MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Shelben Terrell Curtis,

Appellant-Petitioner,

v.

State of Indiana,

Appellee-Respondent.

March 21, 2022

Court of Appeals Case No. 21A-CR-1633

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

The Honorable Kathleen A. Sullivan, Magistrate

Trial Court Cause No. 45G04-1604-PC-1

Tavitas, Judge.

Case Summary

[1] In 2014, Shelben Terrell Curtis was convicted of voluntary manslaughter, a Class A felony, and aggravated battery, a Class B felony, and was sentenced to an aggregate term of fifty years in the Department of Correction. Following an unsuccessful direct appeal, Curtis filed a petition for post-conviction relief ("PCR"). The post-conviction court ("PC Court") denied Curtis's petition. On appeal, Curtis claims that the PC Court erred by determining that he was not denied the effective assistance of trial counsel. Concluding otherwise, we affirm.

Issues

I. Whether Curtis's trial counsel was ineffective for failing to move to dismiss Count I of the indictment for allegedly listing sudden heat as an element of voluntary manslaughter.

III. Whether Curtis's trial counsel was ineffective for failing to object to a jury instruction that erroneously listed sudden heat as an element of voluntary manslaughter.

II. Whether Curtis's trial counsel was ineffective for failing to object to the trial court's aggravated battery instruction.

Facts

[2] On direct appeal, this Court summarized the facts underlying Curtis's convictions as follows:

Theodore Roe attended Calumet High School, and during his senior year the school determined that he needed to be placed in the guidance office because he was harassed by and afraid of Shelton, who was Curtis's son, and James Love. After he graduated, Roe was attacked by Shelton and sustained injuries which included part of his ear being cut off, and Roe and his father reported the incident to police.

On one day in late July 2011, Roe picked up his girlfriend Maranda Cuevas, his sister Cassandra, and Cassandra's boyfriend Cameron Jimerson from a hotel and drove to a residence near 46th Avenue and Roosevelt Street to drop off Jimerson. After dropping him off, Roe drove Cassandra and Cuevas to a D-Mart gas station about two minutes away. As Roe was pumping gasoline, Shelton and Love pulled into the D-Mart lot in a black vehicle and "kind of circle[d] the gas station." Transcript at 328. Shelton and Love stared "[e]villy" at Roe and those with him and gave them "dirty looks." *Id*. at 228, 329. Roe entered his vehicle and "took off." *Id*. at 229. Cassandra observed that Shelton and Love had exited their vehicle and had walked toward the gas pump used by Roe. As Roe drove away, Cuevas noticed that Shelton and Love "were kind of gesturing like as if they wanted to fight or just—not very nice." *Id*. at 331. Shelton and Love returned to their vehicle, pulled out of the D-Mart lot, and drove in the same direction as Roe. Cassandra called Jimerson, and someone called Roe's father, who called the police.

Roe drove back to 46th Avenue and Roosevelt Street, and Jimerson entered the vehicle. Roe drove a short distance, and the black vehicle driven by Shelton reappeared behind his vehicle "out of nowhere." *Id*. at 394. Roe eventually stopped his vehicle, and Jimerson exited it so that he could attempt to speak with Shelton. Jimerson told the others to stay in the car, and he walked slowly towards Shelton's vehicle with his hands up. Shelton started screaming profanities, stated that he was going to

kill Jimerson, made a "gun gesture" towards Jimerson and Roe, and then sped away. *Id*. at 240.

Jimerson entered Roe's vehicle, and Roe drove back to 46th Avenue and Roosevelt Street. As Jimerson was stepping out of the vehicle, the vehicle previously driven by Shelton turned the corner and drove towards Roe's vehicle. Shelton, Curtis, Love, and Curtis's daughter Shaquita exited the vehicle, and Jimerson and Roe exited Roe's vehicle.

Curtis started to run towards Jimerson, and Shelton and Love began to run towards Roe. Jimerson raised his hands and asked what was going on and "what's the problem with these kids." *Id*. at 404. Curtis continued to approach Jimerson with his fists up and said "you want to bang, let's bang." *Id*. Curtis "gave [Shelton] a little nudge," and Shelton stepped forward and started to strike Roe. *Id*. at 340. Shelton and Love punched and pushed Roe. Shaquita struck Cuevas and Cassandra. Jimerson stepped in front of Shaquita with his arms out to back her away, and Curtis joined Shelton and Love in striking Roe. Jimerson then ran towards Curtis, placed his arms out, and tackled him with his forearm, and they fell to the ground.

