MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Wesley Willis,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent

July 26, 2022

Court of Appeals Case No. 21A-PC-2346

Appeal from the St. Joseph Superior Court

The Honorable Jeffrey L. Sanford, Judge

Trial Court Cause No. 71D03-1909-PC-30

Crone, Judge.

Case Summary

[1] Wesley Willis was charged with murder, attempted murder, and several other felonies. At trial, his counsel submitted a final jury instruction on voluntary manslaughter as a lesser-included offense of murder, but decided against submitting an instruction on attempted voluntary manslaughter as an alternative to attempted murder, both of which were class A felonies. The jury found Willis guilty of voluntary manslaughter and attempted murder. Willis filed a petition for post-conviction relief (PCR), alleging that his trial counsel was ineffective. The post-conviction court denied the petition, and we affirm.

Facts and Procedural History

[2] In August 2009, Willis and his friend Jeff Coleman, Jr., had a falling out because Coleman believed that Willis had stolen a safe containing approximately $5,400 that belonged to Coleman and his friend, Robert Torres. Torres had kept the safe in his apartment and was the only one who knew the combination. On or about September 1, 2009, Willis called Coleman and offered to give him half the money inside the safe if Coleman would give him the combination. Coleman told Willis, "When I see [you, you are] through." Trial Tr. Vol. 2 at 200.[1] Willis replied that he would drop off the safe and they

[1] This Court granted the State's request to transmit the direct appeal record into this cause. That record includes four volumes of the trial transcript; for ease of reference, we cite to the page numbers of the separately paginated volumes, rather than the consecutively numbered pages of the original transcript.

could have a "shootout" over it. *Id.* at 201. Coleman told Willis to "drop it off." *Id*.

[3] On the night of September 1, while Coleman and Torres were riding around in Torres's car, Coleman thought he saw Willis in a car on Pulaski Street in South Bend. Coleman got out of the vehicle and fired twelve shots. Coleman heard shots coming from his left, so he "got in the car and pulled off." *Id*. at 205. South Bend Police Department officers determined that those shots came from a house on Pulaski Street in which Willis's cousin and Coleman's acquaintance Shameka Scroggins lived. Willis often visited the home. Police collected several .40-caliber shell casings from the home's backyard.

[4] At approximately 10:45 p.m. on September 3, Scroggins heard "shots go around the house." Trial Tr. Vol. 3 at 16. That same night, Coleman got a call from Willis's brother, Frank, who said, "[W]hen we see you, you're through. We're not going to no houses. We're not shooting at no cars. When we see you, you're through." Tr. Vol. 2 at 216. Coleman, who was in a "vehicle riding around[,]" told Frank, "[C]ome find me." *Id*. at 217. During the conversation, Coleman heard a voice in the background that he believed to be Willis's. *Id*. at 209.

[5] Shortly before 11:30 that night, multiple shots were fired at Coleman's father's home on Milton Street, where several people were socializing on the porch. Veronica Perez was mortally wounded, and Andre Owens was shot in the leg. Juan Martinez was sleeping in a nearby house and was awakened by the

gunshots. Martinez looked out the window and saw a thin Black male with short hair, whom he later identified as Willis, firing a handgun in the direction of Coleman's father's home. Willis stopped firing, turned around, and ran. Fifteen minutes later, multiple shots were fired at Torres's apartment building on Prairie Avenue. One bullet struck Nimrod Cabral, who lived above Torres's apartment. Cabral's fiancée looked out the window and saw a thin Black male with short hair running toward a car. Police recovered shell casings from both scenes, some of which were .40 caliber.

[6] Early in the morning of September 4, Willis, Frank, and others went to the residence of Jacques and Samuel Thomas. Jacques heard Willis say that "some bullshit went down[,]" "they was shooting up some shit[,]" and "we shot the mother fucker[.]" Tr. Vol. 3 at 164, 166, 172. Jacques saw that Willis had "a big ass pistol" between .40 and .45 caliber with "the biggest" clip. *Id*. at 166, 173. Samuel heard Willis say that "they shot up his crib" and that he "did what [he] had to do[.]" *Id*. at 201. Police determined that the .40-caliber shell casings recovered from Pulaski Street, Milton Street, and Prairie Avenue were fired from the same weapon.

[7] The State charged Willis with the murder of Perez, the attempted murder of Owens, and several other felonies. A four-day jury trial was held in December 2009. Near the close of evidence, Willis's counsel, Charles Lahey, submitted a final jury instruction on voluntary manslaughter as a lesser-included offense of murder. As charged in this case, murder, a felony, is the knowing killing of another human being. Ind. Code § 35-42-1-1 (2009). Then, as now, the

sentencing range for murder was between forty-five and sixty-five years. Ind. Code § 35-50-2-3 (2009). Voluntary manslaughter is the knowing killing of another human being while acting under sudden heat; at that time, it was a class A felony if committed by means of a deadly weapon. Ind. Code § 35-42-1-3(a) (2009). The sentencing range for a class A felony was between twenty and fifty years. Ind. Code § 35-50-2-4 (2009).

[8] "Sudden heat is a mitigating factor that reduces otherwise murderous conduct to voluntary manslaughter, but is not an element of voluntary manslaughter." *Boone v. State*, 728 N.E.2d 135, 138 (Ind. 2000). "[S]udden heat requires sufficient provocation to engender passion, which is demonstrated by anger, rage, sudden resentment, or terror that is sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Id*. "When the evidence in a case suggests the presence of sudden heat, the State must disprove its existence beyond a reasonable doubt to obtain a conviction for murder." *Burke v. State*, 719 N.E.2d 1211, 1212 (Ind. 1999). "Existence of sudden heat is a classic question of fact to be determined by the jury." *Fisher v. State*, 671 N.E.2d 119, 121 (Ind. 1996).

[9] Lahey decided against submitting an instruction on attempted voluntary manslaughter as an alternative to attempted murder, both of which were class A felonies. *See* Ind. Code § 35-41-5-1 (2009) ("A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of

the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted. However, an attempt to commit murder is a Class A felony."). When the trial court asked if his decision was being made "strategically[,]" Lahey responded, "Yes, I think that's unnecessary, and it doesn't offer us any real advantage." Trial Tr. Vol. 4 at 45-46. Lahey also agreed with the following comment by the prosecutor: "You do understand, Mr. Lahey, don't you, that if [Willis is] convicted of Attempted Murder, you get to argue [at sentencing] that, hey, Judge, he was really upset. If he's convicted of Attempted Voluntary Manslaughter, you no longer get to argue that because that's part of the crime." *Id*. at 44-45.

[10] The trial court instructed the jury on voluntary manslaughter as a lesser-included offense of murder. The jury found Willis guilty of voluntary manslaughter and guilty as charged on the remaining counts. The trial court imposed an aggregate sentence of eighty-eight years, including consecutive sentences of fifty years for voluntary manslaughter and thirty years for attempted murder. Lahey represented Willis on direct appeal and challenged his convictions and sentence. Another panel of this Court affirmed. *Willis v. State*, No. 71A04-1005-CR-304, 2011 WL 101730, at *14 (Ind. Ct. App. Jan. 12, 2011), *trans. denied*.

[11] Willis filed a PCR petition asserting that Lahey was ineffective in submitting a jury instruction for voluntary manslaughter when there was allegedly no evidence of sudden heat and in failing to submit an instruction on attempted voluntary manslaughter. In September 2021, after a hearing, the post-conviction

court denied the petition, finding that Willis had not established that Lahey's performance was deficient. Willis now appeals.

Discussion and Decision

[12] "Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence." *Bautista v. State*, 163 N.E.3d 892, 896 (Ind. Ct. App. 2021) (quoting *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *cert. denied* (2020)). "A defendant who files a petition for post-conviction relief 'bears the burden of establishing grounds for relief by a preponderance of the evidence.'" *Id*. (quoting Ind. Post-Conviction Rule 1(5)). "Because the defendant is appealing from the denial of post-conviction relief, he is appealing from a negative judgment[.]" *Id*. "Thus, the defendant must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Id*. (quoting *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013)). "In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." *Id*. (quoting *Wilkes*, 984 N.E.2d at 1240).

[13] "A defendant claiming a violation of the right to effective assistance of counsel must establish the two components set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). "First, the defendant must show that counsel's performance was deficient." *Id*. " This requires a showing that counsel's representation fell below an objective

standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted). "Second, the defendant must show that the deficient performance prejudiced the defense." *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*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

Section 1 – Willis has failed to establish that his trial counsel was ineffective in submitting an instruction on voluntary manslaughter.

[14] Citing *Watts v. State*, 885 N.E.2d 1228 (Ind. 2008), Willis first argues that Lahey performed deficiently in submitting an instruction on voluntary manslaughter, asserting that there was no evidence that he acted under sudden heat when he fired the shots that killed Perez. Assuming for argument's sake that there was no evidence of sudden heat, we cannot say that Lahey's decision, which essentially invited the trial court to commit error in his client's favor, harmed Willis in any way. Indeed, as the State puts it, "Willis's trial counsel did not prejudice him, but provided an immense benefit." Appellee's Br. at 21.

[15] Willis's reliance on *Watts* is misplaced, as it is both factually and procedurally distinguishable. In that case, the State charged the defendant with murder and requested a voluntary manslaughter instruction, which the court gave over the defendant's objection that there was no evidence of sudden heat. The jury

found Watts guilty of voluntary manslaughter. On direct appeal, our supreme court agreed with Watts that there was no evidence of sudden heat and held that it is "reversible error for a trial court to instruct a jury on voluntary manslaughter in the absence of evidence of sudden heat." *Id*. at 1233. The court explained,

> One legitimate trial strategy for the defendant in a murder trial is an "all-or-nothing" one in which the defendant seeks acquittal while realizing that the jury might instead convict of murder. In a situation where a jury must choose between a murder conviction and an acquittal, the defendant might well be acquitted. But if the jury has voluntary manslaughter as an intermediate option, the defendant might be convicted of voluntary manslaughter as a "compromise." Such a verdict is not appropriate if unsupported by any evidence of sudden heat; moreover, an unsupported voluntary manslaughter instruction deprives the defendant of the opportunity to pursue a legitimate trial strategy.

Id.

[16] In this case, it was Lahey, not the State, who requested a voluntary manslaughter instruction. Instead of taking the "all-or-nothing" approach, Lahey pursued the equally legitimate trial strategy of offering the jury an opportunity to convict Willis of an offense less serious than murder, which it did. If, in fact, there was no evidence of sudden heat, then the trial court's error in giving Lahey's instruction only benefited Willis by significantly reducing his sentencing exposure. Also, unlike the defendant in *Watts*, Willis is the petitioner in a post-conviction proceeding, so he would not be entitled to the automatic reversal of his voluntary manslaughter conviction if there was no evidence of

sudden heat. Instead, he has the burden to show that the evidence, as a whole, unmistakably and unerringly points to a conclusion that Lahey's representation fell below an objective standard of reasonableness. *Bautista*, 163 N.E.3d at 896. Willis has failed to carry that burden, so he is not entitled to relief on this issue.[2]

Section 2 – Willis has failed to establish that his trial counsel was ineffective in not submitting an instruction on attempted voluntary manslaughter.

[17] Willis also argues that Lahey performed deficiently in failing to "submit an instruction on attempted voluntary manslaughter to mirror the instruction for voluntary manslaughter[,]" which "invited convictions which were inherently conflicting." Appellant's Br. at 21. We observe that our supreme court has held that "[j]ury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable." *Beattie v. State*, 924 N.E.2d 643, 649 (Ind. 2010). Thus, even if Lahey had submitted an instruction on attempted voluntary manslaughter (a class A felony), and the jury nevertheless found Willis guilty of attempted murder (also a class A felony) and voluntary manslaughter, he would have no grounds for relief. Again, Willis has failed to carry his burden to show that Lahey's performance was deficient, so we affirm the denial of his PCR petition.

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[2] The post-conviction court did not make a finding regarding prejudice, but we observe that Willis has offered nothing to establish that there is a reasonable probability that he would have been acquitted if Lahey had not submitted a voluntary manslaughter instruction.

[18] Affirmed.

Vaidik, J., and Altice, J., concur.