance. Why d[id] you do this? Why d[id] you kill my mom?" *Id*. at 118.

[8] Funes had her brother-in-law contact 911 to report the shooting. The tenant who lived below Pacheco-Aleman also contacted 911. He reported that Pacheco-Aleman "killed his wife" and that he saw Pacheco-Aleman "running away with his son" and drive off. State's Ex. 2 2:30; 3:14. Pacheco-Aleman was "carrying a gun in his arms, and he seemed really scared . . . ." *Id*. at 5:40.

[9] Law enforcement responded to the call and found Karen dead at the scene. There were no signs of forced entry or struggle in the apartment. An autopsy later determined that Karen had been shot in the bridge of the nose from an "intermediate range." Tr. Vol. II p. 168. Her death was ruled a homicide.

[10] Meanwhile, Pacheco-Aleman dropped off M.M. at Ela's residence and drove to Illinois. He then drove back through southern Indiana and was discovered sleeping in his car in the emergency lane of I-64 later that night. Law enforcement arrested Pacheco-Aleman and transported him to the Floyd County Jail, where a nine-millimeter bullet was discovered in his pants pocket. When Pacheco-Aleman's car was impounded, his cell phone was plugged in and the Apple Maps app was providing directions "towards [the] Eastern Seaboard." *Id*. at 198.

[11] On March 18, 2021, the State charged Pacheco-Aleman with murder, a felony. The trial court held a jury trial on October 31 and November 1, 2022. After the close of evidence, Pacheco-Aleman proffered a jury instruction on voluntary manslaughter as a lesser-included offense of murder. The State objected on the grounds that Karen's and Pacheco-Aleman's argument was insufficient to establish that Pacheco-Aleman acted under "sudden heat." *Id*. at 245. The trial court declined to instruct the jury on voluntary manslaughter. The jury found Pacheco-Aleman guilty of murder, and the trial court entered judgment of conviction and sentenced Pacheco-Aleman to fifty-five years in the Department of Correction. Pacheco-Aleman now appeals.

Discussion and Decision

I. Ineffective Assistance of Counsel

[12] Pacheco-Aleman argues that his trial counsel was ineffective for failing to raise a hearsay objection to Funes's testimony regarding Karen's statement "that if [Pacheco-Aleman] was the owner of the apartment[,] why wouldn't . . . he just knock the door down."[1] Tr. Vol. II p. 115. We are not persuaded.

[13] "The Sixth Amendment to the federal constitution, applied to this state in relevant part by the Fourteenth Amendment, protects the right of an accused '[i]n all criminal prosecutions . . . to have the assistance of counsel for his defense,'" and "[o]ur state constitution protects the same right." *Hanks v. State*, 71 N.E.3d 1178, 1183 (Ind. Ct. App. 2017) (quoting U.S. Const. amend. VI and citing *Powell v. Alabama*, 287 U.S. 45, 68, 53 S. Ct. 55, 64 (1932); Ind. Const. art 1, § 13), *trans. denied*. "The assistance of counsel means the *effective* assistance of counsel." *Id*. (citing *Powell*, 287 U.S. at 71, 53 S. Ct. at 65) (emphasis in original).

[14] To prevail on his ineffective assistance of trial counsel claim, Pacheco-Aleman must show that: (1) his trial counsel's performance fell short of prevailing professional norms; and (2) his trial counsel's deficient performance prejudiced his defense. *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (citing *Strickland v.*

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[1] We note that, when an ineffective assistance of trial counsel claim is raised on direct appeal, that claim "'is not available in post-conviction proceedings.'" *Hardy v. State*, 786 N.E.2d 783, 786 (Ind. Ct. App. 2003) (quoting *Landis v. State*, 749 N.E.2d 1130, 1133 (Ind. 2001)), *trans. denied*.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007)). Additionally, "[t]o demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

[15] Failure to satisfy either the deficient performance prong or the prejudice prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by the prejudice inquiry alone. *Id.*

[16] That is the case here; Pacheco-Aleman fails to persuade us that his trial counsel's failure to raise a hearsay objection to Funes's testimony prejudiced him in light of the overwhelming evidence against him. The evidence established that, on the night of the murder, Pacheco-Aleman was drunk and upset that he was locked outside of the apartment. He called Karen numerous times in the span of minutes and yelled at her to come unlock the door, which Funes could hear from four flights below. Shortly after Karen arrived, Funes heard a gunshot, Karen yelled that she did not want to die, and M.M. asked why Pacheco-Aleman shot Karen. Pacheco-Aleman's downstairs neighbor contacted 911 and reported that Pacheco-Aleman shot his wife and ran away

with M.M. while carrying a gun. Pacheco-Aleman fled to Illinois and was later arrested in southern Indiana. He had a nine-millimeter bullet in his pocket and had directions on his cellphone to the Eastern Seaboard. There were no signs of forced entry or struggle in the apartment.

