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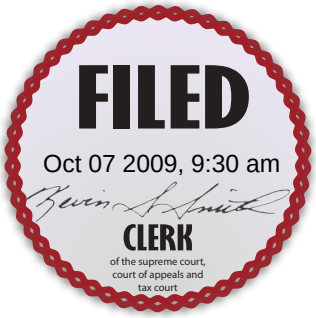

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IN THE
COURT OF APPEALS OF INDIANA

HENRY COLEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-PC-276
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable Stanley E. Kroh, Master Commissioner
Cause No. 49G03-0412-PC-223755

October 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

In 2005, Henry Coleman was convicted of the murder of Monica Burris. Coleman petitioned for post-conviction relief, alleging trial counsel was ineffective because he did not object to two jury instructions. The post-conviction court denied the petition, and we affirm.

FACTS AND PROCEDURAL HISTORY

Coleman and his brother-in-law, Brandon Baskin, made money by detailing automobiles. They ran the business out of Coleman's van, which they parked at various locations around Indianapolis. Coleman knew Baskin kept a gun inside the van. Coleman and Baskin would sometimes set up shop in the parking lot of a Church's Chicken, where Burris was a manager. Coleman and Burris were in a relationship. Coleman never told Baskin about the relationship with Burris, but Baskin suspected they were dating.

In 2004, Burris and Angela McCullough both lived at the Blue Triangle as part of a Community Corrections program. McCullough knew Coleman because he came to visit Burris. Late in September 2004, McCullough saw Coleman and Burris argue. As they came out of Burris' room, Burris was upset and crying. Burris said, "I can't do this anymore. I'm done." (Tr. at 155.) Coleman formed his hand into the shape of a gun, held it up to Burris' head, and said, "You're not done with me until I say you're done with me." (*Id.*)

On December 9, 2004, Burris went to the used car lot where Baskin and Coleman were working. After a brief conversation with Coleman, Burris left. Later that evening, she went to Marvin Banther's house. Banther was her friend and former co-worker. The

two were not romantically involved. Burris would go to Banther's house about twice a week, and they would smoke marijuana and watch television. While she was at Banther's house, Burris received three or four calls, and she did not seem happy.

After work, Coleman and Baskin had supper at Church's Chicken. At some point, Baskin noticed Coleman seemed upset. After they ate, Coleman drove them to Banther's residence. Burris came outside, and she and Coleman argued.

Burris went back inside, and Coleman followed her. Coleman demanded to know who Banther was, why Burris was at his house, and whether Banther was "f***ing his girl." (*Id*. at 252.) Banther said they were just friends and were just hanging out. Coleman said he would show Banther "what a real gangster was all about" and said he would kill Burris and Banther. (*Id*. at 253.) Coleman then drew Baskin's gun and pointed it at them, shifting it back and forth between them. Coleman shot Burris in the chest at close range. Banther heard Burris say, "Dee [Coleman's nickname], you just shot me." (*Id*. at 270.) Coleman called 911 and said his name was Brandon and a woman had been accidentally shot. Coleman attempted to perform CPR on Burris.

Baskin initially remained outside during the argument, and he made inconsistent statements regarding whether he saw the shooting. Baskin told police the gun fell off the stereo, hit the floor, and fired accidentally. Coleman instructed Banther to tell police the same story. Coleman told police Baskin had the gun in his pocket and it went off when he "flopped down" on the couch. (*Id*. at 470.) Neither of these accounts could have been correct because the bullet passed through Burris's chest on a downward trajectory. In

addition, the State's firearms expert testified the gun had a trigger pull of 8.5 pounds, and therefore was unlikely to fire accidentally.[1]

After a jury trial on August 22 and 23 of 2005, Coleman was convicted of murder, pointing a firearm, and carrying a handgun without a license. His convictions were affirmed on direct appeal. *Coleman v. State*, 49A04-0510-CR-608 (Ind. Ct. App. June 13, 2006).

On March 26, 2007, Coleman filed a petition for post-conviction relief, which he amended on July 17, 2008. The amended petition alleged trial counsel was ineffective because he did not object to certain jury instructions. A hearing was held on September 16, 2008. Trial counsel testified concerning his qualifications and his preparations for Coleman's trial. He testified he did not object to the instructions because he believed them to be correct statements of the law. On February 6, 2009, the post-conviction court denied Coleman's petition.

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). Coleman 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

[1] According to the expert's testimony, trigger pull is the amount of weight it takes to cause the gun to discharge, and most firearms have a trigger pull of 3.5 to 6 pounds.

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. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*). There is a strong presumption that counsel rendered adequate assistance. *Id*. "Evidence of isolated poor strategy, inexperience or bad tactics will not support a claim of ineffective assistance." *Id*. at 273. "Counsel's performance is evaluated as a whole." *Lemond v. State*, 878 N.E.2d 384, 391 (Ind. Ct. App. 2007), *trans. denied*. To establish the prejudice prong of the test, Coleman must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sims v. State*, 771 N.E.2d 734, 741 (Ind. Ct. App. 2002), *trans. denied*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Prejudice exists when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result of the proceeding fundamentally unfair or unreliable." *Coleman*, 694 N.E.2d at 272.

