MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Matthew David Castro,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

July 15, 2024

Court of Appeals Case No.
23A-CR-1050

Appeal from the Porter Superior Court

The Honorable Mary A. DeBoer, Judge

Trial Court Cause No.
64D05-2106-MR-5422

Memorandum Decision by Judge Brown
Judges May and Pyle concur.

Brown, Judge.

[1] Matthew David Castro appeals his conviction for murder and asserts he was deprived the effective assistance of trial counsel. We affirm.

Facts and Procedural History

[2] In March 2021, Michael Overton, Castro's best friend, lived with Castro in Castro's studio apartment. On March 21, 2021, Castro's upstairs neighbor called 911 multiple times due to loud noises including fighting, music, and yelling, and Castro attempting to enter her apartment. At 8:11 p.m., Castro's mother called 911 and stated that Castro called her, seemed disoriented, and told her that something was wrong with his friend and he might have killed him.

[3] Valparaiso Officers were dispatched to Castro's apartment. Castro answered the door and had blood on his face, cuts on his hand, a cut on the left side of his head, watery and bloodshot eyes, and the odor of alcohol coming off of him as he spoke, and he "was just overwhelmed with emotion." Transcript Volume II at 169. One of the officers asked Castro if he was in a fight with someone, and Castro nodded. Castro said Overton "got the best of him." *Id.* at 196.

[4] Officers discovered Overton's severely beaten and deceased body and observed that he had "lividity on his arms" and "no color to his skin." *Id.* at 184, 208. Officers transported Castro to a patrol vehicle, Castro was uncooperative, and officers placed a spit hood and "flex cuffs" on him. *Id.* at 197. After being placed in an interview room, Castro stated that he would probably execute

officers if his restraints were removed and that he would hurt anyone who came close to him.

[5] Officers obtained a search warrant for Castro's blood. During a blood draw, Castro repeatedly told the laboratory medical technologist that he "killed somebody." Transcript Volume III at 30. An autopsy revealed that the cause of Overton's death was multiple blunt force trauma to the head and neck.

[6] The State charged Castro with murder. At the beginning of *voir dire*, the court informed the potential jurors:

> The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything. The entire burden rests upon the State of Indiana. You should attempt to fit the evidence to the presumption that the Defendant is innocent, and the theory that every witness is telling the truth.

Transcript Volume II at 9.

[7] The court admitted a bodycam recording which showed law enforcement asking Castro if he was in a fight with someone and Castro nodding. The court also admitted a jail phone call in which Castro stated that he thought he "beat up Michael" and "the next thing" he knew the cops arrived. State's Exhibit 570 at 0:40-0:55.

[8] On February 27, 2023, Castro's counsel filed a proposed jury instruction on involuntary manslaughter which provided in part: "A person who kills another human being while committing or attempting to commit battery commits

involuntary manslaughter, a Level 5 felony." Appellant's Appendix Volume II at 106. When the court asked defense counsel why he thought the instruction was appropriate, he answered that there had been evidence presented that Castro committed a battery, "this is your classic involuntary manslaughter fight occurred in a bar parking lot, and somebody passed away from a fight." Transcript Volume V at 229. The trial court denied the proposed instruction. The jury found Castro guilty as charged.

Discussion

[9] Castro argues that he received ineffective assistance when his trial counsel failed to object to the jury instruction prior to *voir dire*, failed to propose a lesser included instruction on voluntary manslaughter, and failed to object to the trial court allowing the jury to ask oral questions of the witnesses. Generally, to prevail on an ineffective assistance of counsel claim, a petitioner "must show (1) that his counsel's performance fell short of prevailing professional norms, and (2) that counsel's deficient performance prejudiced his defense." *Gibson v. State*, 133 N.E.3d 673, 682 (Ind. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)), *reh'g denied*, *cert. denied*, 141 S. Ct. 553 (2020). A showing of deficient performance under the first of these two prongs requires proof that legal representation lacked an objective standard of reasonableness, effectively depriving the defendant of his Sixth Amendment right to counsel. *Id.* To 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.*

[10] "When assessing counsel's performance under *Strickland*, we rely on several important guidelines." *Id.* "First, we strongly presume that, throughout the proceedings, counsel exercised 'reasonable professional judgment' and rendered adequate legal assistance." *Id.* (quoting *Stevens v. State*, 770 N.E.2d 739, 746 (Ind. 2002) (citing *Strickland*), *reh'g denied*, *cert. denied*, 540 U.S. 830, 124 S. Ct. 69 (2003)). "Second, defense counsel enjoys 'considerable discretion' in developing legal strategies for a client, and this discretion demands deferential judicial review." *Id.* (quoting *Stevens*, 770 N.E.2d at 746-747). *See also Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986) ("Reasonable strategy is not subject to judicial second guesses."). "Finally, counsel's '[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.'" *Gibson*, 133 N.E.3d at 682 (quoting *Stevens*, 770 N.E.2d at 747).

[11] We observe that Castro is raising a claim of ineffective assistance of counsel on direct appeal. A post-conviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim. *Lewis v. State*, 929 N.E.2d 261, 263 (Ind. Ct. App. 2010) (citing *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998), *reh'g denied*, *cert. denied*, 528 U.S. 861, 120 S. Ct. 150 (1999)). This is because presenting such a claim often requires the development of new facts not present in the trial record, and the assessment of such a claim requires a court to consider the overall performance of counsel and the reasonable probability that the alleged error affected the outcome. *McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999).

[12] With respect to the overall performance of Castro's trial counsel, the record reveals that defense counsel gave an opening statement, cross-examined witnesses presented by the State including questioning an officer about a bicycle in front of the apartment that was not processed, objected to the admission of multiple pieces of evidence, and gave a closing argument suggesting that someone other than Castro committed the beating and asserting that, even if Castro fought Overton, he had no intent to kill him.

[13] As for trial counsel's failure to object to the jury instruction at the beginning of *voir dire* that the potential jurors should attempt to fit the evidence to the presumption that Castro was innocent and the theory that every witness is telling the truth, the Indiana Supreme Court has held that such an instruction is not erroneous. *See Timberlake v. State*, 690 N.E.2d 243, 258-259 (Ind. 1997) ("The last of defendant's jury instruction claims concerns an instruction which told the jury to presume that every witness was telling the truth. As we have previously found this instruction to be proper, *see Holmes* [*v. State*, 671 N.E.2d 841, 858 (Ind. 1996), *reh'g denied*, *cert. denied*, 522 U.S. 849, 118 S. Ct. 137 (1997)]; *Lottie v. State*, 273 Ind. 529, 535, 406 N.E.2d 632, 637 (1980), there was no error."), *reh'g denied*, *cert. denied*, 525 U.S. 1073, 119 S. Ct. 808 (1999). Further, Preliminary Instruction No. 8 and Final Instruction No. 10 informed the jurors that they were the "exclusive judges of the evidence, which may be either witness testimony or exhibits," "it is your duty to decide the value you give to the . . . testimony you hear," "[i]f you find conflicting testimony, you may have to decide what testimony you believe and what testimony you do not

believe," "[y]ou may believe all of what a witness said, or only part of it, or none of it," and "[y]ou should give the greatest value to the evidence you find most convincing." Appellant's Appendix Volume II at 91, 117. There is no error here.

[14] With respect to trial counsel's failure to propose a lesser included instruction for voluntary manslaughter, to prevail on this claim, Castro has the burden to show that counsel unreasonably failed to request a proper instruction and that he was prejudiced by the failure. *See Potter v. State*, 684 N.E.2d 1127, 1134 (Ind. 1997). Generally, we apply a three-step analysis in determining whether a defendant was entitled to an instruction on a lesser-included offense. *See Wright v. State*, 658 N.E.2d 563, 566-567 (Ind. 1995). We must determine: whether the lesser-included offense is inherently included in the crime charged; if not, whether the lesser-included offense is factually included in the crime charged; and if either, whether there is a serious evidentiary dispute whereby the jury could conclude the lesser offense was committed but not the greater offense. *Id.* The Indiana Supreme Court has held that "a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense." *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998). In *Autrey*, the Court held that trial counsel was not ineffective for failing to request lesser-included offense instructions on a charge of murder because it represented a reasonable "all or nothing" tactical choice by defense counsel to obtain a full acquittal for the defendant by placing the blame for the victim's death on another person and

highlighting the "discordant" testimony of the witnesses. *Id.* at 1141-1142. *See also Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (holding it was not ineffective assistance not to request voluntary manslaughter instruction on murder charge because it might have undermined defense of self-defense and/or lessened chance of defendant's acquittal).

[15] While Castro does not specifically assert what a voluntary manslaughter instruction would have stated, Ind. Code § 35-42-1-3 governs the offense of voluntary manslaughter and provides that "[a] person who knowingly or intentionally . . . kills another human being . . . while acting under sudden heat commits voluntary manslaughter, a Level 2 felony." "Sudden heat occurs 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." *Conner v. State*, 829 N.E.2d 21, 24 (Ind. 2005). "[N]either mere words nor anger, without more, provide sufficient provocation." *Id.*

[16] As pointed out by the State, no evidence was presented as to what precipitated Castro's physical assault on Overton. Thus, we cannot say a serious evidentiary dispute existed with respect to sudden heat. Further, counsel's omission of such an instruction may have been strategic. *See Morgan v. State*, 755 N.E.2d 1070, 1075-1076 (Ind. 2001) (holding that the record suggested counsel's omission of voluntary manslaughter instruction may have been strategic). While the instruction proposed by defense counsel discussed involuntary manslaughter, which constitutes a level 5 felony, voluntary

manslaughter constitutes a level 2 felony. During closing argument, Castro's counsel argued that the evidence did not show that Castro committed the crime and that the evidence demonstrated someone other than Castro killed Overton. Castro's counsel also mentioned manslaughter and emphasized the lack of the element of intent for a murder conviction even if Castro fought Overton. We cannot say that Castro has demonstrated reversal is warranted on this basis.

[17] With respect to Castro's argument that he received ineffective assistance of counsel based upon his counsel's failure to object to the trial court allowing the jury to ask oral questions of the witnesses, Castro cites page 129 of Volume V of the Transcript. However, as pointed out by the State, that page indicates that the trial court asked the questions written by the jury. To the extent Castro argues that his trial counsel was deficient for failing to object to the mention of "murder" in a juror's question which asked how loud his apartment was on the night of the murder, Castro acknowledges that "trial counsel . . . failed to object, perhaps not wanting to draw additional attention" to the mention of murder. Appellant's Brief at 27. We cannot say reversal is warranted.[1]

[18] For the foregoing reasons, we affirm Castro's conviction.

[19] Affirmed.

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[1] To the extent Castro argues in his reply brief that the trial court failed to "conduct any type of filter process to edit the proposed questions" from the jury or that his constitutional right to confront and cross-examine witnesses was violated, Appellant's Reply Brief at 12, we conclude that he has waived these arguments for raising them for the first time in his reply brief. *See Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011).

May, J., and Pyle, J., concur.

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