[17] Pacheco-Aleman's trial counsel's failure to raise a hearsay objection to Funes's testimony does not undermine our confidence in Pacheco-Aleman's conviction. Indeed, Pacheco-Aleman recognizes that the statements "do not have inculpatory value." Appellant's Br. p. 23. Accordingly, we cannot say Pacheco-Aleman's trial counsel was ineffective. *See Gibson*, 133 N.E.3d at 695 (rejecting ineffective assistance of counsel claim based on "overwhelming evidence" of defendant's guilt).

II. Abuse of Discretion—Voluntary Manslaughter Instruction

[18] Next, Pacheco-Aleman argues that the trial court abused its discretion by failing to instruct the jury on voluntary manslaughter. We are not persuaded.

[19] Voluntary manslaughter is a lesser-included offense of murder. *Watts v. State*, 885 N.E.2d 1228, 1231 (Ind. 2008). "When a party asks a trial court to instruct the jury on an alleged lesser-included offense of the crime charged, the court must conduct a three-part analysis to determine whether the instruction is appropriate." *Id*. (citing *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995)). Because there is no dispute that voluntary manslaughter is a lesser-included offense of murder, only the third step in the analysis is relevant. That step asks:

> whether there is *a serious evidentiary dispute* over the element or elements that distinguish the crime charged and the lesser-included offense. If it would be possible for a jury to find that the lesser, but not the greater, offense had been committed, then the trial court must instruct the jury on both offenses.

Id. (emphasis in original, citation omitted).

[20] Turning to the proof required to establish voluntary manslaughter, the offense is codified under Indiana Code Section 35-42-1-3, which provides:

> (a) A person who knowingly or intentionally:
>
> (1) kills another human being . . .
>
> * * * * *
>
> while acting under sudden heat commits voluntary manslaughter, a Level 2 felony.
>
> (b) 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.

[21] "Sudden heat must be separately proved. Therefore, if there is no serious evidentiary dispute over sudden heat, it is error for a trial court to instruct a jury on voluntary manslaughter in addition to murder." *Watts*, 885 N.E.2d at 1232. "Sudden heat exists when a defendant is 'provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of

cool reflection.'" *Brantley v. State*, 91 N.E.3d 566, 572 (Ind. 2018) (quoting *Isom v. State*, 31 N.E.3d 469, 486 (Ind. 2015)). Our courts have held that "insults or taunts alone are not sufficiently provocative to merit a conviction for voluntary manslaughter instead of murder." *Watts*, 885 N.E.2d at 1233 (citation omitted); *see also Suprenant v. State*, 925 N.E.2d 1280, 1282 (Ind. Ct. App. 2010) (observing that "words alone" do not "'constitute sufficient provocation to warrant a jury instruction on voluntary manslaughter'" (quoting *Allen v. State*, 716 N.E.2d 449, 452 (Ind. 1999))), *trans. denied*. We review the trial court's denial of an instruction on voluntary manslaughter for an abuse of discretion. *Watts*, 885 N.E.2d at 1283 (citing *Washington v. State*, 808 N.E.2d 617, 626 (Ind. 2004)).

[22] Here, the evidence established that Pacheco-Aleman and Karen argued loudly over the phone regarding Pacheco-Aleman being locked out of the apartment. When Karen arrived at the apartment to unlock the door, the two continued to argue. The family entered the apartment, and moments later, Pacheco-Aleman shot Karen in the head.

[23] Pacheco-Aleman contends that a serious evidentiary dispute exists because his argument with Karen could constitute sudden heat. He further contends that Karen was intoxicated[2] and suggests that Karen might have taken some action

[2] During trial, Pacheco-Aleman sought to ask the forensic pathologist questions regarding Karen's blood alcohol content around the time of her death. The State objected on relevancy grounds, and the trial court sustained the objection. Pacheco-Aleman then made an offer of proof, and the forensic pathologist testified

in the apartment to further provoke Pacheco-Aleman. There was, however, no evidence of any such action. This leaves the argument between Pacheco-Aleman and Karen as the only evidence of provocation, and this exchange of words alone is insufficient to establish that Pacheco-Aleman acted under sudden heat. *Cf. White v. State*, 699 N.E.2d 630, 632, 635 (Ind. 1998) (holding no serious evidentiary dispute regarding sudden heat existed when the victim merely insulted the defendant and neither "made physical contact with defendant, nor threatened him in any manner"). Moreover, we are not persuaded that Karen's statement would have "obscure[d] the reason of an ordinary person" to a degree sufficient for a jury to find Pacheco-Aleman less culpable of killing Karen. *Brantley v. State*, 91 N.E.3d 566. Accordingly, the trial court did not abuse its discretion by failing to instruct the jury on voluntary manslaughter.

