Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

IN THE SUPREME COURT
OF MISSOURI

KEITH MEINERS,	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC96278**
	)	
STATE OF MISSOURI,	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE ST. LOUIS COUNTY CIRCUIT COURT
THE HONORABLE COLLEEN DOLAN,
JUDGE AT TRIAL AND POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

Lisa M. Stroup, Bar#36325
Attorney for Appellant
1010 Market St.
Ste. 1100
St. Louis, MO 63101
(314)340-7662
Fax (314)340-7685
lisa.stroup@mspd.mo.gov

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

INDEX

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES AND RULES:

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

JURISDICTIONAL STATEMENT

On April 24, 2013, Appellant Keith Meiners was found guilty of second-degree murder, a class A felony violating Mo. Rev. Stat. § 565.021 (2000), after a jury trial before the Hon. Colleen Dolan, 21st Judicial Circuit.

On June 10, 2013, Mr. Meiners was sentenced to twenty-five (25) years' imprisonment in Missouri Department of Corrections' (DOC) custody.

Mr. Meiners appealed his conviction and sentence to this Court in State v. Keith Meiners, No. ED100157 (Mo. App. E.D. May 13, 2014). On May 13, 2014, the Missouri Court of Appeals, Eastern District, affirmed the Circuit Court's judgment and sentence and issued its mandate on June 5, 2014.

Mr. Meiners filed a *pro se* Motion for Post-Conviction Relief under Missouri Supreme Court Rule 29.15 on July 31, 2014. On August 19, 2014, the motion court appointed the State Public Defender's Office, Appellate/PCR Division, to represent Mr. Meiners and gave counsel an additional thirty (30) days in which to file an amended motion. An amended motion was filed on November 18, 2014. Mr. Meiners asked the court to accept the untimely motion as timely filed under Sanders v. State, 807 S.W.2d 493 (Mo. banc 1993). [1] The court denied Mr. Meiners' request for post-conviction relief on November 23, 2015 after an evidentiary hearing.

Mr. Meiners filed a Notice of Appeal on January 4, 2016. He was also granted leave to file his appeal as a poor person.

[1] The record does not establish that the motion court ruled on the Sanders motion.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

In Cause No. ED103861, on January 10, 2017, the Court of Appeals affirmed the motion court's denial of post-conviction relief. Keith Meiners v. State, No. ED103861, memo. at 10, 14 (Mo. App. E.D. January 10, 2017)[hereinafter, Memorandum.].

On March 15, 2017, Mr. Meiners filed an Application for Transfer, which was granted on May 2, 2017. Thus, jurisdiction lies in this Court. Mo. Const. Art. V, § 10 (2000); Mo. Sup. Ct. Rules 83.04, .09.[2]

* * * * *

Sources will be cited as follows: trial transcript – "Tr."; legal file in underlying criminal cause from direct appeal – "L.F."; transcript of the evidentiary hearing – "E.H.Tr."; and legal file on appeal of post-conviction proceeding – "PCR L.F."

[2]All further statutory references are to Mo. Rev. Stat. 2000, unless otherwise indicated.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

STATEMENT OF FACTS

Appellant Keith Meiners filed a *pro se* motion for post-conviction relief after being convicted of second-degree murder (Tr. 541; L.F. 63, 70; PCR L.F. 4-9).

In an amended motion, Mr. Meiners argued appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter) (PCR L.F. 17-25).

Mr. Meiners was originally charged with first-degree murder by knowingly causing the death of Mr. James "JJ" Willman by beating him (L.F. 11; Tr. 320).

Ms. Danielle Buhrman testified she had known the decedent, Mr. Willman, since 2008 (Tr. 320). She and the decedent had been romantically involved (Tr. 321). After she dated the decedent, she dated Mr. Meiners (Tr. 321). She continued a platonic relationship with the decedent until a month after she started dating Mr. Meiners (Tr. 321). She stopped the relationship because the decedent continued to hit on her (Tr. 322).

Ms. Buhrman talked with Mr. Meiners about her past relationship with the decedent (Tr. 325). She told him about her past sexual encounters with the decedent (Tr. 325).

