MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Tyron Johnson,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 22, 2024

Court of Appeals Case No.
23A-PC-2556

Appeal from the St. Joseph Superior Court

The Honorable Elizabeth C. Hurley, Judge

Trial Court Cause No.
71D08-1806-PC-22

Memorandum Decision by Judge Bailey
Judges Crone and Pyle concur.

Bailey, Judge.

Case Summary

[1] Tyron Johnson appeals the denial of his post-conviction petition challenging his conviction for Murder, a felony.[1] We affirm.

Issues

[2] Johnson presents two issues for review:

I. Whether he was denied the effective assistance of trial counsel because counsel failed to object to the language of the voluntary manslaughter instruction given; and

II. Whether he was denied the effective assistance of appellate counsel because counsel failed to raise an issue as to the voluntary manslaughter instruction.

Facts and Procedural History

[3] The relevant facts as recited in Johnson's direct appeal are as follows:

> During the morning of June 12, 2015, Johnson was walking toward his mother's Mishawaka home with his girlfriend, Precious Jackson ("Jackson"). Jackson was carrying her infant son (who had been fathered by Johnson) in a baby carrier; her three pre-school children were following behind her. The couple

[1] Ind. Code § 35-42-1-1.

> began to engage in a heated argument about their relationship, drawing the attention of neighbors.
>
> Johnson drew a handgun from his waistband and fired six shots. Three of the shots struck Jackson and she died within minutes. Johnson ran from the scene, tossing away the gun and shedding his clothing as he fled.
>
> Johnson was located and arrested a few days later. On June 15, 2015, he was charged with Murder. His jury trial commenced on June 27, 2016. At trial, Johnson did not deny that he shot and killed Jackson, but argued that he was guilty of Voluntary Manslaughter rather than Murder because he shot her under sudden heat. The trial court provided the jury with an instruction on Voluntary Manslaughter but the jury found Johnson guilty of Murder, as charged. On July 25, 2016, Johnson was sentenced to sixty years' imprisonment, with five years suspended.

Johnson v. State, No. 71A03-1608-CR-1896, slip op. at 1, (Ind. Ct. App. June 30, 2017). Johnson appealed, raising issues as to the sufficiency of the evidence to support his conviction and the admission of autopsy photographs. Johnson's conviction was affirmed. *Id.*

[4] On June 5, 2018, Johnson filed a pro-se petition for post-conviction relief. On December 20, 2021, Johnson filed an amended petition, with the assistance of appointed counsel. The post-conviction court conducted a hearing on November 21, 2022. On October 2, 2023, the post-conviction court issued its findings of fact, conclusion thereon, and order denying Johnson post-conviction relief. Johnson now appeals.

Discussion and Decision

Post-Conviction Standard of Review

[5] The petitioner in a post-conviction proceeding bears the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of postconviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id*. On review, we will not reverse the judgment of the post-conviction court unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id*. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error, that which leaves us with a definite and firm conviction that a mistake has been made. *Id*. In this review, findings of fact are accepted unless they are clearly erroneous, and no deference is accorded to conclusions of law. *Id*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id*.

Effectiveness of Trial Counsel

[6] To establish a post-conviction claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." *Id*. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious

that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Id*. "Second, a defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. *Id*. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694, 104 S. Ct. at 2052. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id*. Further, we "strongly presume" that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002).

[7] Indiana's voluntary manslaughter statute provides:

> (a) A person who knowingly or intentionally:
>
> (1) kills another human being; or
>
> (2) except as provided in section 6.5 of this chapter, kills a fetus in any stage of development;
>
> 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.

Ind. Code § 35–42–1–3.

[8] "Sudden heat" is characterized as "anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection." *Dearman v. State*, 743 N.E.2d 757, 760 (Ind. 2001). It is not an element of Voluntary Manslaughter. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). Rather, it is that which distinguishes Voluntary Manslaughter from Murder. *Id*. Although Voluntary Manslaughter is a lesser-included offense of Murder, it is an atypical example of a lesser-included offense. *Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008). "In the case of voluntary manslaughter … sudden heat is a mitigating factor, not an element, that the State must prove *in addition* to the elements of murder." *Id.* (emphasis in original.)

[9] Johnson claims that his trial attorney was ineffective for failing to object to the Voluntary Manslaughter instruction given to the jury, which was a pattern jury instruction for lesser-included offenses. According to Johnson, the instruction is one of "erroneous sequencing" which "precluded the jury from considering voluntary manslaughter once it determined Johnson was guilty of murder." Appellant's Brief at 24. In particular, Johnson points to the following language as objectionable:

> If the State proves the defendant guilty of murder, you need not consider the included crimes. However, if the State fails to prove the defendant committed murder, you may consider whether the defendant committed voluntary manslaughter or reckless homicide, which the Court will define for you.

(P-C.R. App. Vol. II, pg. 149.)

[10] It is incorrect to use language instructing a jury that "if the State did *not* prove all the elements of murder," it should then consider voluntary manslaughter. *See Howell v. State*, 97 N.E.3d 253, 262 (Ind. Ct. App. 2018), *trans. denied* (emphasis in original). In *Howell*, the defendant was charged with murder, among other offenses, and was convicted of voluntary manslaughter as a lesser-included offense of murder. On appeal, we rejected Howell's contention that the erroneous instruction resulted in fundamental error and made a fair trial impossible because the jury had been provided with an additional instruction, Instruction 3, that correctly stated the law. *Id.* at 263. Instruction 3

> correctly informed the jury of the definitions of murder and voluntary manslaughter, that sudden heat is a mitigating factor that reduces murder to voluntary manslaughter, and that the State had the burden of proving that Howell was not acting under sudden heat, and Instruction 3 laid out specifically the circumstances under which the jury was required to find him not guilty of murder, guilty of voluntary manslaughter, or guilty of murder based on the State's success or failure to prove the required elements.

