MEMORANDUM DECISION

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IN THE

Court of Appeals of Indiana

John Brennan Larkin,

Appellant-Petitioner

v.

State of Indiana,

Appellee-Respondent

March 18, 2024

Court of Appeals Case No.
23A-PC-1081

Appeal from the LaPorte Superior Court

The Honorable Kim E. Hall, Special Judge

Trial Court Cause No.
46D01-2201-PC-2

Memorandum Decision by Judge Weissmann
Chief Judge Altice and Judge Kenworthy concur.

Weissmann, Judge.

[1] In 2012, John Larkin shot and killed his wife during an argument. For this, he was convicted of involuntary manslaughter and received a 2-year prison sentence. In his fifth appeal in just over a decade, Larkin alleged in a petition for post-conviction relief (PCR) that his trial counsel performed ineffectively in defending him. The PCR Court denied Larkin's petition and we affirm.

Facts[1]

[2] On a December night in 2012, Larkin and his wife, Stacey Larkin, got into an argument that quickly devolved into a fatal fight. As Larkin described the scene to police shortly thereafter, Stacey had attempted to grab the couple's handgun from a safe during their argument. Just as Stacey put her hand on it, Larkin grabbed the gun, too. In response, Stacey ran at Larkin and knocked them both to the ground, falling forward. According to Larkin, the handgun suddenly discharged and shot Stacey, who had been scratching Larkin's face. Larkin then pushed Stacey into a corner with the handgun, which discharged again, shooting her a second time. Stacey died from her injuries.

[3] Shortly after Larkin's police interview, the State charged him with voluntary manslaughter as a Class A felony. The case quickly developed a lengthy procedural history, largely due to law enforcement and prosecutorial

[1] We held oral argument in this case and thank counsel for their excellent advocacy.

misconduct. This pre-trial litigation ended with an Indiana Supreme Court decision holding that any tainted evidence must be suppressed. *See State v. Larkin*, 100 N.E.3d 700 (Ind. 2018).

[4] In September 2019, nearly seven years after the shooting, Larkin's jury trial began. During the five-day trial, the jury heard evidence that included Larkin's first-hand account to the police about the shooting. Larkin mainly argued self-defense, blaming his wife's recent erratic behavior for his need to defend himself. He also revealed evidence of defects with the handgun, that eventually caused the manufacturer to issue a product recall, where the gun would "discharge upon being dropped." Tr. Vol. V, p. 158-59. But the State heavily pushed back on this issue. Under ideal testing conditions, the gun misfired only 2 out of 24 times. And the misfires occurred when the gun was dropped straight down from a height of about 4 feet, muzzle pointed up, such that when the gun hit the ground inertia continued to act on the trigger, producing a misfire. *Id.* at 191-95. This scenario also related to the handgun's second defect, the lack of a "trigger safety" that prevents the weapon from firing unless the trigger is being pulled by the shooter. *Id.* at 159. As the State argued to the jury, these conditions were completely unlike the scene Larkin described since "the gun wasn't dropped." Tr. Vol. VI, p. 1.

[5] At the end of the trial's fourth day, with closing arguments set to begin the next day, the State requested that the jury be instructed on involuntary manslaughter as a lesser-included offense. The court gave the instruction over Larkin's objection that he lacked fair notice of the lesser included offense because the

charging information never alleged involuntary manslaughter. The jury found Larkin not guilty of voluntary manslaughter but guilty of involuntary manslaughter. Larkin appealed, challenging among other things, the propriety of the involuntary manslaughter charge.

[6] Taking the issue all the way to the Indiana Supreme Court, Larkin's involuntary manslaughter conviction was affirmed. The Court pointed out that, for decades, "[a] knowing or intentional killing with a handgun" has been "classified as a battery." *Larkin v. State*, 173 N.E.3d 662, 668 (Ind. 2021) (citing *Lynch v. State*, 571 N.E.2d 537, 538-39 (Ind. 1991)). "Thus, involuntary manslaughter based on a battery was a factually included lesser offense."[2] *Id.* The majority also concluded that Larkin had fair notice of the involuntary manslaughter charge.

[7] After his direct appeal, Larkin sought post-conviction relief. In his petition, he claimed ineffective assistance of trial counsel based on three alleged deficiencies:

- Counsel had an "incorrect belief of law regarding lesser-included offenses, resulting in compounding errors" including presenting incorrect law to the jury, failing to object to the prosecutor's legal arguments, and failing to present a defense for involuntary manslaughter;

[2] A lesser included offense is factually included "if the charging document alleged all of its elements." *Id.* at 668.

- Counsel failed to offer jury instructions on "the proximate cause and causation requirements" for involuntary manslaughter and on jury unanimity; and

- Counsel failed "to seek dismissal after the prosecution constructively amended the information by providing the jury with an alternate uncharged basis to convict."

App. Vol. II, p. 15.

[8] At the evidentiary hearing, Larkin provided records from his direct appeal and affidavits from the two attorneys who represented him at trial. The affidavits stated counsel were unaware that "involuntary manslaughter could be a lesser-included offense to voluntary manslaughter" and "did not investigate, research, or prepare a defense against involuntary manslaughter." Exhs., pp. 79-82. He speculated that he might have been acquitted but for his attorneys' alleged errors. The PCR Court rejected Larkin's arguments, finding that "it is simply impossible to conclude" that the performance of Larkin's trial counsel resulted in prejudice. App. Vol. III, p. 16.

Discussion and Decision

[9] To obtain post-conviction relief, a petitioner must show "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilson v. State*, 157 N.E.3d 1163, 1170 (Ind. 2020). In other words, the PCR court should be affirmed unless "there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Findings of fact are

accepted unless they are "clearly erroneous." *Davidson v. State*, 763 N.E.2d 441, 443-44 (Ind. 2002).

I. Larkin's Ineffective Assistance of Counsel Claim Fails

[10] From the start, there is a strong presumption that Larkin's counsel rendered adequate assistance. Larkin can only rebut this presumption with "strong and convincing evidence" to the contrary. *Carr v. State*, 728 N.E.2d 125, 132 (Ind. 2000). Larkin must show both that: "(1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) the deficiency was so prejudicial as to create a reasonable probability the outcome would have been different absent counsel's errors." *Bradbury v. State*, 180 N.E.3d 249, 252 (Ind. 2022) (applying *Strickland v. Washington*, 466 U.S. 668 (1984)).

[11] When reviewing counsel's performance, we focus more on the overall performance rendered by counsel and not specific acts. *Strickland*, 466 U.S. at 690-96. This is because "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Thus, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001).

[12] Larkin failed to prove prejudice and thus he cannot succeed on his ineffectiveness of counsel claim. *State v. Pearson*, 191 N.E.3d 892, 899 (Ind. Ct. App. 2022) ("Most ineffective assistance of counsel claims can be resolved by a

prejudice inquiry alone."). To prove he suffered prejudice, Larkin "must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Bradbury*, 180 N.E.3d at 253 (quoting *Wilson v. State*, 157 N.E.3d 1163, 1177 (Ind. 2020)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

[13] Thus, the critical question here is whether there exists a reasonable probability that the outcome would have changed if Larkin's trial counsel did not make the mistakes he alleges they did. We agree with the PCR Court that Larkin failed to show prejudice.

[14] Larkin went to trial facing a potential maximum sentence of 50 years, and in the end, received just a 2-year sentence. Already, it is hard to see this result as anything but the work of competent counsel. *See Bradbury*, 180 N.E.3d at 255 (Massa, J., concurring) (noting that counsel was "extraordinarily effective" by "persuading the trial court to heighten the prosecution's burden"). Yet Larkin maintains that his trial strategy was in effect "all-or-nothing;" thus, his conviction for involuntary manslaughter should be seen as an indictment of his trial counsel's lack of preparation.

[15] But the evidence is uniform that Larkin committed involuntary manslaughter. Involuntary manslaughter involves a knowing or intentional killing while committing, as relevant here, a battery. Ind. Code § 35-42-1-4(b)(3). "A battery is a knowing or intentional touching 'in a rude, insolent, or angry manner.'"

Ind. Code § 35-42-2-1(a) (2012). Larkin clearly committed a battery. He has never denied shooting his wife. Moreover, he admitted to pushing his wife during the altercation. Both acts qualify as an offensive touch for the purposes of battery, and Larkin makes no argument that these acts were not intentionally done. *Larkin v. State*, 173 N.E.3d 662, 668 (Ind. 2021) (citing *Lynch v. State*, 571 N.E.2d 537, 538-39 (Ind. 1991)). Thus, there is no plausible argument that Larkin did not commit a battery and any argument that his trial counsel could have, somehow, changed this result necessarily fails.

[16] To wit, Larkin's assertion that he could have benefited from his trial counsel focusing more on the gun's manufacturing defect is misplaced. First, the gun's defects were already heavily discussed at Larkin's trial. As the prosecutor described it during its closing argument "one of the issues that I think absolutely is legitimate, and maybe the most important issue, is the gun." Tr. Vol. V, p. 250. And the facts surrounding the defect do not support Larkin's theory of an accidental discharge either. The conditions necessary to produce a misfire were nothing like the scene described by Larkin. As explained at the trial, the gun only had a roughly 10% chance of misfiring when dropped straight down to the ground from a height of about 4 feet. *Id.* at 191-95. Yet Larkin told the police, and maintained throughout the trial, that he held onto the weapon during the entire altercation, even pushing his wife with it. Thus, even viewing the defect in the light most favorable to Larkin's case, it offers no explanation for how the handgun accidentally discharged even once—much less an explanation for how

his wife was shot twice. *Id.* at 250 ("common sense tells you that a gun doesn't go off accidentally twice").

[17] Nor was there any obvious benefit to seeking additional jury instructions on involuntary manslaughter and jury unanimity. Even if such instructions were proper, Larkin has not proved with a reasonable probability that they would have affected the outcome—again, because there is no plausible argument that Larkin did not commit involuntary manslaughter. *See Carrillo v. State*, 982 N.E.2d 461, 467-68 (Ind. Ct. App. 2013) (finding no prejudice where "overwhelming evidence" existed of defendant's guilt and thus no "objectively reasonable probability" existed of a different outcome). Regardless of the instructions placed before it, the jury was confronted with all the information necessary to conclude that Larkin knowingly killed his wife while committing a battery.

[18] In short, it does not seem "readily conceivable" that a different result may have been reached under these facts. *Washington v. State*, 177 N.E.3d 498, 506-08 (Ind. Ct. App. 2021).

Conclusion

[19] The PCR Court's judgment is affirmed.[3] Larkin did not prove that he received ineffective assistance of counsel because he suffered no prejudice from any alleged mistake.

Altice, C.J., and Kenworthy, J., concur.

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[3] This holding necessarily rejects Larkin's alternative argument that we remand this case for the PCR Court to redo its order. *See Pierce v. State*, 135 N.E.3d 993, 1002-03 (Ind. Ct. App. 2019) (rejecting appellant's remand request because "the court's theory of decision is clear, the parties plainly understood it, and they have cogently and specifically argued the merits of their respective positions to this Court accordingly").