Ms. Buhrman spoke with the decedent on the telephone the night he died (Tr. 253). At the time, she and Mr. Meiners and Justice Brickey were at the same party (Tr. 253-55). Mr. Brickey was living with the Meiners family (Tr. 251-52).

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Mr. Brickey testified he was with the decedent and Mr. Meiners later that night in a car (Tr. 259). Mr. Willman was driving (Tr. 259). They were driving, according to Mr. Brickey, to meet Mr. Meiners' sister (Tr. 257). As Mr. Willman drove, Mr. Brickey asked him to pull over so he could throw up (Tr. 259). After the car stopped, Mr. Brickey opened the car door and started dry-heaving (Tr. 259). When he looked back, he saw Mr. Meiners strangling Mr. Willman with duct tape (Tr. 260).

Ms. Rebecca Pigg testified Mr. Meiners told her the decedent had tried to stab Mr. Brickey and him with a switchblade knife (Tr. 469).

When Mr. Brickey got to the other side of the car, the decedent was on the ground (Tr. 260). Mr. Meiners was hitting him (Tr. 260-61). Mr. Meiners was "filled with rage" and "out of control" (Tr. 311). Mr. Meiners asked Mr. Brickey to help him move the decedent off the road, which he did (Tr. 262). Mr. Meiners and Mr. Brickey got back in the car and drove away (Tr. 264, 265).

At trial, the state offered verdict directors on first- and second- degree murder (Tr. 482; L.F. 46-47). They were submitted to the jury (Tr. 487; L.F. 46-47).

Trial counsel asked the court to submit a verdict director on voluntary manslaughter (Tr. 479-80; E.H.Tr. 10). Trial counsel argued the decedent's trying to stab Mr. Meiners was adequate cause for sudden passion (Tr. 479-80). Even though there was evidence Mr. Meiners had pulled the decedent out of the car before Mr. Willman pulled out the knife, trial counsel testified that Mr. Willman's

pulling out the knife escalated the encounter to another level to support the jurors' finding sudden passion (E.H.Tr. 17). Because of that, trial counsel believed there was a legal basis for the voluntary-manslaughter instruction (E.H.Tr. 10-11).

Trial counsel also asked the court to submit a verdict director on first-degree involuntary manslaughter (Tr. 479-80; E.H.Tr. 10). Trial counsel argued the state's evidence had shown Mr. Meiners could have acted recklessly in killing Mr. Willman (Tr. 480-81).

The court refused to submit the instructions on voluntary and first-degree involuntary manslaughter and marked them "A" and "B," respectively (Tr. 480, 481).

The jurors acquitted Mr. Meiners of first-degree murder, but found him guilty of second-degree murder (Tr. 541; L.F. 56).

In a Motion for New Trial, trial counsel argued the court had erred in not submitting Instructions A and B (L.F. 67-68).

Before writing the Appellant's Brief, appellate counsel noted the voluntary and first-degree involuntary manslaughter instructions had been refused (E.H.Tr. 38). But she did not raise on direct appeal the issues that the trial court had erred in refusing Instructions A and B (E.H.Tr. 38-39). *See* Brief for Appellant, State v. Meiners, No. ED100157 (Mo. App. E.D. 2014).

Mr. Meiners argued in an amended post-conviction motion that appellate counsel was ineffective for failing to raise the issue on direct appeal that the trial

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

court erred in refusing the verdict directors on voluntary and first-degree involuntary manslaughter (PCR L.F. 17-25).

The motion court denied relief on this point after an evidentiary hearing (PCR L.F. 92-93, 94). The court decided counsel had not been ineffective because – had she raised the issue on direct appeal that the trial court erred in refusing the voluntary-manslaughter instruction – the issue would not have been successful (PCR L.F. 92).

It would not have been successful, the court decided, because there was no evidence Mr. Meiners had acted in sudden passion (PCR L.F. 92). Any passion would not have been sudden because Ms. Buhrman had told Mr. Meiners two months before the confrontation about her relationship with the decedent (PCR L.F. 92).