Id. Accordingly, the instructions taken as a whole did not mislead the jury. The challenged instruction "did not result in reversible error, let alone fundamental error." *Id.*

[11] In this case, the jury was likewise provided with correct instructions defining murder and voluntary manslaughter and was informed that sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. The jury was instructed that the State had the burden of proving

beyond a reasonable doubt that Johnson was not acting under sudden heat. Both the prosecutor and defense counsel reiterated this requirement during closing argument. The jury was further instructed that it could find Johnson guilty of murder only if the State proved beyond a reasonable doubt that Johnson knowingly killed Precious Jackson and Johnson was not acting under sudden heat. The circumstances under which Johnson could be found guilty of voluntary manslaughter were described as follows:

> If the State did prove each of the elements one through four [Johnson knowingly killed Jackson] beyond a reasonable doubt but the State failed to prove beyond a reasonable doubt element five [absence of sudden heat], you may find the defendant guilty of voluntary manslaughter, a level 2 felony, a lesser included offense of murder, a felony.

(P-C.R. App. Vol. II, pg. 150.)

[12] The *Howell* decision involved a fundamental error review, while the issue before us is one of effectiveness of counsel. However, as our supreme court has explained,

> While we frame the standard for ineffective assistance of counsel and fundamental error in somewhat different terms – appropriate so, since the first is a standard of Federal Constitutional law and the second of state criminal procedure – they will invariably operate to produce the same result where the procedural posture of the claim is caused by counsel's failure to object at trial.

McCorker v. State, 797 N.E.2d 257, 262–63 (Ind. 2003) (footnote omitted). We are persuaded that the outcome of Johnson's trial would not have differed had defense counsel objected to the voluntary manslaughter instruction as given. Johnson was not denied the effective assistance of trial counsel.

Effectiveness of Appellate Counsel

[13] A defendant is entitled to the effective assistance of appellate counsel. *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002). The two-pronged standard for evaluating the assistance of trial counsel first enunciated in *Strickland* is applicable to appellate counsel ineffective assistance claims. *Bieghler v. State*, 690 N.E.2d 188, 192 (Ind. 1997). There are three basic categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal, (2) waiver of issues, and (3) failure to present issues well. *Id*. at 193-95. Here, the second category is implicated.

[14] "Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance." *Walker v. State*, 843 N.E.2d 50, 60 (Ind. Ct. App. 2006), *trans. denied*. Our supreme court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. *Bieghler*, 690 N.E.2d at 194. If this analysis demonstrates deficient performance by counsel, the court then

examines whether the issues that appellate counsel failed to raise "would have been clearly more likely to result in reversal or an order for a new trial." *Id*.

[15] Johnson claims that appellate counsel performed deficiently by failing to obtain an adequate record inclusive of the instructions given and failing to challenge on appeal the voluntary manslaughter instruction as fundamental error. But the record does not support Johnson's suggestion that the instructions were unavailable to appellate counsel. At the post-conviction hearing, appellate counsel testified that he had reviewed the instructions given to the jury at Johnson's trial. His review did not lead him to believe that there was an instructional error that should be challenged on appeal as fundamental error.

[16] Had appellate counsel raised the issue of whether the voluntary manslaughter instruction amounted to fundamental error, the reviewing Court would have considered the instructions as a whole. *See Howell*, 97 N.E.3d 261. As a whole, the instructions given at Johnson's trial did not mislead the jury. Additionally, both the prosecutor and defense counsel clearly reminded the jury of the distinction between murder and voluntary manslaughter – an additional element that the State must prove – stating in closing argument:

> Prosecutor: [T]he additional element of not in sudden heat comes into play in order to differentiate murder versus manslaughter. For voluntarily [sic] it would be under sudden heat. For murder it was not acting under sudden heat. Once that issue is interjected in the case it becomes something the state has to disprove, the evidence has to disprove.

(Closing Tr. at 22.)

> Defense Counsel: One is murder, one is voluntary manslaughter which is nothing more than murder in sudden heat. … Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. The state has the burden of proving beyond a reasonable doubt that the defendant was not acting under sudden heat. So what that means is that to get a conviction for murder the state can prove a murder, but it also has to disprove beyond a reasonable doubt that sudden heat was not involved [sic]. … And murder requires the state to disprove sudden heat. Voluntary manslaughter if the State hasn't disproved it, voluntary manslaughter is the crime he has committed.

(*Id.* at 49, 52, 65-66.) Appellate counsel did not fail to raise an issue that was significant and obvious from the face of the record.

Conclusion

[17] Johnson was not denied the effective assistance of trial or appellate counsel. Accordingly, the post-conviction court did not clearly err in denying Johnson post-conviction relief.

[18] Affirmed.

Crone, J., and Pyle, J., concur.

ATTORNEYS FOR APPELLANT

Amy E. Karozos
State Public Defender

Laura L. Volk
Deputy State Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana