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**IN THE  
COURT OF APPEALS OF INDIANA**

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WILLIAM O'BRIEN, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A02-0809-PC-862

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila A. Carlisle, Judge  
The Honorable Stanley H. Kroh, Master Commissioner  
Cause No. 49G03-0411-PC-211987

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**May 14, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

William O'Brien, who was convicted of murder, appeals the denial of his petition for post-conviction relief. He argues his trial counsel was ineffective because counsel did not object to an erroneous instruction on voluntary manslaughter. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The underlying facts were stated in our decision on O'Brien's direct appeal:

On the evening of October 30, 2003, Mary E. Green was having a party at her home on North Colorado Avenue in Indianapolis. The group was drinking, smoking marijuana, and playing cards. Mary, O'Brien, Terrell Robey, Jesse Austin, Tecriscia McCloud, David Green, and some others were at the house. While playing cards, Austin and O'Brien got into an argument regarding whether there were "white gangsters."<sup>[1]</sup> Austin told O'Brien that there were no white gangsters. The argument moved outside, where Austin got into a physical altercation with O'Brien and Robey. Austin then came back inside the house and bragged that he had beat up O'Brien and Robey. Austin went back outside with David and McCloud, and Austin continued to argue with O'Brien and Robey. Austin was standing on the porch, and O'Brien and Robey were in the alley next to the house. Robey handed a gun to O'Brien and told O'Brien to shoot Austin. O'Brien fired the gun several times at Austin, and O'Brien and Robey then jogged down the alley. Austin died as a result of his gunshot wounds. Crime scene technicians recovered spent casings of ".380 auto, RP brand" bullets at the scene.

Mary later talked to O'Brien on the telephone, and O'Brien admitted to shooting Austin and apologized. Mary immediately called the police and told them the telephone number from which O'Brien had called. The police used the telephone number to find the address where O'Brien was located and arrested O'Brien and Robey. During a search of Robey, a ".380 auto R and P" bullet was found in his pocket and a holster was found in his waistband.

*O'Brien v. State*, 49A02-0505-CR-439, slip op. at 2-3 (Ind. Ct. App. Feb. 15, 2006)

(citations omitted).

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<sup>1</sup> O'Brien was the only white person present at Mary's house that night.

During the trial, counsel for O'Brien submitted a proposed instruction on voluntary manslaughter, which would have instructed the jury that the State had the burden to prove beyond a reasonable doubt that O'Brien was not acting under sudden heat. However, the trial court told the jury:

Voluntary manslaughter is included in Count I, Murder. If the State proves the defendant guilty of murder, you need not consider the included crime. However, if the State fails to prove the defendant committed murder, you may consider whether the defendant committed voluntary manslaughter, which the Court will define for you.

(PCR Ex. C at 4-5.)<sup>2</sup> The court proceeded to define voluntary manslaughter, but did not inform the jury that the State had the burden of proving O'Brien did not act under sudden heat. Defense counsel did not object to the court's instruction on voluntary manslaughter.

On March 9, 2005, a jury found O'Brien guilty of murder. On direct appeal, O'Brien argued the State had failed to prove beyond a reasonable doubt that he did not act under sudden heat, and we affirmed. *See O'Brien*, slip op. at 5.

On June 6, 2007, O'Brien petitioned for post-conviction relief, arguing trial counsel was ineffective because counsel did not object to the voluntary manslaughter

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<sup>2</sup> O'Brien's proposed instruction was included in the appendix on direct appeal. A handwritten notation in the corner reads, "Given as Voluntary 'A.'" (Direct Appeal App. at 43.) The trial court's instructions were transcribed for the PCR hearing and were admitted as Petitioner's Exhibit C. Exhibit C demonstrates the trial court did not read the instruction as tendered. The PCR court found:

Proposed instruction number 2 was a voluntary manslaughter instruction containing a correct and complete statement of the law; it was noted in writing as "given" by the court, T.R. 43, but was later substituted by the court with a similar but different voluntary manslaughter instruction. The record does not reflect discussion as to this substitution . . . . The instruction that the court did give as to voluntary manslaughter . . . failed to inform the jury that if they find sudden heat, then the State has the burden of disproving its existence beyond a reasonable doubt.