The motion court also decided there had been no evidence of sudden passion because there was no evidence the decedent had provoked it (PCR L.F. 92). There had not been such evidence, the court decided, because Mr. Meiners had been the initial aggressor, citing Hill v. State, 160 S.W.3d 855 (Mo. App. S.D. 2005) (PCR L.F. 92). Mr. Meiners had been the initial aggressor because it was his pulling the decedent out of the car that caused the decedent to pull out his knife (PCR L.F. 92).

The motion court also decided appellate counsel had not been ineffective for not raising on direct appeal the issue that the trial court had erred in not giving the instruction on first-degree involuntary manslaughter (PCR L.F. 92-93). The

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

court decided counsel had not been ineffective because evidence Mr. Meiners kicked, punched, strangled, bound, and left the decedent in a field established he had not acted recklessly (PCR L.F. 92-93).

At the evidentiary hearing, appellate counsel testified she did not raise on direct appeal the issue about the court's failure to submit the voluntary-manslaughter instruction because she did not "see . . . grounds for stating that there was evidence that he acted under sudden passion" (E.H.Tr. 38-39).

Counsel had made a note from the transcript that there had been testimony the decedent had pulled a knife on Mr. Meiners (Tr. 39). She testified that someone pulling a knife on a person would cause sudden passion (E.H.Tr. 39). She testified it "could well be" that trial counsel had offered a manslaughter instruction, instead of pursuing a defense of self-defense, if the evidence had been that Mr. Meiners had pulled the decedent out of his car before the decedent pulled out a knife (E.H.Tr. 40-41). "That would seem to fit the manslaughter scenario," she testified (E.H.Tr. 40).

As for not raising the involuntary-manslaughter issue, counsel did not think the facts adduced at trial established recklessness, the mental state for involuntary manslaughter (E.H.Tr. 39; L.F. 52). She testified, "I didn't think this fact pattern, any of the facts that were adduced at trial fit into a scenario of recklessness, that there was not evidence for that" (E.H.Tr. 39).

Appellate counsel testified that – under this Court's decision in State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014) – "these instructions probably would

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

have both been given" (E.H.Tr. 41). That case had been decided after counsel wrote the Appellant's Brief for Mr. Meiners (E.H.Tr. 41).

Counsel also testified that – even before the decision in State v. Jackson – "[i]t has always been the case that the jurors can believe or disbelieve any witness" (E.H.Tr. 44).

Further facts will be stated as necessary in the Argument section.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

POINT RELIED ON

The motion court clearly erred in denying Appellant Keith Meiners' Rule 29.15 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[3] in that appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter).

The court denied Mr. Meiners' Rule 29.15 motion for post-conviction relief after an evidentiary hearing although he established by a preponderance of the evidence he was denied his rights.

Mr. Meiners was prejudiced by appellate counsel's ineffectiveness. Had appellate counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded.

Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985);

State v. Battle, 32 S.W.3d 193 (Mo. App. E.D. 2000);

Hill v. State, 160 S.W.3d 855 (Mo. App. S.D. 2005);

State v. Hineman, 14 S.W.3d 924 (Mo. banc 1999);

U.S. Const., Amend. V;

[3] These rights are guaranteed by the United States Constitution, Fifth, Sixth, and Fourteenth Amendments and the Missouri Constitution, Article I, §§ 10 and 18(a).

U.S. Const., Amend. VI;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10;

Mo. Const., Art. I, § 18(a);

Mo. Sup. Ct. Rule 29.15;

Mo. Rev. Stat. § 547.070;

Mo. Rev. Stat. § 556.046;

Mo. Rev. Stat. § 565.023;

Mo. Rev. Stat. § 565.024 (Cum. Supp. 2010); and

Mo. Rev. Stat. § 565.025.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

ARGUMENT

The motion court clearly erred in denying Appellant Keith Meiners' Rule 29.15 motion for post-conviction relief because he was denied his rights to effective assistance of counsel and due process of law[4] in that appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter).

The court denied Mr. Meiners' Rule 29.15 motion for post-conviction relief after an evidentiary hearing although he established by a preponderance of the evidence he was denied his rights.

Mr. Meiners was prejudiced by appellate counsel's ineffectiveness. Had appellate counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded.

Preservation Statement

Mr. Meiners argued in his amended motion appellate counsel failed to raise the issue the trial court erred in refusing Instructions A and B (PCR L.F. 17-25). Appellate counsel testified on this point at the evidentiary hearing (E.H.Tr. 35-45). Because the claim was included in the amended motion and tried at the evidentiary hearing, it has been preserved for appellate review. *See* Mouse v.

[4] *See* n.3.

State, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in amended post-conviction motion or tried by implicit consent of the parties at the evidentiary hearing).

Review Standard

Appellate review of a motion court's denial of post-conviction relief is limited to determining whether the findings and conclusions of the trial court are clearly erroneous. Rotellini v. State, 77 S.W.3d 632, 634 (Mo. App. E.D. 2002); Rule 29.15(k). Findings of fact and conclusions of law are clearly erroneous if an appellate court, upon reviewing the record, is left with the definite and firm impression a mistake has been made. Richardson v. State, 719 S.W.2d 912, 915 (Mo. App. E.D. 1986).

Counsel did not raise the issue the court erred in refusing Instructions A, B

General Case Law

The United States Constitution's Sixth Amendment – as applied to the states through the Missouri Constitution's Fourteenth Amendment and Article I, Sections 10 and 18(a) – guarantee defendants in state criminal proceedings the right to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). This right is designed to assure fairness, and thus to give legitimacy to the adversarial process. Id. To ensure a fair trial, the right to counsel must be the right to "effective" assistance of counsel. Kimmelman v.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Morrison, 477 U.S. 365, 106 S. Ct. 2594 (1986); McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441 (1970).

When a criminal defendant seeks post-conviction relief claiming ineffective assistance of counsel, he must establish first, that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under similar circumstances, and second, that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Seales v. State, 580 S.W.2d 733, 736-737 (Mo. banc 1979).

Defendants in Missouri have an appeal of right after a final judgment on an Indictment or Information. Mo. Rev. Stat. § 547.070. The United States Constitution's Due Process Clause guarantees effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 393-94, 105 S. Ct. 830, 836-37 (1985). To allege and prove ineffective assistance of appellate counsel, the error overlooked must have been "so obvious from the record that a competent and effective lawyer would have recognized and asserted it." Moss v. State, 10 S.W.3d 508, 514-15 (Mo. banc 2000). To prove prejudice, the error must have been a manifest injustice or a miscarriage of justice. Id.

A person establishes prejudice when he or she demonstrates "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Analysis – Voluntary-manslaughter instruction

Appellate counsel was ineffective for failing to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter) (Tr. 480; PCR L.F. 19). The error was obvious from the record because trial counsel asked the court to submit those instructions, and the court refused (PCR L.F. 19).

The court's refusal was erroneous because voluntary manslaughter is a lesser-included offense of first-degree murder. Mo. Rev. Stat. §§ 556.046.1(2); 565.025.2(1)(b). A trial court must instruct on an included offense if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for convicting the defendant of that particular included offense. Mo. Rev. Stat. § 556.046.3.

To determine if there is a basis in the evidence to acquit a defendant of first-degree murder yet convict him of voluntary manslaughter, appellate courts review the evidence in the light most favorable to the defendant. State v. Battle, 32 S.W.3d 193, 195 (Mo. App. E.D. 2000)(citing State v. Hill, 17 S.W.3d 157, 159 (Mo. App. E.D. 2000)). A defendant is entitled to a requested instruction that is supported by the evidence and any inferences logically flowing from the evidence. Id. at 196(citing State v. Hill, 17 S.W.3d at 159). Any doubts about whether to instruct on a lesser-included offense should be resolved in favor of

instructing on the lesser offense. Id.(citing State v. Santillan, 948 S.W.2d 574, 577 (Mo. banc 1997)).

There was a basis in the evidence at Mr. Meiners' trial to acquit him of first-degree murder. The jurors found it because they acquitted him of it (L.F. 56).

There was also a basis in the evidence to convict Mr. Meiners of voluntary manslaughter. Voluntary manslaughter is second-degree murder mitigated by the element of sudden passion arising from adequate cause. Mo. Rev. Stat. § 565.023.1(1).

There was evidence that Mr. Meiners had adequate cause to experience sudden passion. On the night he was killed, the decedent showed up at a party where Mr. Meiners was (Tr. 254). Mr. Meiners knew that his girlfriend – Ms. Buhrman – had earlier been romantically involved with the decedent (Tr. 325). He also knew from Ms. Buhrmann about her past sexual encounters with the decedent (Tr. 325). Mr. Meiners told Margaret Schwaderer that he and the decedent had been arguing in the car about Mr. Meiners' sister (Tr. 248). Mr. Meiners had told Rebecca Pigg that the decedent had tried to stab him and Mr. Brickey with a switchblade knife (Tr. 469). Appellate counsel testified that someone pulling a knife on a person would cause sudden passion (E.H.Tr. 39).

There was also a basis in the evidence for jurors to find that Mr. Meiners had acted in a sudden passion when he beat the decedent. Mr. Brickey testified that – when Mr. Meiners was attacking the decedent – he was "filled with rage" and "out of control" (Tr. 311). Mr. Brickey saw Mr. Meiners strangling the

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

decedent with duct tape (Tr. 260). Mr. Brickey testified the police had told him they found a roll of duct tape in the front passenger seat of the decedent's car (Tr. 314). If Mr. Meiners had been thinking rationally, he would not have left the duct tape in the car for the police to find, but would have taken it with him. Therefore, there was a basis in the evidence for jurors to find Mr. Meiners had acted in sudden passion arising from adequate cause.

Because there was a basis to acquit Mr. Meiners of first-degree murder and instead find him guilty of voluntary manslaughter, the trial court's error in refusing the instruction was so obvious from the record that a competent and effective lawyer would have recognized and asserted it (PCR L.F. 21). Therefore, appellate counsel was ineffective for failing to raise the issue on direct appeal that the trial court erred in refusing Instruction A, the verdict director for voluntary manslaughter (PCR L.F. 21).

Mr. Meiners was prejudiced by counsel's ineffectiveness (PCR L.F. 22). The court's errors caused manifest injustice or a miscarriage of justice (PCR L.F. 22). Had counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded for a new trial (PCR L.F. 23). Thus, Mr. Meiners was prejudiced by counsel's ineffectiveness (PCR L.F. 23).

The motion court's ruling – Voluntary-manslaughter instruction

The motion court denied relief on this point after an evidentiary hearing (PCR L.F. 92-93, 94). The court decided counsel had not been ineffective because

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

– had she raised the issue on direct appeal that the trial court erred in refusing the voluntary-manslaughter instruction – the issue would not have been successful (PCR L.F. 92).

It would not have been successful, the court decided, because there was no evidence Mr. Meiners had acted in sudden passion (PCR L.F. 92). Any passion would not have been sudden because Ms. Buhrman had told Mr. Meiners two months before the confrontation about her relationship with the decedent (PCR L.F. 92).

The court also decided there had been no evidence of sudden passion because the decedent had not provoked it (PCR L.F. 92).

There had not been such evidence, the court decided, because Mr. Meiners had been the initial aggressor, citing Hill v. State, 160 S.W.3d 855 (Mo. App. S.D. 2005) (PCR L.F. 92). Mr. Meiners had been the initial aggressor because it was his pulling the decedent out of the car that caused the decedent to pull out the knife (PCR L.F. 92).

The motion court clearly erred in deciding Mr. Meiners had been the initial aggressor. According to Mr. Brickey, the first thing he noticed while in the car was Mr. Meiners' strangling the decedent with duct tape (Tr. 260). That happened before Mr. Meiners pulled the decedent out of the car (Tr. 260). And, according to Margaret Schwaderer, Mr. Meiners told her that he and the decedent had been arguing in the car about Mr. Meiners' sister (Tr. 248). The argument could have

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

provoked Mr. Meiners into strangling the decedent. Therefore, the motion court clearly erred in deciding Mr. Meiners was the initial aggressor.

Even if the decedent had pulled the knife on Mr. Meiners because Mr. Meiners had pulled him out of his car, there was still a basis for the voluntary-manslaughter instruction. As Counsel Goeke explained at the evidentiary hearing, the decedent's pulling out the knife escalated the confrontation to another level (E.H.Tr. 17). And appellate counsel agreed that a knife being pulled on a person could cause him to experience sudden passion (Tr. 39). Therefore, the motion court clearly erred in deciding there had not been evidence of sudden passion.

The motion court also clearly erred in citing Hill v. State to support its denying post-conviction relief by finding Mr. Meiners had been the initial aggressor. In Hill, the movant and decedent argued over missing marijuana. 160 S.W.3d at 858. The movant pointed a gun at the decedent; the decedent shot at the movant. Id. The decedent retreated. Id. The movant followed and shot the decedent in the back. Id. The Court of Appeals decided appellate counsel had not been ineffective for failing to raise the issue that the evidence was not sufficient that the movant had committed second-degree murder, but had committed voluntary manslaughter instead. Id. at 859-60. The Court of Appeals decided the movant could not have argued that the evidence only supported a conviction for voluntary manslaughter because the jurors could have reasonably inferred the movant had been the initial aggressor. Id. at 859.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

But in Hill v. State, the Court of Appeals did not use the correct standard. The question was ***not*** whether the jurors could have reasonably inferred the movant had been the initial aggressor. The issue was whether there was a basis in the evidence for the jurors to decide that adequate cause had arisen either because of Ms. Buhrmann's testimony that the decedent had shown up at a party where his former girlfriend and her current boyfriend were, or Ms. Schwaderer's testimony that the decedent had argued with Mr. Meiners about his sister. Mo. Rev. Stat. § 556.046.3. Therefore, the motion court clearly erred in citing Hill v. State. Thus, the motion court clearly erred in denying post-conviction relief.

Analysis – First-degree involuntary manslaughter instruction

Appellate counsel was also ineffective for failing to raise on direct appeal the issue that the trial court erred in refusing Instruction B, a verdict director on first-degree involuntary manslaughter (PCR L.F. 21). The first-degree involuntary manslaughter statute prohibits a person recklessly causing the death of another person. Mo. Rev. Stat. § 565.024.1(1) (Cum. Supp. 2010). First-degree involuntary manslaughter is a lesser-included offense of both first- and second-degree murder. Mo. Rev. Stat. § 565.025.2(1)(c). It is also a "nested" lesser-included offense because the *mens rea* element is the only differential element between first- and second- degree murder and first-degree involuntary manslaughter. *See* State v. Ramirez, 479 S.W.3d 640, 645 (Mo. App. W.D. 2015).

With nested lesser-included offenses, the jury is permitted to draw any reasonable inferences from the evidence as the evidence will permit. State v.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Hineman, 14 S.W.3d 924, 927 (Mo. banc 1999). The jurors may believe or disbelieve all, part, or none of the evidence. Id. This Court has held the same in State v. Derenzy, 89 S.W.3d 472 (Mo. banc 2002); State v. Pond, 131 S.W.3d 792 (Mo. banc 2004); State v. Williams, 313 S.W.3d 656 (Mo. banc 2010); State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014); and State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014).

There was a basis in the evidence for the jurors to acquit Mr. Meiners of knowingly causing Mr. Willman's death, yet find him guilty of recklessly causing it (PCR L.F. 22). There was a basis because – according to the state's evidence – Mr. Meiners caused the decedent's death without preparing for it (PCR L.F. 22). He did not bring any instruments with him (PCR L.F. 22). He used duct tape he must have found in the decedent's vehicle because Mr. Brickey did not see him with a roll of duct tape before the attack (Tr. 264). And, after he strangled the decedent with the duct tape, he punched him (Tr. 260-61). Had he intended to kill the decedent, he would have stopped attacking the decedent after strangling him. He would also have brought a weapon with him (PCR L.F. 22). Mr. Meiners' using his bare hands and what was at hand to attack the decedent was evidence he did not intend to kill Mr. Willman, but did so recklessly (PCR L.F. 22). Therefore, there was a basis in the evidence to acquit Mr. Meiners of second-degree murder and find him guilty instead of first-degree involuntary manslaughter (PCR L.F. 22). Thus, the trial court's refusing Instruction B was an

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

error so obvious from the record that appellate counsel should have raised it (PCR L.F. 22).