As soon as Curtis and Jimerson hit the ground, Curtis reached behind his back and pulled out a .40 caliber semiautomatic pistol. Jimerson attempted to grab Curtis's arm to keep him from pointing the gun at him. As they struggled, Curtis was able to pull back the slide and cock the gun. Jimerson began to stand up, pushed Curtis, and attempted to turn away. While Jimerson was within a few feet, Curtis shot Jimerson in the back, and Jimerson felt his legs stop working and fell to the ground. Roe had backed away across the street. Curtis then crossed the street moving towards Roe, Cassandra, and Cuevas. Curtis fired his pistol at Roe's chest, and Roe threw his hands on his chest, stumbled, and fell down in the grass. Curtis went toward his vehicle and said to the others with him "come on. Come on.

> Let's go." *Id*. at 421. Before Curtis and the others entered their vehicle, police swarmed the intersection. Roe died at the scene, and Jimerson was permanently paralyzed from the waist down.

Curtis v. State, No. 45A03-1410-CR-365, slip op. pp. 2-4 (Ind. Ct. App. June 9, 2015).

[3] On March 29, 2012, a grand jury indicted Curtis on two counts: voluntary manslaughter and aggravated battery. A four-day jury trial commenced on June 23, 2014. Toward the conclusion of the trial, the trial court instructed the jury regarding the elements of the charged crimes. Curtis's trial counsel made no objection to these instructions, and the jury ultimately found Curtis guilty as charged. Trial Tr. Vol. III p. 687. The trial court sentenced Curtis to an aggregate term of fifty years of incarceration.

[4] Curtis raised four issues on direct appeal: (1) whether the trial court abused its discretion in admitting certain evidence; (2) whether the evidence was sufficient to sustain Curtis's convictions; (3) whether the trial court abused its discretion in sentencing Curtis; and (4) whether Curtis's sentence was inappropriate in light of the nature of the offenses and his character. *Curtis,* slip op. at 2. A panel of this Court affirmed Curtis's convictions and sentence. *Id*. at 20.

[5] On August 12, 2019, Curtis filed a petition for PCR claiming that his trial counsel was ineffective for: (1) failing to move to dismiss Count I of the indictment; and (2) failing to object to the trial court's instructions listing the elements of the crimes charged. The PC Court held an evidentiary hearing on

Curtis's petition on February 19, 2021. At this hearing, Curtis's trial counsel testified that he knew sudden heat is not an element of voluntary manslaughter but is instead a mitigating factor that reduces what would otherwise be murder to voluntary manslaughter. PCR Tr. Vol. I p. 15. Curtis's trial counsel, however, could not recall whether his failure to move to dismiss the indictment was a strategic decision. *Id*. at 15-20. Curtis's PC counsel also questioned his trial counsel regarding the aggravated battery instruction, which varied from the language of the indictment. Curtis's trial counsel agreed that he should have objected to the aggravated battery instruction. *Id*. at 10-11. The PC Court took the matter under advisement and, on June 30, 2021, entered findings of fact and conclusions of law denying Curtis's petition for PCR. Curtis now appeals.

Analysis

[6] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019), *reh'g denied, cert. denied*, 141 S. Ct. 553 (2020); Ind. Post-Conviction Rule 1(1)(b). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.3d at 681. "Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata." *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.;* P.-C.R. 1(5).

[7] When, as here, the petitioner "appeals from a negative judgment denying post-conviction relief, he 'must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.'" *Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000), *cert. denied*). When reviewing the PC court's order denying relief, we will "not defer to the post-conviction court's legal conclusions," and the "findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a petitioner "fails to meet this 'rigorous standard of review,' we will affirm the post-conviction court's denial of relief." *Gibson*, 133 N.E.3d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)). To prevail on his ineffective assistance of counsel claims, Curtis was required to show that: (1) his counsel's performance fell short of prevailing professional norms; and (2) his counsel's deficient performance prejudiced his defense. *Gibson*, 133 N.E.3d at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

[8] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *cert. denied*). We strongly presume that counsel exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in

developing legal strategies for a client. *Id.* This "discretion demands deferential judicial review." *Id.*

[9] "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.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

I. Failure to Move to Dismiss Voluntary Manslaughter Indictment

[10] Curtis argues that the PC Court clearly erred in rejecting his claim that his trial counsel was ineffective for failing to move to dismiss the indictment charging him with voluntary manslaughter. At the time of Curtis's offenses,[1] the statute defining the crime of voluntary manslaughter provided as follows:

> (a) A person who knowingly or intentionally:
>
> (1) kills another human being; or
>
> (2) kills a fetus that has attained viability [ ];
>
> while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon.

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[1] "[I]n general, 'the law in effect at the time that the crime was committed is controlling.'" *Collins v. State*, 911 N.E.2d 700, 708 (Ind. Ct. App. 2009) (quoting *Holsclaw v. State*, 270 Ind. 256, 261, 384 N.E.2d 1026, 1030 (1979)). We therefore cite the version of the voluntary manslaughter statute that was in effect in 2011, when Curtis committed his offenses.

(b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter.

Ind. Code § 35-42-1-3 (1997).

[11] Our Supreme Court has long held that "sudden heat is a mitigating factor, not an element" of voluntary manslaughter. *Brantley v. State*, 91 N.E.3d 566, 571 (Ind. 2018) (citing *Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008); *Bane v. State*, 587 N.E.2d 97, 100-01 (Ind. 1992)). Typically, voluntary manslaughter is an included offense of the charged crime of murder. *See Brantley*, 91 N.E.3d at 571 ("[I]n most cases voluntary manslaughter is charged as a lesser-included offense to a murder charge."). In such cases, the State must prove all the elements of murder and *disprove* the existence of sudden heat, if there is any appreciable evidence of such in the record. *Roberson v. State*, 982 N.E.2d 452, 456 (Ind. Ct. App. 2013) (citing *Watts*, 885 N.E.2d at 1232).

[12] Here, however, the State did not charge Curtis with murder and instead charged him only with voluntary manslaughter as a stand-alone offense. This is atypical, but it is not prohibited. *See Brantley,* 91 N.E.3d at 571 ("[W]e find that voluntary manslaughter may be brought as a standalone charge and, accordingly, the State was permitted to charge Brantley with only voluntary manslaughter."). Our Supreme Court in *Brantley* held that, in such cases, sudden heat is still a mitigating factor, not an element. *Id*. at 571-72. Thus, the State must prove the elements of murder and there must be "some evidence" of

sudden heat. *Id.* at 572 (citing *Watts*, 885 N.E.2d at 1232-33; *Bane*, 587 N.E.2d at 100-01).

[13] Here, Count I of the indictment stated:

> [O]n or about July 29, 2011, in the County of Lake, State of Indiana SHELBREN TERRELL CURTIS did knowingly or intentionally, kill THEODORE J. ROE while acting under sudden heat and by means of a handgun, a deadly weapon, contrary to I.C. 35-42-1-3, and against the peace and dignity of the State of Indiana.

PCR App. Vol. II p. 20. Nothing in this language states that sudden heat is an *element* of the charged crime, as opposed to merely a mitigating factor. In fact, Count I does not explain whether sudden heat is an element or a mitigating factor at all. Instead, Count I merely tracks the language of subsection 3(a) of the voluntary manslaughter statute. For this reason, Curtis's trial counsel was not ineffective for failing to move to dismiss Count I, and the PC Court did not clearly err by rejecting Curtis's claim that his trial counsel was ineffective for failing to move to dismiss Count I of the indictment.[2]

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[2] As explained in more detail *infra*, we also conclude that Curtis was not prejudiced by any error in informing the jury that sudden heat was an element of voluntary manslaughter, as this error increased the State's burden.

II. Failure to Object to Voluntary Manslaughter Instruction

[14] In a similar vein, Curtis argues that the trial court's final instruction defining voluntary manslaughter improperly listed sudden heat as an element. He is correct. Final Instruction 3 provided in relevant part:

> In order to convict the defendant, the State must have proved *each of the following elements* beyond a reasonable doubt:
>
> 1. the defendant
> 2. knowingly or intentionally
> 3. killed
> 4. another human being, to-wit: Theordore [sic] J. Roe
> 5. by means of a deadly weapon, to-wit: a handgun
> 6. *and acted under sudden heat.*

PCR App. Vol. II p. 23 (emphases added). This instruction erroneously lists sudden heat as an element of voluntary manslaughter instead of explaining that it is a mitigating factor that reduces what would otherwise be murder to voluntary manslaughter.

[15] Curtis notes that it has long been the law in Indiana that sudden heat is not an element of voluntary manslaughter. But at the time of Curtis's 2014 trial, it was not entirely clear whether this was true when the State brought a free-standing charge of voluntary manslaughter.[3] Indeed, the Court in *Brantley* explicitly

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[3] Curtis cites many cases, including several that are decades old, explaining that sudden heat is not an element of voluntary manslaughter. These cases, however, did not involve a freestanding charge of voluntary manslaughter, but instead involved situations where the State charged the defendant with murder, and the jury was instructed on voluntary manslaughter as a lesser-included offense. *See, e.g., Isom v. State*, 651 N.E.2d

noted the uniqueness of the factual situation before it: "[a] search of our library turns up few precedents on which to resolve this question." 91 N.E.3d at 571 n.1; *see also id.* at 572 (referring to the situation before the court as a "novel case.").

[16] We agree with the PC Court that Curtis's trial counsel cannot be faulted for failing to predict the course our Supreme Court would eventually take in *Brantley*, i.e., that even in a free-standing charge of voluntary manslaughter, sudden heat remains a mitigating factor and not an element. *See Reed v. State*, 856 N.E.2d 1189, 1197 (Ind. 2006) ("[C]ounsel cannot be held ineffective for failing to anticipate or effectuate a change in existing law."). Because Curtis was not charged with murder but only with voluntary manslaughter, the law was still unclear at the time of his trial regarding whether sudden heat was a mitigating factor or an element in such cases. *See Brantley*, 91 N.E.3d at 571-72. But even if we were to conclude that Curtis's trial counsel should have objected to this instruction, which we do not,[4] we also conclude that Curtis was not prejudiced thereby.

1151, 1152 (Ind. 1995); *Bane*, 587 N.E.2d at 100-01; *Holland v. State*, 454 N.E.2d 409, 410 (Ind. 1983); *Sanders v. State*, 764 N.E.2d 705, 713 (Ind. Ct. App. 2002); *Wilcoxen v. State*, 705 N.E.2d 198, 203 (Ind. Ct. App. 1999), *trans. denied*; *Palmer v. State*, 553 N.E.2d 1256, 1257 (Ind. Ct. App. 1990), *trans. granted, summarily aff'd*, 573 N.E.2d 880 (Ind. 1991).

[4] Indeed, Curtis's trial counsel could have reasonably concluded that requiring the State to prove the existence of sudden heat beyond a reasonable doubt bolstered his claim of self-defense. *See Brantley,* 91 N.E.3d at 573 (noting that a claim of self-defense is not inconsistent with a claim of killing in sudden heat and that "common to both defenses is terror.").

[17] Curtis claims that this instruction "shifted the burden of proof upon Curtis." Appellant's Br. p. 12. We cannot agree. It is a fundamental principle of American jurisprudence that the State, not the defendant, bears the burden of proving each element of a charged crime beyond a reasonable doubt. *Galloway v. State*, 938 N.E.2d 699, 708 (Ind. 2010) (citing Ind. Code § 35-41-4-1(a); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)). Here, the trial court instructed the jury that, to convict Curtis of voluntary manslaughter, "*the State* must have proved each of the following elements beyond a reasonable doubt," including that Curtis "acted under sudden heat." PCR App. Vol. II p. 23. There is nothing in this instruction that suggests that the burden of proof was on Curtis.[5]

[18] Thus, even though the jury was informed that sudden heat was an element of voluntary manslaughter, which it is not, the error was in Curtis's favor. Instead of merely having to show "some evidence" of sudden heat, as required by *Brantley,* 91 N.E.3d at 572, the jury instruction required the State to prove the existence of sudden heat beyond a reasonable doubt. As we read *Brantley*, this *increased* the burden on the State; it did not shift the burden to Curtis.[6] We

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[5] In his reply brief, Curtis claims that, by including sudden heat as an element, the State puts the defendant in the position of having to prove murder to be exonerated of a charge of voluntary manslaughter. This is not so. A defendant could present any number of defenses in such a situation, including that he was acting in self-defense, as Curtis unsuccessfully did here, that he was not guilty by reason of insanity, or that he did not commit the crimes alleged at all.

[6] Curtis also argues, without further elaboration, that the State did not introduce any evidence of sudden heat. *See* Appellant's Br. p. 16. A post-conviction petition is not the proper forum to present a claim of insufficient evidence, which could have been presented on direct appeal. *Law v. State*, 797 N.E.2d 1157, 1167 (Ind. Ct. App. 2003). To the extent that Curtis makes this argument only in support of his claim of

therefore conclude that Curtis was not prejudiced by his trial counsel's performance, and the PC Court properly rejected Curtis's claim that his trial counsel was ineffective for not challenging Final Instruction 3.

III. Failure to Object to Aggravated Battery Instruction

[19] Curtis also argues that the jury instruction defining aggravated battery was improper and that his trial counsel was ineffective for failing to object to this instruction. At the time of Curtis's offenses, Indiana Code Section 35-42-2-1.5 provided:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
>
> (2) protracted loss or impairment of the function of a bodily member or organ; or
>
> (3) the loss of a fetus;
>
> commits aggravated battery, a Class B felony.

Ind. Code § 35-42-2-1.5 (1997). Count II charged Curtis under subsection 1.5(2) by alleging that Curtis "knowingly or intentionally inflict[ed] injury on Cameron Jimerson that caused protracted loss of impairment of the function of a bodily member or organ . . . ." PCR App. Vol. II p. 21.

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ineffective assistance, we disagree. Curtis's claim of self-defense and the State's allegation of sudden heat both had the common emotion of terror. Here, given the nature of the fight that provoked Curtis to shoot the victims, the jury could reasonably conclude that Curtis was in terror during the fight, and therefore acted in sudden heat, but did not act in self-defense. *See id.*, 91 N.E.3d at 573-74 ("terror sufficient to establish the fear of death or great bodily harm necessary for self-defense could be equally sufficient to invoke sudden heat. In other words, the same evidence can either mitigate murder or excuse it altogether. It's the jury's call.").

[20] Final Instruction 4, however, included language from both subsections 1.5(1) and 1.5(2):

> A person who knowingly or intentionally inflicts injury on a person that causes *serious permanent disfigurement* or protracted loss or impairment of the function of a bodily member or organ, commits Aggravated Battery, a class B felony.
>
> In order to convict the defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1) the defendant
> 2) knowingly or intentionally
> 3) inflicted injury on Camera on [sic] Jimerson
> 4) that caused *serious permanent disfigurement* or protracted loss or impairment of the function of a bodily member or organ.

Id. at 24 (emphases added).

[21] Curtis argues that this instruction was broader in scope than the language of the indictment and permitted the jury to convict him of aggravated battery for causing serious permanent disfigurement, a crime with which he was not charged. He, therefore, claims that his trial counsel was ineffective for failing to object to this instruction.[7]

[22] When a defendant claims that trial counsel was ineffective for failing to object, "the standard is whether the trial court would have been required to sustain the

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[7] Curtis notes that his trial counsel agreed at the post-conviction hearing that he should have objected to Final Instruction 4. PCR Tr. Vol. II p. 11. We reiterate, however, that "we judge [counsel's] performance by the standard of objective reasonableness, not [counsel's] subjective state of mind. *Woodson v. State*, 961 N.E.2d 1035, 1041 (Ind. Ct. App. 2012) (citing *Harrington v. Richter*, 562 U.S. 86, 110, 131 S. Ct. 770, 790 (2011)).

objection had one been made, or conversely whether the trial court would have committed prejudicial error if it overruled the objection." *Ross v. State*, 877 N.E.2d 829, 835 (Ind. Ct. App. 2007) (citing *Stephenson v. State*, 864 N.E.2d 1022, 1035 (Ind. 2007)). Here, if Curtis's trial counsel had objected to Final Instruction 4, the trial court should have sustained the objection. We conclude, however, that Curtis was not prejudiced by this error.

[23] Our Supreme Court has held that "prejudicial error does not arise solely because a jury instruction has been given in the language of the statute which is broader than the crime as charged." *Potter v. State*, 684 N.E.2d 1127, 1132 (Ind. 1997). The Court in *Potter* explained:

> The defendant is not prejudiced by such an erroneous instruction if there is no evidence in the record to support the uncharged portions of the crime. Also, the defendant is not prejudiced if the jury is expressly informed of the specific crime charged against defendant and that the State must prove the material allegations of that charge beyond a reasonable doubt before the jury may convict. If, along with the erroneous final instruction, the jury is plainly made aware (*for example by an express or referential reading of the charging information*) that the jury can only convict upon a finding that defendant committed the specific acts charged in the information, then there is no prejudice.

684 N.E.2d at 1132 (emphasis added) (citing *Evans v. State*, 571 N.E.2d 1231, 1235 (Ind. 1991); *McIntosh v. State*, 638 N.E.2d 1269, 1275 (Ind. Ct. App. 1994); *Dixon v. State*, 425 N.E.2d 673, 678 (Ind. Ct. App. 1981)).

[24] Here, the trial court's preliminary and final instructions expressly reiterated the language of Count II of the indictment, which made no reference to serious permanent disfigurement and only charged him with causing protracted loss or impairment of the function of a bodily member or organ. Trial Tr. Vol. I p. 25; PCR App. Vol. II pp. 21, 22. Thus, pursuant to *Potter*, Curtis was not prejudiced. *Potter*, 684 N.E.2d at 1132.

[25] Furthermore, the State made no argument that the jury could find Curtis guilty based on causing serious permanent disfigurement; instead, the State argued that the jury should find Curtis guilty of aggravated battery for causing protracted loss or impairment of the function of a bodily member or organ. Specifically, during its closing argument, the State argued: "Count II, 'The defendant did knowingly or intentionally inflict injury on Cameron Jimerson which caused protracted loss or impairment of the function of a bodily member or organ.' "*Cameron will never walk again because he was shot in the back*." Trial Tr. Vol. III p. 657 (emphasis added).

[26] More importantly, there was no evidence that would suggest that Curtis caused serious permanent disfigurement. Jimerson testified regarding his paralysis, not any disfigurement caused by his injuries. Trial Tr. Vol. II pp. 428-30, 432-33. The State made no reference to any disfigurement caused by Curtis shooting Jimerson. In contrast, the State presented ample evidence that Curtis caused protracted loss or impairment of the function of a bodily member because Jimerson was paralyzed from the waist down. *Id*. Thus, Curtis was not

prejudiced by the erroneous instruction as there was "no evidence in the record to support the uncharged portions of the crime." *Potter*, 684 N.E.2d at 1132.

[27] As in *Potter*, we cannot say that Curtis was prejudiced simply because the instruction was "given in the language of the statute, which is broader than the crime as charged." *Id.*; *see also Emerson v. State*, 695 N.E.2d 912, 916 (Ind. 1998) (holding that even though the jury instruction on battery exceeded the scope of the crime as charged, defendant was not entitled to post-conviction relief because the State also presented evidence sufficient to prove that the defendant committed battery as charged).[8] Even if Curtis's trial counsel's performance was deficient for failing to object to Final Instruction 4, Curtis was not prejudiced thereby. Accordingly, the PC Court properly rejected Curtis's claim that his trial counsel was ineffective for failing to object to Final Instruction 3.

Conclusion

[28] The PC Court did not clearly err in rejecting Curtis's post-conviction claims that his trial counsel was ineffective. We therefore affirm the judgment of the PC Court.

[29] Affirmed.

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[8] Curtis cites *Salary v. State*, 523 N.E.2d 764, 767 (Ind. Ct. App. 1988), for the proposition that a defendant is deprived of due process if he is convicted of a statutory offense that has one or more additional element or elements which differ from those of the alleged statutory offense. In *Salary*, the defendant was convicted based on elements that were not included in the charging information. *Id*. In contrast, here, the indictment clearly alleged that Curtis caused protracted loss or impairment of the function of a bodily member or organ. *Salary* is therefore inapplicable.

Bradford, C.J., and Crone, J., concur.