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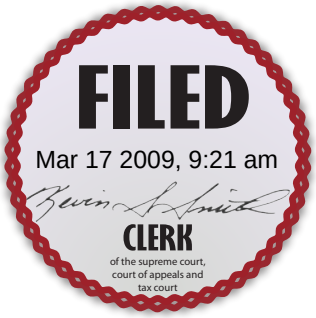

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IN THE
COURT OF APPEALS OF INDIANA

EDWARD A. HOBSON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0810-PC-904
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
The Honorable John Jay Boyce, Master Commissioner
Cause No. 49G01-0107-PC-156387

March 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Edward A. Hobson ("Hobson") appeals the denial of his petition for post-conviction relief, which challenged his conviction for Murder, a felony.[1] We affirm.

Issue

Hobson presents a single issue for review: whether he was denied the effective assistance of trial counsel because counsel failed to tender instructions on lesser-included offenses of voluntary manslaughter, involuntary manslaughter, and reckless homicide.

Facts and Procedural History

On direct appeal, this Court recited the underlying facts as follows:

> Edward Hobson and Marcus Curd are both pre-operative transsexuals who dated Troy Wright. Curd believed that Hobson and Wright had an affair while Curd was still dating Wright. According to Hobson, he was unaware of Curd and Wright's relationship when he and Wright began dating. As a result of the love triangle, Curd and Hobson were at odds. Hobson claimed that after Curd discovered Hobson and Wright's relationship, Curd repeatedly called his residence and threatened him several times. Hobson had knowledge that Curd had spent time in prison and had allegedly stabbed other persons in the past. Curd also took responsibility for a break-in at Hobson's apartment.
>
> On July 19, 2001, Hobson went with friends Stacie Adair and Shovonyai Jones to The Ten, a bar in Indianapolis. Curd was also at the bar with his cousin, William. Curd and Hobson's first confrontation that night occurred in the parking lot; the confrontation was verbal and lasted approximately five to ten minutes. Curd then went back inside the bar, and Hobson stayed in the parking lot. Later, Hobson entered the bar and had another verbal confrontation with Curd and William. Hobson then approached a security guard and told him that he "needed to get [Curd] out of the club, because he ... would go to jail that night for fighting him."

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[1] Ind. Code § 35-42-1-1.

> Hobson called 911 from the bar shortly after 2:00 a.m. and claimed he was being harassed. The 911 operator told Hobson to wait in the parking lot. But when an officer arrived a few minutes later, Hobson had already left. Shortly before 3:00 a.m., Curd returned to the parking lot and saw Hobson, who had changed clothes. Following another verbal confrontation, the two began fighting. Curd threw the first punch, and Hobson responded with his own punches. The two struggled with one another across the parking lot and eventually separated. Hobson then reached inside his purse, retrieved a .25 caliber Lorcin automatic pistol, and stated, "I am going to kill you." Next, Hobson fired the gun repeatedly until it clicked empty. Curd was running away from Hobson as he fired the multiple shots. Curd suffered five bullet wounds, including a "defensive wound" to his forearm, shots to his back, and a fatal shot that went through his heart and lungs.
>
> After the shooting, William attacked Hobson until guards separated them by using pepper spray. Hobson ran from the scene and met Steven Gaddie, whom he told that he "shot the bitch, and if she keeps bothering me or comes back, I'll shoot her again." Gaddie and Hobson then returned to the parking lot at the bar.

Hobson v. State, 795 N.E.2d 1118, 1120 (Ind. Ct. App. 2003), trans. denied. Hobson was convicted of murder and sentenced to fifty years imprisonment.

On July 12, 2005, Hobson filed his pro-se petition for post-conviction relief, which was amended on January 24, 2008. The post-conviction court conducted a hearing on May 27, 2008. On August 20, 2008, Hobson was denied post-conviction relief. This appeal ensued.

Discussion and Decision

I.A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). Post-conviction

proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.[2]

Ineffectiveness of counsel claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id.

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[2] The State has filed no appellee's brief in this matter and thus the petitioner may prevail by making a prima facie case of error. However, this circumstance in no way relieves us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. Sims v. State, 771 N.E.2d 734, 737 n.1 (Ind. Ct. App. 2002), trans. denied.

I.B. Analysis

Throughout his trial, Hobson claimed self-defense. At an instructions conference during the trial, Hobson's counsel declined to tender instructions on lesser-included offenses, leading the trial court to observe that the self-defense strategy was "an all or broke strategy." (Tr. 612). However, the trial court indicated that counsel could request instructions after Hobson's anticipated testimony. Hobson's counsel did not do so.

At the post-conviction hearing, Hobson's counsel testified that Hobson asked her to tender lesser-included offense instructions after he testified. Counsel further testified that she "would have argued against Voluntary A" but had agreed with Hobson that she would request instructions on reckless homicide and involuntary manslaughter. (P.C.R. Tr. 19). Counsel stated that she would "always, in a murder case where self-defense is a defense" tender instructions on involuntary manslaughter and reckless homicide but not voluntary manslaughter. (PCR Tr. 18.) In this particular case, she had prepared instructions on involuntary manslaughter and reckless homicide and placed them in her briefcase, but failed to tender them because of her physical exhaustion and sickness.

The failure to tender instructions does not automatically amount to ineffectiveness of counsel. Rather, according to Strickland, Hobson must show there is a reasonable probability that, but for the error or omission, the result of the proceeding would have been different.

Voluntary Manslaughter

Voluntary manslaughter is a lesser-included offense of murder, distinguishable by the factor of the defendant having killed while acting under sudden heat. Earl v. State, 715

N.E.2d 1265, 1267 (Ind. 1999). "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).

As previously observed, Hobson's strategy was that he killed Curd in self-defense. He testified that he heard shots and "noticed the bullets were whizzing by my face." (Tr. 701. According to Hobson, he "returned fire." (Tr. 702.) He denied that he wanted to kill Curd, saying his intent was "for [himself] not to die." (Tr. 712.)

A valid claim of self-defense is legal justification for an otherwise criminal act. Hood v. State, 877 N.E.2d 492, 496 (Ind. Ct. App. 2007), trans. denied. A claim of self-defense is not necessarily inconsistent with finding killing in sudden heat. Clark v. State, 834 N.E.2d 153, 157 (Ind. Ct. App. 2005). However, according to prevailing professional norms, trial counsel might reasonably conclude that a claim of intentional killing in sudden heat weakens a self-defense claim and may prefer to rely upon self-defense in hopes of exoneration. See Morgan v. State, 755 N.E.2d 1070, 1076 (Ind. 2001) (recognizing that it is a reasonable strategic decision to not request an instruction on voluntary manslaughter when the defendant invoked a self-defense argument). Here, counsel was not ineffective because she did not tender a voluntary manslaughter instruction.

Involuntary Manslaughter

Involuntary manslaughter occurs if a person kills another human being while committing or attempting to commit battery. Ind. Code § 35-42-1-4(c)(3). Murder requires

at the minimum a killing committed by a perpetrator who engaged in the killing with an awareness of a high probability that he was doing so. Erlewein v. State, 775 N.E.2d 712, 714 (Ind. Ct. App. 2002), trans. denied. Involuntary manslaughter is not an inherently included lesser offense of murder. Evans v. State, 727 N.E.2d 1072, 1081 (Ind. 2000). However, it is a factually included lesser offense if the charging instrument alleges that a battery accomplished the killing. Id. Where a battery has been alleged, the critical element distinguishing involuntary manslaughter from murder is intent – the intent to kill as opposed to the intent to batter. Erlewein, 775 N.E.2d at 714. When there exists a serious evidentiary dispute about the element distinguishing the greater offense from a lesser included offense, the trial court should give an instruction on the lesser included offense when requested. Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995).

Here, the Information alleged an offensive touching by shooting and thus involuntary manslaughter was factually included. Apparently, trial counsel came to believe that an appropriate trial strategy included requesting an involuntary manslaughter instruction but failed to follow through with her altered strategy.

Nevertheless, it cannot be said that there is a reasonable probability that, but for counsel's error in omitting to tender the involuntary manslaughter instruction, the outcome would have been different. Here, Hobson continued to fire a deadly weapon until he had discharged "six to seven rounds," five of which struck Curd. (Tr. 113.) Because the jury could not reasonably have found that Hobson merely intended to batter Curd instead of kill him, the trial court was not obliged to give an instruction when there was no serious

evidentiary dispute. Hobson has not demonstrated ineffective assistance of counsel because of the omission of an involuntary manslaughter instruction.

Reckless Homicide Instruction

The only element distinguishing murder and reckless homicide is the defendant's state of mind. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). Reckless homicide occurs when the defendant "recklessly" kills another human being. Ind. Code § 35-42-1-5. Murder occurs when the killing is done "knowingly" or "intentionally." Ind. Code § 35-41-1-1. Reckless conduct is action taken in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. Ind. Code § 35-41-2-2(c). By contrast, a person engages in conduct "knowingly" if the person is aware of a "high probability" that he or she is doing so. Ind. Code § 35-41-2-2(b).

Accordingly, reckless homicide is an inherently included lesser offense of murder. Fisher, 810 N.E.2d at 679. The determinative issue is whether the evidence produced a serious evidentiary dispute concerning Hobson's state of mind that would justify giving the requested instruction had trial counsel tendered it. See id.

Hobson and Curd were at odds because of a dating triangle and had engaged in physical fighting in which Curd "was getting the best of" Hobson. (Tr. 98.) Just after the fist fight ceased, Hobson fired at Curd, saying "I'm going to kill you." (Tr. 189.) Curd began running and Hobson continued to fire shots in his direction until the gun was empty and "clicked." (Tr. 190.) After the shooting, Hobson boasted that he had shot Curd and claimed

he would do it again if she came back. During his testimony, Hobson claimed he shot Curd to save his own life. The evidence does not present a serious evidentiary dispute as to whether Hobson acted knowingly or merely acted with a reckless disregard of harm that might ensue.

Hobson has not established a reasonable probability that the outcome of his trial would have differed had counsel tendered instructions on lesser-included offenses.

Conclusion

The post-conviction court did not err in rejecting Hobson's ineffective assistance claim and denying post-conviction relief.

Affirmed.

MATHIAS, J., and BARNES, J., concur.