Mr. Meiners was prejudiced by counsel's ineffectiveness (PCR L.F. 22). The court's errors were manifest injustice or a miscarriage of justice (PCR L.F. 22). Had counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded for a new trial (PCR L.F. 23). Thus, Mr. Meiners was prejudiced by counsel's ineffectiveness (PCR L.F. 23).

The motion court's ruling – Involuntary-manslaughter instruction

The motion court also decided appellate counsel had not been ineffective for not raising on direct appeal the issue that the trial court had erred in not giving the instruction on first-degree involuntary manslaughter (PCR L.F. 92-93). The court decided counsel had not been ineffective because evidence Mr. Meiners kicked, punched, strangled, bound, and left the decedent in a field established he had not acted recklessly (Tr. 260-62, 313; PCR L.F. 92-93).

The motion court clearly erred in denying relief by analyzing whether the evidence established Mr. Meiners had not acted recklessly. Because involuntary manslaughter is a nested lesser-included offense of murder, the jurors could have believed or disbelieved all, part, or none of the evidence. State v. Hineman, 14 S.W.3d at 927. At Mr. Meiners' trial, jurors could have disbelieved any evidence he acted knowingly or purposely and believed the evidence that established he acted recklessly. The jurors heard evidence that Mr. Meiners had not brought any

weapons with him, but had used his fists and the duct tape he found in the decedent's car to attack the decedent (Tr. 260-61, 264). The jurors could have used that evidence to decide Mr. Meiners acted recklessly. Therefore, the motion court clearly erred in deciding the evidence did not establish Mr. Meiners had acted recklessly. Thus, the motion court clearly erred in denying post-conviction relief.

For the reasons cited above, the motion court clearly erred in denying Mr. Meiners post-conviction relief because appellate counsel failed to raise the issue on direct appeal that the trial court erred in refusing Instructions A (a verdict director on voluntary manslaughter) and B (a verdict director on first-degree involuntary manslaughter), thus violating his rights under the United States Constitution, Fifth and Fourteenth Amendments, and the Missouri Constitution, Article I, § 10. Mr. Meiners therefore requests this Court reverse the motion court's judgment and remand this cause with directions that his conviction and sentence in the underlying criminal cause be set aside.

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

CONCLUSION

WHEREFORE, for the reasons set forth, Appellant Keith Meiners requests this Court reverse the motion court's judgment and remand this cause with directions that his conviction and sentence in the underlying criminal cause be set aside.

Respectfully submitted,

/s/ Lisa M. Stroup
Lisa M. Stroup, Bar#36325
Attorney for Appellant
1010 Market St.
Ste. 1100
(314)340-7662
Fax (314)340-7685
lisa.stroup@mspd.mo.gov

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - May 22, 2017 - 06:04 PM

CERTIFICATE OF SERVICE

Under Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 22nd day of May, 2017, a copy of this Substitute Brief was served via the Court's electronic filing system to Assistant Attorney General Shaun J. Mackelprang, Attorney General's Office, P.O. Box 899, Jefferson City, MO 65102 at shaun.mackelprang@ago.mo.gov.

/s/ Lisa M. Stroup
Lisa M. Stroup

CERTIFICATE OF COMPLIANCE

Under Mo. Sup. Ct. Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed the limitations of 31,000 words for a Substitute Brief in this Court. The word-processing software identified that this brief contains 6,763 words. It is in text-searchable PDF form.

/s/ Lisa M. Stroup
Lisa M. Stroup, Mo. Bar No. 36325
Assistant Public Defender
1010 N. Market St., Ste. 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(314) 340-7685 (facsimile)
lisa.stroup@mspd.mo.gov
ATTORNEY FOR APPELLANT