(PCR App. at 45.)

instruction given by the trial court. A hearing was held on April 15, 2008. O'Brien testified his primary defense was that the State could not prove he was the shooter, but he also "wanted voluntary [manslaughter] to be there as an option for the jury." (PCR Tr. at 5.)

Trial counsel testified he believed he had submitted an instruction that was a correct statement of law. He did not recall any discussion about changing the wording of the instruction. Trial counsel felt it was of utmost importance to keep out evidence of another murder with which O'Brien had been charged. He decided not to raise the issue of sudden heat so as to avoid opening the door for the State to admit evidence of the other murder. Trial counsel felt sudden heat "was raised by the facts in the case, to some degree." (*Id.* at 14-15.) His primary strategy was to impeach the State's witnesses:

. . . Mr. O'Brien, from the onset, told me that he did not commit this killing . . . . So, there was some evidence that if the jury believed he did it, he may have done it under sudden heat, but certainly that was not our defense. I never argued for it, never presented any direct testimony to that extent. The scope of our defense was that the witnesses were shifting responsibility from somebody else onto Mr. O'Brien . . . . I think Mr. O'Brien and I both felt that [the eyewitnesses'] credibility was in substantial doubt and we attempted to impeach their version of events . . . .

(*Id.* at 15.)

On August 8, 2008, the post-conviction court denied O'Brien's petition. The court held the voluntary manslaughter instruction was erroneous, but reversal was not required:

Sudden heat was not an issue in O'Brien's case (or in Robey's case) and was not supported by the State's evidence or the defense theory of either codefendant<sup>3</sup> . . . . In O'Brien's case, the record is void of any analysis or finding by the trial court (and void of any argument by the State or defense)

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<sup>3</sup> O'Brien and Robey were tried together.

that a serious evidentiary dispute existed warranting the voluntary manslaughter instruction. The trial court gave the defense the benefit of counsel's request for a voluntary manslaughter instruction without requiring the defense to specifically point to some evidence in support thereof. Also, the State did not object to the defendant's proposed instruction on voluntary manslaughter . . . . Unable to prove that any serious evidentiary dispute existed as to sudden heat, O'Brien has therefore failed to prove prejudice on his ineffective assistance of counsel claim as to his counsel's failure to correct or object to the giving of an improper voluntary manslaughter instruction.

(PCR App. at 52-53.) The court found trial counsel's work was "thorough and skilled" and "subjected the State's case to meaningful adversarial testing," (*id.* at 50); the failure to object to the instruction was an "isolated mistake" and was "harmless." (*Id.* at 55.)

### **DISCUSSION AND DECISION**

The petitioner bears the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *cert. denied* 537 U.S. 839 (2002). O'Brien is appealing from a negative judgment, and to the extent his appeal turns on factual issues, he must convince us "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court." *Id.* We will reverse "only if the evidence is without conflict and leads only to a conclusion contrary to the result of the postconviction court." *Id.*

To prevail on a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance so prejudiced the petitioner that he was denied a fair trial. *Pennycuff v. State*, 745 N.E.2d 804, 811 (Ind. 2001) (citing *Strickland v. Washington*, 466

U.S. 668 (1984), *reh'g denied*). “Counsel’s performance is evaluated as a whole.” *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied* 891 N.E.2d 40 (Ind. 2007). There is a strong presumption that counsel rendered adequate assistance. *Pennycuff*, 745 N.E.2d at 811. “Isolated poor strategy, inexperience, or bad tactics do not necessarily amount to ineffectiveness of counsel.” *Id.* (quoting *Bellmore v. State*, 602 N.E.2d 111, 123 (Ind. 1992)). To establish prejudice, the petitioner must show “a reasonable probability” that the deficient performance “altered the outcome of the case.” *Id.*

The State concedes the trial court erroneously instructed the jury it need not consider voluntary manslaughter if the elements of murder were met and also failed to inform the jury that, if there was evidence of sudden heat, the State bore the burden of disproving its existence beyond a reasonable doubt. *See Earl v. State*, 715 N.E.2d 1265, 1267 (Ind. 1999) (if sudden heat is placed in issue, State bears the burden of negating its presence beyond a reasonable doubt); *see also Falconer v. Lane*, 905 F.2d 1129, 1136-37 (7th Cir. 1990) (granting *habeas corpus* relief because jury instructions permitted jury to return murder verdict without considering whether defendant’s mental state would support a voluntary manslaughter verdict instead). Therefore, the State acknowledges “trial counsel may have performed inadequately because he did not notice the errors in the trial court’s final instructions and did not object to them.” (Appellee’s Br. at 9.)