1. <u>Instruction 29</u>

Coleman first argues trial counsel should have objected to Instruction 29, which read:

> The intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause serious injury or death and may be inferred from discharging a weapon in the direction of a victim.

> The intent to kill can be found from the acts, declarations and conduct of the Defendant at or just immediately before the commission of the act, from the character of the weapon used, and from the part of the body on which the wound was inflicted.

(Appellant's App. at 90.)

Coleman argues counsel should have objected to the portion of the instruction that permitted the jury to infer intent to kill from discharging a weapon in the victim's direction. Coleman argues there is no logical nexus between a gun having been fired in a victim's direction and the shooter's intent, as a gun may be fired intentionally or recklessly.

The State counters that Instruction 29 is similar to instructions that have been approved in other cases, relying on *Alexander v. State*, 819 N.E.2d 533, 541 (Ind. Ct. App. 2004), and the cases discussed therein. In *Alexander*, we approved an instruction that stated, "Intent, for the purposes of a murder conviction, may be inferred from the severity, duration, or brutality of the attack." *Id.* We relied on *Barany v. State*, 658 N.E.2d 60 (Ind. 1995), and *Cohen v. State*, 714 N.E.2d 1168 (Ind. Ct. App. 1999):

> In *Barany v. State*, 658 N.E.2d 60, 65 (Ind. 1995), the defendant challenged a similar jury instruction on the intent to kill. There, the challenged instruction provided:
>
> > The intent to kill can be found from acts, declarations, and conduct of the defendant at or just immediately before the commission of the offense, from the character of the weapon used, and from the part of the body on which the wound was inflicted.
>
> *Id*. In holding that "this instruction is a correct statement of the law in Indiana[,]" our supreme court acknowledged that it has "repeatedly held that the intent to kill may be inferred from the use of a deadly weapon; the nature, duration, or brutality of the attack; and the circumstances surrounding the crime." *Id*. (citing *Nunn v. State*, 601 N.E.2d 334, 339 (Ind. 1992)).

> More recently, in *Cohen v. State*, 714 N.E.2d 1168, 1177 (Ind. Ct. App. 1999), *trans. denied*, another panel of this Court upheld the following "intent to kill" instruction:
>
> > The intent to kill may be inferred from the use of a deadly weapon used in a manner reasonably calculated to cause death and from the nature, duration, or brutality of the attack. An intention to kill may also be found from acts, declarations, and conduct of the defendants at or just immediately before the commission of the offense, and from noting the part of the body on which the wound was inflicted.
>
> *Id.*

Alexander, 819 N.E.2d at 541.

Most of Instruction 29 tracks language approved in *Alexander*, *Barany*, or *Cohen*. However, none of these decisions address whether intent may be inferred from discharging a weapon in the direction of a victim. Coleman argues this portion of the instruction is similar to an instruction that was held to be an incorrect statement of law in *McDowell v. State*, 885 N.E.2d 1260, 1264 (Ind. 2008). In *McDowell*, our Supreme Court disapproved the following instruction: "The intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused." *Id*. at 1262. While Instruction 29 is arguably similar in that it permits the jury to infer intent from the mere use of a weapon against the victim, *McDowell* was decided well after Coleman's trial.

In sum, when Coleman was tried, our Courts had not addressed the language from Instruction 29 that Coleman challenges. Trial counsel could have raised arguments similar to the ones Coleman now makes, but no established law would have required the trial court to sustain the objection. "To succeed on a claim that counsel was ineffective for failure to make an objection, the defendant must demonstrate that if such objection

had been made, the trial court would have had no choice but to sustain it." *Little v. State*, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004), *trans. denied*. Therefore, we cannot say counsel was ineffective for not objecting to Instruction 29.

2. Instruction 25

Coleman also argues trial counsel should have objected to Instruction 25, which stated:

> The Defendant is charged with Murder. Voluntary Manslaughter and Reckless Homicide are included [in] Count I, Murder. *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.
>
> You must not find the Defendant guilty of more than one crime for each count.

(Appellant's App. at 89) (emphasis added).

Coleman asserts the italicized portion of the instruction might lead the jury to believe he could be found guilty of murder even if he acted in sudden heat. The Seventh Circuit held a similar instruction violated the Due Process Clause in *Falconer v. Lane*, 905 F.2d 1129, 1130 (7th Cir. 1990).[2] The State concedes a proper objection to that statement would have been sustained, but argues Coleman was not prejudiced because: (1) Instruction 26 correctly explained the interplay between murder and voluntary manslaughter in detail, and (2) there was no evidence Coleman acted in sudden heat.

Instruction 26 stated:

[2] *Falconer* was an appeal from an Illinois case. In Illinois, as in Indiana, the state must disprove sudden heat beyond a reasonable doubt. *See Falconer*, 905 F.2d at 1131 (discussing *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988)).

The crime of Murder, a felony with which the Defendant is charged in Count I, is defined as follows:

"A person who knowingly or intentionally kills another human being commits murder, a felony."