III. Sufficiency of Evidence

[24] Lastly, Pacheco-Aleman argues that the State presented insufficient evidence to support his conviction for murder.[3] Again, we are not persuaded.

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outside the presence of the jury that Karen's blood alcohol content was .052, which did not rise to the level of "legally intoxicated." Tr. Vol. II p. 178.

[3] Although Pacheco-Aleman challenges the sufficiency of the evidence, Pacheco-Aleman's counsel omits any mention of some of the most incriminating evidence presented at trial. Most obviously, counsel fails to mention evidence that, after the gunshot was fired, M.M. screamed at Pacheco-Aleman, "Dad, . . . [w]hy did you kill my mom?" Tr. Vol. II p. 18. All Pacheco-Aleman's counsel states is that M.M. was "desperately screaming and begging for an ambulance." Appellant's Br. p. 14. We remind counsel that we closely review the record, and that treating unfavorable evidence as if it simply does not exist reflects poorly on the legal profession. *See also* App. R. 46(A)(6)(b) (requiring appellant's brief to state the facts "in accordance with the standard of review appropriate to the judgment or order being appealed").

[25] Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Powell*, 151 N.E.3d at 262 (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* at 263. We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[26] Pacheco-Aleman argues that the State presented no direct evidence that he murdered Karen and that the circumstantial evidence is insufficient to support his conviction. He relies on *Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017), and *Glover v. State*, 255 N.E.2d 657 (Ind. 1970), both of which we find distinguishable.

[27] In *Humphrey*, Humphrey was charged with the shooting of a would-be-buyer during a drug transaction. 73 N.E.3d at 680. During trial, Humphrey's counsel

did not raise a hearsay objection to an unsworn statement in which the declarant claimed that Humphrey confessed to the shooting, and the jury found Humphrey guilty. *Id*. at 680-81. Humphrey raised an ineffective assistance of counsel claim based on his trial counsel's failure to raise a hearsay objection to the unsworn statement, and our Indiana Supreme Court found in his favor. In discussing the prejudice prong of the ineffective assistance of counsel claim, the Court found that trial counsel's deficient performance prejudiced Humphrey because "[a]bsent [the] unsworn hearsay statement, at best the testimony presented . . . places Humphrey at the scene on the night [the victim] was shot, giving him an opportunity to commit the crime," and that "'[s]howing mere opportunity to commit the crime is not sufficient.'" *Id*. at 689 (quoting *Glover*, 255 N.E.2d at 659). In *Glover*, our Supreme Court reversed Glover's murder conviction when the evidence only showed that Glover "was in the general area when the killing occurred at about the time the killing occurred." 255 N.E.2d at 659.

[28] Here, a neighbor heard Pacheco-Aleman and Karen fighting and heard a gunshot. After the shooting, M.M. repeatedly screamed at Pacheco-Aleman, "Dad, . . . [w]hy did you kill my mom?" Tr. Vol. II p. 18. Pacheco-Aleman fled the apartment with a firearm, fled the state, and was later arrested with a nine-millimeter bullet in his pants pocket. As we explained above, the evidence against Pacheco-Aleman was overwhelming. It shows far more than Pacheco-Aleman's mere opportunity to commit the crime. "A conviction for murder may be sustained on circumstantial evidence alone if that circumstantial

evidence supports a reasonable inference of guilt." *Fry v. State*, 25 N.E.3d 237, 248 (Ind. Ct. App. 2015) (citing *Lacey v. State,* 755 N.E.2d 576, 578 (Ind. 2001)), *trans. denied*. That is the case here.[4] Accordingly, the State presented sufficient evidence to support Pacheco-Aleman's conviction.

Conclusion

[29] Trial counsel was not ineffective for failing to raise a hearsay objection to Funes's testimony; the trial court did not abuse its discretion by failing to instruct the jury on voluntary manslaughter as a lesser-included offense of murder; and the State presented sufficient evidence to support Pacheco-Aleman's conviction. Accordingly, we affirm.

[30] Affirmed.

Pyle, J., and Foley, J., concur.

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[4] The State also argues that Pacheco-Aleman's trial counsel admitted that Pacheco-Aleman shot Karen during his closing argument and that Pacheco-Aleman "is bound by this admission." Appellee's Br. p. 14. During his closing argument, Pacheco-Aleman's trial counsel stated, "[T]hey are screaming and yelling at each other at the door and then some sort of anger, rage, [or] something happens that sets [Pacheco-Aleman] over . . . and he fires one time at the head of Karen." Tr. Vol. III pp. 11-12. Because we find the evidence sufficient to support Pacheco-Aleman's conviction, we do not address whether trial counsel's statement constitutes a binding admission.