However, the State argues O’Brien was not prejudiced because there was no evidence of sudden heat. Sudden heat is “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). “While the jury should be instructed on voluntary manslaughter if there is some appreciable evidence of sudden heat, evidence of mere anger or words cannot alone support a jury instruction on voluntary manslaughter.” *White v. State*, 699 N.E.2d 630, 635 (Ind. 1998) (citations omitted).

The testimony bearing on the presence or absence of sudden heat was as follows. Mary testified that while they were playing cards, Austin and O’Brien began fighting because Austin said there were no white gangsters. She left the room, and at that point, the argument was “still a sit-down-type deal” with no physical contact. (Tr. at 102.) Although three other witnesses placed her at the scene during the shooting, Mary testified she was walking to the liquor store with Anthony Coleman at the time, and she did not testify about a physical altercation or the shooting.

Coleman testified he and Mary did not go to the liquor store. He knew O’Brien and Austin were outside arguing about something. O’Brien and Robey tried to “jump” Austin, and Austin hit O’Brien in the mouth. (*Id.* at 342.) Austin called for Coleman. Coleman told them to “leave it alone,” and they did. (*Id.* at 343.) The fight did not last very long. O’Brien shot Austin after the fight was over.

David testified O’Brien and Austin got into an argument about whether there were white gangsters. They went outside and fought. Austin came inside and said he had beat up O’Brien and Robey. Everyone went outside. O’Brien and Austin were not arguing right before the shooting. After they had been outside for about three minutes, O’Brien shot Austin.

McCloud testified O'Brien, Robey, and Austin got in a fight. Austin came inside and said, "I laid both of them out," then went back outside. (*Id.* at 143.) McCloud also went outside. Austin was "talking junk," and the fight escalated. (*Id.* at 151.) Then O'Brien shot Austin.

Coleman, David, and McCloud testified that when the shots were fired, O'Brien was standing in the alley, and Austin was standing on the porch. Coleman testified O'Brien was not close to the porch when he shot Austin. McCloud testified the wall along the porch would be higher than her head if she were standing next to it on the ground.

Detective Charles Benner, the lead officer on the case, testified O'Brien had a "busted lip" when he was apprehended. (*Id.* at 451.) Detective Benner did not notice any other injuries on O'Brien or Robey.

The argument about whether there are white gangsters was not sufficient provocation to warrant an instruction on voluntary manslaughter. *See White*, 699 N.E.2d at 635 ("exchange of words and insults" not sufficient provocation). Although the argument turned physical, it did not last long, and O'Brien did not sustain any significant injuries. David and McCloud testified Austin went back inside after hitting O'Brien. *See Jackson v. State*, 709 N.E.2d 326, 329 (Ind. 1999) (after brief physical altercation in apartment complex, Jackson returned to his apartment to retrieve and load shotgun; although this took "a minute or less," Jackson had "sufficient time for 'cool reflection'"). David and Coleman testified the fight was over when O'Brien shot Austin. McCloud, by contrast, testified Austin continued to taunt O'Brien and caused the argument to escalate.

However, she also testified O'Brien was in the alley and Austin was on the porch, so there was some distance and a high wall separating the two. Therefore, it is clear even under McCloud's account that this was nothing but an "exchange of words" and "an ordinary argument gone bad." See *White*, 699 N.E.2d at 635. See also *Dearman v. State*, 743 N.E.2d 757, 762 (Ind. 2001) (voluntary manslaughter instruction not warranted where Dearman killed man who made unwanted sexual advances; although the men engaged in a "scuffle," there was "no indication in the record . . . that Dearman was in such a state of terror or rage that he was rendered incapable of cool reflection").

The post-conviction court noted the trial court did not make a finding as to whether there was a serious evidentiary dispute warranting an instruction on voluntary manslaughter. After reviewing the record, the post-conviction court concluded there was no serious evidentiary dispute, and we agree. As O'Brien was not entitled to an instruction in the first place, he was not prejudiced by the erroneous instruction.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.