Included in the charge of Murder in this case is the crime of Voluntary Manslaughter that is defined as follows:

"A person who knowingly or intentionally kills another human being while acting under sudden heat commits Voluntary Manslaughter, a class B felony. The Offense is a class A felony if it is committed by means of a deadly weapon."

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.

To convict the Defendant of Murder, the State must prove each of the following elements beyond a reasonable doubt:

1. The Defendant, Henry Coleman
2. Knowingly
3. Killed (by shooting a deadly weapon, that is: a handgun at and against the person of Monica L. Burris, thereby inflicting mortal injuries upon Monica L. Burris, causing Monica L. Burris to die)
4. Monica L. Burris, another human being.

If the State failed to prove each of these elements beyond a reasonable Doubt, you should find the Defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt that the Defendant was not acting under sudden heat, you may find the Defendant guilty of Voluntary Manslaughter, a class B felony, as covered under Count I. If your finding is that the Defendant committed Voluntary Manslaughter, not Murder, and if you further find beyond a reasonable doubt that the offense was committed by means of a deadly weapon, you may find the Defendant guilty of Voluntary Manslaughter, a class A felony, as covered under Count I.

If the State did prove beyond a reasonable doubt that the Defendant knowingly or intentionally killed Monica L. Burris, and the State also did prove beyond a reasonable doubt that the Defendant acted without sudden heat, you may find the Defendant guilty of Murder, a felony, as charged in Count I.

If you find the Defendant did not commit Murder or either type of Voluntary Manslaughter, then you may consider whether or not the Defendant committed the crime of Reckless Homicide, a class C felony. Reckless Homicide, a class C felony covered under Count I, is defined as follows:

> "A person who recklessly kills another human being commits reckless homicide, a class C felony."
>
> To convict the Defendant, the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. The Defendant, Henry Coleman
> 2. Recklessly
> 3. Killed Monica L. Burris
>
> If the State failed to prove each of these elements beyond a reasonable doubt, then you should find the Defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, then you may find the Defendant guilty of Reckless Homicide, a class C felony covered under Count I.

(Appellant's App. at 89-90.)

Coleman argues Instruction 26 does not remedy the error in Instruction 25. In *Falconer*, the Court noted the murder instruction preceded the voluntary manslaughter instructions. Because the murder instruction was "at the top of the jury instruction check-list," the jurors may have been "encouraged by the structure of the instructions to answer its requirements first and then move on only if those requirements cannot be met." *Falconer*, 905 F.2d at 1136. Because Instruction 25 preceded Instruction 26, Coleman argues it was "at the top of the jury instruction check-list" and therefore was likely prejudicial. We disagree. Instruction 25 explained only that voluntary manslaughter and reckless homicide were included offenses of murder. Instruction 26 was a detailed elements instruction, and Coleman concedes it accurately explained the elements and the interplay between murder and voluntary manslaughter. (Appellant's Br. at 16.) Therefore, we decline to give controlling weight to the fact that Instruction 25 preceded Instruction 26.

In addition, we agree with the State that there is no significant evidence of sudden heat.[3] The State presented evidence that Burris tried to break up with Coleman months before the shooting. Burris came to Coleman's workplace before dinner, and they spoke. Sometime afterward, Baskin thought Coleman seemed upset. Coleman tracked Burris down at Banther's house and argued with her before going inside. Once inside, he made jealous accusations, but there was no evidence he had any reason to believe Burris and Banther were romantically involved. Coleman pulled out a gun and pointed it alternately at Burris and Banther before he decided to shoot Burris. In sum, Coleman and Burris had an ongoing conflict and Coleman had time to deliberate. *See Washington v. State*, 808 N.E.2d 617, 626 (Ind. 2004) (Washington saw another man leave the apartment of a woman he had recently broken up with, and later in the evening he stabbed her to death; our Supreme Court found no abuse of discretion in the trial court's refusal to give a voluntary manslaughter instruction). Therefore, we conclude counsel's failure to object to Instruction 25 was an isolated mistake that did not result in a breakdown of the adversarial process and does not undermine our confidence in the outcome.

CONCLUSION

Coleman has not established the trial court would have sustained an objection to Instruction 29; therefore, trial counsel was not ineffective for not objecting to it.

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[3] Coleman argues the *Falconer* Court rejected this type of harmless error analysis. *Falconer* held that it was not enough that the murder conviction was sustained by *sufficient* evidence. 905 F.2d at 1136. However, subsequent decisions have made clear that the strength of the State's case may be evaluated. *Rosa v. Peters*, 36 F.3d 625, 630-32 (7th Cir. 1994), *reh'g and suggestion for reh'g en banc denied*; *Cuevas v. Washington*, 36 F.3d 612, 619-21 (7th Cir. 1994), *reh'g and suggestion for reh'g en banc denied*; *Green v. Peters*, 36 F.3d 602, 606-08 (7th Cir. 1994), *reh'g and suggestion for reh'g en banc denied, cert. denied*.

Instruction 25 was erroneous, but the error is not one that undermines our confidence in the outcome; therefore, Coleman has not established prejudice. The judgment of the post-conviction court is affirmed.

Affirmed.

CRONE, J., and BROWN, J., concur.