No. SC96278

IN THE

Supreme Court of Missouri

KEITH MEINERS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable Colleen Dolan, Judge

RESPONDENT'S SUBSTITUTE BRIEF

JOSHUA D. HAWLEY
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Meiners appeals the denial of his Rule 29.15 motion, in which he alleged, *inter alia*, that direct appeal 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)" (PCR L.F. 17). The motion court denied Mr. Meiners's motion after an evidentiary hearing (PCR L.F. 91-94).

* * *

A jury found Mr. Meiners guilty of murder in the second degree (L.F. 56; Tr. 541). *See State v. Meiners*, 430 S.W.3d 914 (Mo.App. E.D. 2014) (per curiam order). In brief, in a light favorable to the verdict, the evidence presented at trial showed the following.

On November 26, 2010, Mr. Meiners, Justice Brickley, and a number of other people were drinking at Mr. Meiners's home (Tr. 253, 274, 450-451). James "JJ" Willman (Victim) had been invited over by Mr. Meiners, and he joined the party later (Tr. 253-254, 451).

Victim had been the boyfriend of Danielle Buhrman for over two years before she started dating Mr. Meiners in August 2010 (Tr. 320-321). After Victim arrived, Mr. Meiners handed him a drink of Jack Daniels that had been laced with crushed-up pain killers (Tr. 451-452, 462-463). Mr. Meiners

said, "If you're a man, you'll down this" (Tr. 452). Victim consumed the drink (Tr. 452).

Later, Mr. Meiners decided to leave the house with Mr. Brickley and Victim to go to a party (Tr. 254-255, 452, 463). Although Rebecca Pigg wanted to go with the men, Mr. Meiners told her to stay (Tr. 453, 463). Mr. Meiners and Mr. Brickley rode in a truck while Victim drove his own car (Tr. 255-256). Andrea Watts and her best friend, Margaret Schwaderer, met up with the three men at a QuikTrip (Tr. 162-163, 220-222, 256). The women followed the men to a party (Tr. 161-165, 221-222, 256-257).

Shortly after they arrived at the party, the three men decided to leave (Tr. 165-166, 223, 257). Mr. Meiners told Victim that he wanted to meet up with his sister at a gas station (Tr. 257-258). Mr. Meiners, Mr. Brickley, and Victim left in Victim's vehicle (Tr. 258).

As Victim was driving, Mr. Brickley asked him to pull over because he was drunk and felt sick (Tr. 259). As Mr. Brickley sat in the car and heaved, he saw Mr. Meiners strangling Victim with duct tape (Tr. 260). Mr. Brickley got out of the car as Mr. Meiners pulled Victim out of the driver's seat (Tr. 260). Mr. Meiners was standing over Victim and punching him while Victim was on the ground (Tr. 260-261). Victim's face was covered with blood, and he was screaming for Mr. Meiners to stop (Tr. 261). When Mr. Brickley grabbed Mr. Meiners's shoulder and tried to pull him off, Mr. Meiners gave Mr.

Brickley an enraged look and continued to beat Victim (Tr. 261). When Mr. Meiners finally stopped and got up off of Victim, Victim was no longer moving or making a sound (Tr. 261-262).

Mr. Brickley assisted Mr. Meiners in moving Victim off of the road (Tr. 262). They tried to carry Victim across the road, but Mr. Brickley dropped Victim's feet and became sick again (Tr. 263). Mr. Brickley looked up and saw Mr. Meiners standing on Victim's chest and talking to him (Tr. 263). Mr. Brickley screamed at Mr. Meiners and told him it was time to go (Tr. 263). When they got back in Victim's car, Mr. Meiners said he had "no more problems" (Tr. 264). Mr. Meiners drove Victim's car to a Missouri Welcome Center and parked it, and then he and Mr. Brickell walked towards a gas station (Tr. 265-266).

Mr. Meiners called Ms. Watts several times in the early morning hours (Tr. 166-169, State's Ex. 3). Mr. Meiners told her that he needed to be picked up since Victim had gotten mad and kicked him and Mr. Brickley out of his car (Tr. 168-170). Ms. Watts and Ms. Schwaderer picked up Mr. Meiners and Mr. Brickley at a convenience store and then returned to the party (Tr. 169-171, 237, 267).

On the way back to the party, Ms. Watts stopped after Mr. Meiners claimed that he had lost his bandanna earlier when Victim purportedly threw it out of the car window (Tr. 171-172, 200-203, 224, 239-240, 267). Ms. Watts

and Ms. Schwaderer noticed that Mr. Meiners and Mr. Brickley had muddy feet and appeared tired and disheveled (Tr. 172, 224, 237, State's Ex. 4). Ms. Schwaderer noticed blood on Mr. Meiners's shirt (Tr. 224, 238-239). After returning to the party, the group decided that they didn't want to stay, so they went to Mr. Meiners's house sometime after midnight and hung out downstairs for a while (Tr. 225, 240-241, 243, 267).

Ms. Pigg asked Mr. Meiners that morning if Victim had made it home (Tr. 454). Mr. Meiners told her no, and eventually told her that he had killed Victim by beating and stomping him on his throat while Mr. Meiners sang a song titled "Ain't No Rest for the Wicked" (Tr. 454-455). Mr. Meiners told Ms. Pigg that he stood on Victim's throat until he could not feel his pulse (Tr. 455). Mr. Meiners also told her that he threw the license plates from Victim's car in the river (Tr. 456).

Officer Scott Freant investigated Victim's disappearance after he was reported missing (Tr. 370). His investigation led him to Mr. Meiners's mother, Ms. Watts, and Ms. Schwaderer (Tr. 371-372). On November 30, Victim's vehicle was located on Dunn Road, with the license plates removed (Tr. 372, 375). Police seized surveillance footage from the welcome center (Tr. 376-377, State's Ex. 21). Police also seized surveillance footage from a nearby Moto Mart (Tr. 379-380, State's Ex. 4). Police used canine teams to locate Victim's body in a field among the tall grass (Tr. 382-383, 386). Officer Brian

Schmidt investigated the crime scene at Columbia Bottom Road where the victim's body was found (Tr. 339-340). Evidence seized included strands of duct tape located under Victim's body (Tr. 340). Victim's hands and wrists were behind his back, bound with duct tape (Tr. 341-342, 387).

During the days following Victim's disappearance, Ms. Buhrman noticed that Mr. Meiners's hands had been scraped, as if he had been punching something (Tr. 326). A few weeks later, Ms. Buhrman was at Mr. Meiners's house when she became upset about Victim after speaking with Victim's father (Tr. 326). Mr. Meiners hugged Ms. Buhrman and told her that everything was okay, it wasn't her fault, and that she should not worry about it (Tr. 326-327). Mr. Meiners laughingly admitted to Ms. Buhrman that he had killed Victim by beating him (Tr. 327).

On direct appeal, the Court of Appeals affirmed Mr. Meiners's conviction and sentence. *State v. Meiners*, 430 S.W.3d at 914. The Court of Appeals issued its mandate on June 5, 2014.

On July 31, 2014, Mr. Meiners timely filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 1, 4). On August 19, 2014, the motion court appointed counsel to represent Mr. Meiners (PCR L.F. 1, 10). Mr. Meiners's amended motion was, thus, initially due by October 20, 2014. *See* Rule 29.15(g); Rule

44.01(a).[1] However, the motion court granted Mr. Meiners a thirty-day extension of time (PCR L.F. 1); thus, his amended motion was due by November 19, 2014.

On November 18, 2014, Mr. Meiners's timely filed an amended motion (PCR L.F. 1, 14). In his motion, he alleged, *inter alia*, that direct appeal 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)" (PCR L.F. 17).

On August 4, 2015, the motion court held an evidentiary hearing (PCR Tr. 1). Mr. Meiners testified that he talked to appellate counsel about the trial court's refusing to submit instructions for voluntary manslaughter and involuntary manslaughter (PCR Tr. 5-6). He stated that he wanted appellate counsel to raise the issue on appeal, but he said that she "didn't feel that it had enough weight" (PCR Tr. 6).

Mr. Meiners's trial attorneys testified that they requested instructions for voluntary manslaughter and involuntary manslaughter (PCR Tr. 9-10; *see* PCR Tr. 21-22). Trial counsel testified that they argued that the evidence

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[1] The sixtieth day after August 19, 2014, was October 18—a Saturday. Thus, Mr. Meiners's amended motion would have been due the following Monday.

supported the submissions (PCR Tr. 10-11; *see* PCR Tr. 22-23).

Appellate counsel testified that she reviewed the motion for new trial to identify issues, and that she reviewed the trial transcript with an eye toward those issues and any other "glaring errors that might be raised as plain error" (PCR Tr. 36). She identified her notes and confirmed that she had identified the refused instructions as potential issues (PCR Tr. 38). She testified that she did not assert error as to refused Instruction A (voluntary manslaughter) because she "didn't see a grounds for stating that there was evidence that he acted under sudden passion" (PCR Tr. 38-39). She confirmed that she noted that a witness had testified that Mr. Meiners said Victim had "pulled a knife on him" (PCR Tr. 39). She opined that "someone pulling a knife on a person would cause sudden passion" (PCR Tr. 39).

She testified that she did not assert error as to refused Instruction B (involuntary manslaughter in the first degree) because she "didn't think this fact pattern, any of the facts that were adduced at trial fit into a scenario of recklessness, that there was no evidence for that" (PCR Tr. 39). She did not recall testimony from Mr. Brickley that Mr. Meiners had "only meant to scare" Victim (Tr. 40).

On cross-examination, appellate counsel testified that pulling a knife in response to something the other person did "could be" "sudden passion" (PCR Tr. 40). She testified that, if the defendant attacked the victim and the victim

pulled out a knife, the defendant could claim sudden passion, "depending on the exact facts . . . of the case" (PCR Tr. 40-41). Counsel opined that "under the law as it stands right now, which is very different post *State versus Jackson*, these instructions probably would have both been given" (PCR Tr. 41).[2] Counsel testified that the appeal was before *Jackson* (PCR Tr. 41).

On November 23, 2015, the motion court denied Mr. Meiners's motion (PCR L.F. 91-94). The motion court found that appellate counsel was not ineffective for failing to assert error based on the trial court's refusing Instructions A and B (PCR L.F. 92).

With regard to Instruction A (voluntary manslaughter), the motion court found that there was no evidence of sudden passion arising from adequate cause (PCR L.F. 92). The motion court found that some of the alleged evidence of sudden passion was based on conversations that occurred several weeks before the murder (PCR L.F. 92). The motion court stated that "[s]udden passion requires that the passion arise at the time of the offense and is not solely the result of former provocation" (PCR L.F. 92). The motion court also found that the evidence that the victim pulled a knife was based on Ms. Pigg's testimony that "Mr. Meiners told her the victim pulled a knife on

[2] Counsel was referring to *State v. Jackson*, 433 S.W.3d 390 (Mo. 2014). Counsel filed her direct appeal brief on December 31, 2013 (*see* PCR L.F. 68).

[Mr. Meiners] in response to [Mr. Meiners] pulling the victim out of the car" (PCR L.F. 92). The motion court stated that "[s]udden passion is not an appropriate defense when the Movant is the initial aggressor" (PCR L.F. 92).

With regard to Instruction B (involuntary manslaughter), the motion court found that "[t]he evidence showed [Mr. Meiners] repeatedly kicked, punched and strangled victim, bound him with duct tape and dragged him into a field where he was left to die" (PCR L.F. 92). The motion court concluded that "[a]ppellate counsel was not ineffective for failing to argue that [Mr. Meiners's] conduct was reckless and that his tendered involuntary manslaughter instruction should have been submitted to the jury under these circumstances" (PCR L.F. 92-93).

The motion court concluded that counsel's performance did not fall below an objective standard of reasonableness (PCR LF. 93). The motion court further concluded that "[t]o the extent the record may have even hinted that Movant's counsel failed to exercise the care and skill of a reasonably competent lawyer rendering similar services under the existing circumstances, Movant was not prejudiced thereby" (PCR L.F. 93).

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Meiners's claim that appellate counsel was ineffective for failing to assert on direct appeal that the trial court erred in refusing to submit instructions on the included offenses of voluntary manslaughter and involuntary manslaughter in the first degree.

Mr. Meiners asserts that the motion court clearly erred in denying his claim that appellate counsel was ineffective for failing to assert on direct appeal that the trial court erred in refusing to submit instructions on the included offenses of voluntary manslaughter and involuntary manslaughter in the first degree (App.Sub.Br. 16). He asserts that he was prejudiced by appellate counsel's alleged error because, "[h]ad appellate counsel raised this issue on direct appeal, there was a reasonable probability an appellate court would have reversed and remanded" (App.Sub.Br. 16).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression

that a mistake has been made." *Id.*

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Rule 29.15(*i*). This Court defers to the motion court's credibility determinations. *Chacon v. State*, 409 S.W.3d 529, 532 n. 5, 533 (Mo.App. W.D. 2013).

B. Mr. Meiners failed to prove that counsel was ineffective

1. The *Strickland* standard

To prevail on a claim of ineffective assistance of counsel, a movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also show prejudice from counsel's alleged error. *Id.* at 694. To show prejudice, the movant "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.*

"To prevail on a claim of ineffective assistance of appellate counsel, a movant must establish that appellate counsel failed to raise a claim of error that was so obvious that a competent and effective attorney would have recognized and appealed the issue." *Barnes v. State*, 454 S.W.3d 396, 399 (Mo.App. E.D. 2015). "The claimed error must have been sufficiently serious so as to create a reasonable probability that, if the issue had been raised on direct appeal, it would have required reversal." *Id.*

2. The motion court's findings and conclusions

The motion court found that appellate counsel was not ineffective for failing to assert on direct appeal that the trial court erred in refusing to submit Instructions A and B (*see* PCR L.F. 92-93).

With regard to Instruction A (voluntary manslaughter), the motion court found that there was no evidence of sudden passion arising from adequate cause (PCR L.F. 92). The motion court found that some of the alleged evidence of sudden passion was based on conversations that occurred several weeks before the murder (PCR L.F. 92). The motion court stated that "[s]udden passion requires that the passion arise at the time of the offense and is not solely the result of former provocation" (PCR L.F. 92). The motion court also found that the evidence that the victim pulled a knife was based on Ms. Pigg's testimony that "Mr. Meiners told her the victim pulled a knife on [Mr. Meiners] in response to [Mr. Meiners] pulling the victim out of the car" (PCR L.F. 92). The motion court stated that "[s]udden passion is not an appropriate defense when the Movant is the initial aggressor" (PCR L.F. 92).

With regard to Instruction B (involuntary manslaughter), the motion court found that "[t]he evidence showed [Mr. Meiners] repeatedly kicked, punched and strangled victim, bound him with duct tape and dragged him into a field where he was left to die" (PCR L.F. 92). The motion court concluded that "[a]ppellate counsel was not ineffective for failing to argue

that [Mr. Meiners's] conduct was reckless and that his tendered involuntary manslaughter instruction should have been submitted to the jury under these circumstances" (PCR L.F. 92-93).

The motion court concluded that appellate counsel's performance did not fall below an objective standard of reasonableness (PCR LF. 93). The motion court further concluded that "[t]o the extent the record may have even hinted that Movant's counsel failed to exercise the care and skill of a reasonably competent lawyer rendering similar services under the existing circumstances, Movant was not prejudiced thereby" (PCR L.F. 93). The motion court did not clearly err.

3. Mr. Meiner failed to prove that counsel's performance fell below an objective standard of reasonableness

"Appellate counsel will not be found ineffective for failing to raise a non-meritorious claim." *Cusumano v. State*, 495 S.W.3d 231 (Mo.App. E.D. 2016). "Further, appellate counsel has no duty to raise every possible issue asserted in the motion for new trial on appeal, and no duty to present non-frivolous issues where appellate counsel strategically decides to winnow out arguments in favor of other arguments." *Id*.

Here, at the evidentiary hearing, appellate counsel testified that she reviewed the motion for new trial to identify issues, and that she reviewed the trial transcript with an eye toward those issues and any other "glaring

errors that might be raised as plain error" (PCR Tr. 36). She identified her work notes and confirmed that she had identified the refused instructions as potential issues to assert on appeal (PCR Tr. 38).

She testified that she did not assert error as to refused Instruction A (voluntary manslaughter) because she did not see "grounds for stating that there was evidence that he acted under sudden passion" (PCR Tr. 38-39). She confirmed that she noted that a witness had testified that Mr. Meiners said Victim had "pulled a knife on him" (PCR Tr. 39). She opined that "someone pulling a knife on a person would cause sudden passion" (PCR Tr. 39).

Counsel testified that she also did not assert error as to refused Instruction B (involuntary manslaughter in the first degree) because she "didn't think this fact pattern, any of the facts that were adduced at trial fit into a scenario of recklessness, that there was no evidence for that" (PCR Tr. 39). She did not recall any testimony from Mr. Brickley that Mr. Meiners had "only meant to scare" Victim (Tr. 40).

In light of this testimony, Mr. Meiners failed to prove that appellate counsel's performance fell below an objective standard of reasonableness. In evaluating counsel's performance in deciding which claims to assert on appeal, the reasonableness of counsel's performance—as opposed to whether the defendant was prejudiced—should not be governed by whether counsel "misjudged" the merit of the claim on appeal; rather, the question is whether

counsel's decision not to raise the issue "was within the range of competence demanded of attorneys in criminal cases." *See generally McMann v. Richardson*, 397 U.S. 759, 770-771 (1970) ("Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.").

As the Court stated in *McMann*, "uncertainty is inherent in predicting court decisions[.]" *Id.* at 771. Consequently, in cases where an issue asserted on appeal involves some uncertainty, courts should not find that appellate counsel's performance fell below an objective standard of reasonableness simply because appellate counsel may have—in the Court's view—reached the wrong conclusion about the merit of a particular claim. *See generally id.* ("That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilt.").

Instead, a court evaluating appellate counsel's performance should consider whether counsel reviewed the record, identified potential issues, and made a determination that "was within the range of competence demanded of

attorneys in criminal cases" in deciding which claims to assert. In short, "[a] post-conviction movant fails to prove counsel's performance is deficient when appellate counsel testifies he or she did not raise a particular issue because he or she believed it would be without merit, and the motion court credits that testimony." *Salazar v. State*, 499 S.W.3d 738, 747 (Mo.App. S.D. 2016) (citing *Sykes v. State*, 372 S.W.3d 33, 41-42 (Mo.App. W.D. 2012)).

Here, as outlined above, it is evident that appellate counsel identified the refused instructions as potential issues on appeal, and that counsel reviewed the record to ascertain whether she could challenge the trial court's rulings on direct appeal. Counsel's review of the evidence left her convinced, however, that the evidence did not support the submissions. Thus, inasmuch as counsel did not overlook these potential claims and instead evaluated them and merely decided that there were better claims to assert, counsel's decision to winnow out these claims did not fall below an objective standard of reasonableness, particularly in light of the facts and the case law that was current at the time of Mr. Meiners's direct appeal.

In determining whether to challenge the trial court's rulings, counsel first had to determine whether she believed there was error, *i.e.*, whether the trial court failed to give an included offense instruction that it was obligated to give under § 556.046. Generally, a trial court is obligated to give an instruction on a lesser offense when three conditions are met: "[1]. a party

timely requests the instruction; [2]. there is a basis in the evidence for acquitting the defendant of the charged offense; and [3]. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." *State v. Jackson*, 433 S.W.3d at 396.

Here, it appears that a timely request was made for Instructions A and B (*see* Tr. 479-481). The record also shows that trial counsel asserted error in the motion for new trial, asserting that the trial court erred in refusing both instructions (*see* L.F. 67-68). Thus, in reviewing the record, appellate counsel could have reasonably concluded that the alleged trial-court error was preserved, and that the first condition for submission was satisfied.

The second and third conditions—that there is a basis to acquit of the greater offense and a basis to convict of the included offenses—would have been less clear, however, and the reasonableness of appellate counsel's decision to assert instructional error—or to refrain from asserting such error—must be viewed in light of "the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. For the reasons set forth below as to each included offense, counsel was not ineffective.

a. Voluntary manslaughter

Under § 565.046.3, RSMo Cum. Supp. 2013, a trial "court shall be obligated to instruct the jury with respect to a particular included offense only 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." Here, the immediately higher included offense that was submitted to the jury was murder in the second degree (*see* L.F. 47).

Because the elements of murder in the second degree and voluntary manslaughter differ only as to the existence of "sudden passion arising from adequate cause," the issue here is whether there was evidence to support a finding of "sudden passion." *See State v. Redmond*, 937 S.W.2d 205, 208 (Mo. 1996) ("The crime of voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder in the second degree, except that the death was caused 'under the influence of sudden passion arising from adequate cause[.]' "). As the Court stated in *Redmond*, "[t]he trial court is . . . required to give an instruction on voluntary manslaughter if there is sufficient evidence to support a finding that the defendant cause the death of the victim under the influence of sudden passion arising from adequate cause." *Id. See generally State v. Jensen*, No. SC95280, slip op. at 10 (Mo. July 11, 2017) ("While section 565.025 provides that voluntary manslaughter is a lesser included offense of second degree murder, it is not a nested lesser included offense.").

"Sudden passion is defined as 'passion directly caused by and arising out of provocation by the victim or another acting with the victim which

passion arises at the time of the offense and is not solely the result of former provocation.' " *State v. Simpson*, 315 S.W.3d 779, 783 (Mo.App. W.D. 2010). "Adequate cause is 'cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control.' " *Id.*

"Adequate cause requires a showing of 'a sudden, unexpected encounter or provocation tending to excite the passion beyond control such that it renders a person of ordinary temperament incapable of reflection, or such passion as to obscure reason.' " *Id.* "Passion, whether rage, anger, or terror, must be so extreme that for the moment, the conduct is driven by passion, not reason." *Id.* "Where Missouri courts have found sudden passion during confrontations there has been evidence of weapons being brandished and/or other minor contact combined with an exchange of words that would create a fear of great bodily harm in the defendant." *See State v. Burks*, 237 S.W.3d 225, 228 (Mo.App. S.D. 2007).

Here, counsel reasonably decided not to challenge the trial court's refusing to instruct the jury on voluntary manslaughter. Mr. Meiners points to certain aspects of the case that allegedly would have supported a finding of "adequate cause" (*see* App.Sub.Br. 20). First, he points out that there was evidence that Victim "showed up at a party where Mr. Meiners was," and that "Mr. Meiners knew that his girlfriend—Ms. Buhrman—had earlier been

romantically involved with" Victim, and that he "knew from Ms. Buhrman about her past sexual encounters with" Victim (App.Sub.Br. 20, citing Tr. 325). Next, he states that there was evidence that he "told Margaret Schwaderer that he and [Victim] had been arguing in the car about Mr. Meiners' sister" (App.Sub.Br. 20, citing Tr. 248). Finally, he states that there was evidence that he "told Rebecca Pigg that [Victim] had tried to stab him and Mr. Brickey with a switchblade knife" (App.Sub.Br. 20, citing Tr. 469).

There are, however, significant problems with these arguments. First, the mere fact that Mr. Meiners's girlfriend had previously been romantically and sexually involved with Victim, and that Mr. Meiners "showed up at a party where Mr. Meiners was," did not constitute adequate cause to provoke an attack of passion. Such circumstances are merely ordinary circumstances of social interaction.

Moreover, the record shows that when Victim arrived at the party, Mr. Meiners did not exhibit any "sudden passion" caused by Victim's arrival. Instead, the record shows that Victim talked to Ms. Pigg, and that Mr. Meiners "handed [Victim] a bottle of Jack Daniels" (Tr. 254-255). There was no evidence that Victim's arrival caused any type of "sudden passion." In fact, the evidence showed that Mr. Meiners had invited Victim over (Tr. 451).

It was only after Mr. Meiners, Mr. Brickey, and Victim had left Mr. Meiners's house, had met up with some other women at another location, and

had then gone to another party that Mr. Meiners killed Victim while they were purportedly driving to meet Mr. Meiners's sister at a gas station (*see* Tr. 162-166, 220-223, 254-258, 452-453, 463). Accordingly, appellate counsel reasonably concluded that Victim's arrival at the party at Mr. Meiners's house was not an adequate provocation for the alleged "sudden passion" that Mr. Meiners experienced later that night. *See Roberts v. State*, 471 S.W.3d 781, 785 (Mo.App. E.D. 2015) (" '[P]rior provocation can never be the sole cause of sudden passion….' "); *see generally Lopez v. State*, 300 S.W.3d 542, 550 (Mo.App. S.D. 2009) (appellate counsel was not ineffective in failing to assert that the trial court erred in refusing an instruction for voluntary manslaughter where the defendant asserted that his belief that the victim had been unfaithful to him "escalated the second fight to the level of sudden passion").

Mr. Meiners's assertion that there was evidence of an argument between Mr. Meiners and Victim also does not show that appellate counsel overlooked evidence of "adequate cause." The evidence showed that Mr. Meiners told Ms. Schwaderer that Victim had kicked them out of his car because they were having a "disagreement" about "a female," and that the female "might have been [Mr. Meiners's] sister" (Tr. 248). This evidence did not show any "sudden passion" arising from "adequate cause." Indeed, it is well settled that "[w]ords alone, no matter how opprobrious or insulting, are

not sufficient to show adequate provocation." *State v. Craig*, 33 S.W.3d 597, 600 (Mo.App. E.D. 2000).

Mr. Meiners final observation—that he told Ms. Pigg that Victim had tried to stab him and Mr. Brickey with a switchblade knife—also was not sufficient to show that appellate counsel overlooked an obvious claim that should have been asserted on direct appeal. Ms. Pigg testified that Mr. Meiners told her that he killed Victim (Tr. 454). She stated that Mr. Meiners said that he "beat him" and "kicked him" or "stomped on him" (Tr. 455). She said that Mr. Meiners told her that he "[s]tepped on his throat" and sang, "Ain't no rest for the wicked" (Tr. 455). She said that he told her that he stood on Victim's throat "[u]ntil he couldn't feel his pulse" (455). Ms. Pigg then said she was not sure who had told her, but that she was also "told that [Victim] did have a knife" (Tr. 455). She stated that Victim "had a knife and tried to defend himself at some point" during Mr. Meiners's attack (Tr. 455).

On cross-examination, Ms. Pigg testified that she told the police that Mr. Meiners told her that he and Mr. Brickey "pulled [Victim] out of his car and that [Victim] pulled a switch blade and tried to stab them" (Tr. 468-469). She testified that Mr. Meiners said he "knocked it out of his hand and [Mr. Brickey] kicked [Victim's] head into the pavement, rolled him over, and stomped on his back, the back of his neck, rolled the body over again, crushed the front of the body, and [Mr. Meiners] said he stood on his neck and sang:

There ain't no rest for the wicked until he couldn't feel the pulse any longer" (Tr. 469). On re-direct, Ms. Pigg confirmed that she told the police that Mr. Meiners told her that Victim "pulled out a knife after they were trying to pull him out of the car" (Tr. 472).

In light of this record, appellate counsel reasonably concluded that the evidence did not support a finding of "sudden passion arising from adequate cause." The evidence showed that when Victim pulled his knife, he was already under attack. (Other evidence showed that, while they were still in the car, Mr. Meiners attempted to strangle Victim with duct tape (Tr. 260).) Thus, according to the account given by Mr. Meiners to Ms. Pigg, when Mr. Meiners and Mr. Brickey pulled Victim out of the car, Victim was attempting to defend himself against the aggressive actions of two attackers. There was no evidence that Victim was the initial aggressor.

Missouri cases have recognized that an aggressor in a confrontation cannot claim "sudden passion" when the victim responds to acts of violence by using force. "Sudden passion cannot arise unless a defendant shows the victim took some action to inflame the defendant and that the defendant was not the initial aggressor." *Hill v. State*, 160 S.W.3d 855, 859 n. 5 (Mo.App. S.D. 2005); *see State v. Stidman*, 259 S.W.3d 96, 102-103 (Mo.App. S.D. 2008) (the defendant, who had known about an affair for some time, took a gun to confront his wife and her lover, and the unarmed victim (the lover) acted in

self-defense against defendant's display of deadly force); *State v. Everage*, 124 S.W.3d 11, 15-16 (Mo.App. W.D. 2004) ("To show sudden passion arising from adequate cause, [defendant] had to prove the victim took some action to inflame him and that he was not the initial aggressor.").

In addition, the record did not support a finding that Victim's death was sudden. "A finding of sudden passion requires a 'sudden' event." *Lopez v. State*, 300 S.W.3d at 550. Although there was evidence that Mr. Meiners was enraged and out of control, Mr. Meiners's "killing of the victim was not sudden." *See id*. As outlined above, the evidence showed that victim was strangled, beaten, and kicked or stomped, and that Mr. Meiners stood on this throat and sang, "Ain't no rest for the wicked" until Victim was dead. "Case law finding sufficient evidence of sudden passion for submission of voluntary manslaughter has consistently involved a sudden death, such as from a gunshot or blow to the victim's head." *Id*.

In sum, in light of the facts of the case, and in light of the various cases that would have guided appellate counsel's consideration of the issues, counsel reasonably concluded that there was not sufficient evidence of sudden passion arising from adequate cause. The motion court did not clearly err in concluding that appellate counsel was not ineffective.

Moreover, even if the Court were to conclude that it was error for the trial court to refuse to submit an instruction for voluntary manslaughter, and

even if the Court were to conclude that it fell below an objective standard of reasonableness for appellate counsel to fail to accurately predict that the Court would find error, Mr. Meiners has failed to demonstrate that he was prejudiced by counsel's error, *i.e.*, that the claim would have resulted in reversal on direct appeal.

With regard to prejudice in assessing such claims on direct appeal, the Court recently clarified that, while there is a presumption of prejudice on direct appeal when a trial court erroneously refuses to submit an instruction, that presumption is rebuttable. *See State v. Jensen*, slip op. at 6 n. 3 ("The fact that a conviction will be reversed only if there is a "reasonable probability" the [instructional] error affected the outcome demonstrates the presumption of prejudice is rebuttable.").

Here, because the offense of voluntary manslaughter includes an element that is not included in the greater offense, it was not a "nested" included offense. Thus, in evaluating whether Mr. Meiners could have shown prejudice on direct appeal, the question is whether there is a reasonable probability that the outcome of the case would have been different if a voluntary manslaughter instruction had been submitted. *See generally id*. at 6, n. 3 (""The fact that a conviction will be reversed only if there is a 'reasonable probability' the error affected the outcome demonstrates the presumption of prejudice is rebuttable.").

As outlined above, it is respondent's contention that there was no substantial evidence of sudden passion arising from "adequate cause." The only arguable evidence identified by Mr. Meiners of adequate cause was Victim's alleged use of a knife. However, as discussed above, that evidence was part of an out-of-court statement offered by Mr. Meiners, and the evidence showed that Victim allegedly drew a knife in trying to defend himself from Mr. Meiners's use of force.

In other words, the only arguable basis for finding "adequate cause" was a piece of evidence that simultaneously showed that Mr. Meiners was the aggressor with regard to the use of force. If the jury had been relying on that piece of evidence to discern Mr. Meiners's state of mind at the time of the homicide, there is no reason to believe the jury would have stripped away the context provided by Mr. Meiners, which showed that he was the aggressor. There was no other evidence showing that Victim provoked Mr. Meiners by the use or force or threats; thus, there is no reason to believe that the jury would have believed there was "adequate cause" for Mr. Meiners's passion. In short, the presumption of prejudice that would ordinarily arise from failing to submit an included offense supported by the evidence was rebutted under the facts of this case.

In sum, in light of the evidence presented at trial, appellate counsel reasonably decided not to assert that the trial court erred in failing to submit

an instruction for voluntary manslaughter. In short, counsel's performance "was within the range of competence demanded of attorneys in criminal cases." Moreover, because there was no substantial evidence of sudden passion arising from adequate cause, there is no reasonable probability that asserting a claim of trial court error on direct appeal would have resulted in a finding of error and prejudice requiring reversal. The motion court did not clearly err in denying Mr. Meiners's claim.

b. Involuntary manslaughter in the first degree

Appellate counsel testified that she also concluded that the evidence did not support the submission of an instruction for the included offense of involuntary manslaughter in the first degree (*see* PCR Tr. 39). However, in light of this Court's decisions in *State v. Jackson*, *supra*; *State v. Randle*, 465 S.W.3d 477, 480 (Mo. 2015); and *State v. Roberts*, 465 S.W.3d 899, 902-903 (Mo. 2015), appellate counsel's conclusion was, in hindsight, incorrect.

As the Court stated in *Jackson*, "the jury's right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence—by itself—for a jury to conclude that the state has failed to prove the differential element" of the greater offense. *State v. Jackson*, 433 S.W.3d at 399. In *Randle* and *Roberts*, the Court held that where the sole difference between two offenses is that one has a lesser culpable mental state, the lesser offense is a "nested" lesser included offense.

As the Court stated, "Section 562.021.4 provides that '[w]hen recklessness suffices to establish a culpable mental state, it is also established if a person acts purposefully or knowingly.' " *Roberts*, 465 S.W.3d at 902.

In other words, regardless of the strength of the evidence presented, there was a basis to acquit Mr. Meiners of murder in the second degree (the immediately higher offense submitted to the jury) and to convict him of the "nested" included offense of involuntary manslaughter in the first degree, since the jury was not required to find or infer that Mr. Meiners knowingly caused Victim's death and the evidence otherwise established as a matter of law that he acted recklessly. *See id.* However, while that conclusion is now apparent in the wake of *Jackson*, *Roberts*, and *Randle*, that does not end the inquiry in this case.

At the time appellate counsel reviewed the evidence in this case and decided which claims to assert on direct appeal, *Jackson*, *Roberts*, and *Randle* had not yet been decided. Thus, at the time appellate counsel filed her brief on direct appeal, the critical holding of *Jackson*—that the jury's disbelief of evidence is a sufficient "basis" in itself to acquit of the greater offense—was not yet a settled proposition.

To the contrary, while the Court pointed out in *Jackson* that its holding had been foreshadowed (and arguably compelled) by earlier cases, the Court acknowledged that it had not completely overruled an earlier case—*State v.*

Olson, 636 S.W.2d 318, 321 (Mo. 1982)—which had held that the jury's ability to disbelieve evidence was *not* a sufficient basis to require the submission of an included offense. *See Jackson*, 433 S.W.3d at 397-399. The Court acknowledged that its earlier opinions had not "expressly overrule[d] the remainder of *Olson*," and it then stated, "The Court now does so." *Id*. at 399.

Before *Jackson*, however, Missouri courts had held that "[f]or purposes of instructing down, in accordance with § 556.046, for there to be a basis for an acquittal of the greater offense, the record must be such that a reasonable juror could draw inferences that an essential element of the greater offense has not been established." *State v. Smith*, 229 S.W.3d 85, 92 (Mo.App. W.D. 2007). In other words, there had to be some evidence from which to infer that the greater offense had not been established, and the jury's disbelief was *not* a sufficient basis in itself. As the Court stated in *Smith*, "In the absence of such evidence, 'a trial court should not instruct on a lesser-included offense merely because the jury might disbelieve some of the [S]tate's evidence or decline to draw some or all of the permissible inferences.' " *Id*.; *see State v. Coffman*, 378 S.W.3d 405, 408-409 (Mo.App. E.D. 2012) (holding that it was not error to refuse an instruction for involuntary manslaughter because there was no evidence that defendant recklessly caused the victim's death).

Thus, taking into account the legal landscape before *Jackson*, appellate counsel's decision in this case was understandable, and it did not fall below

an objective standard of reasonableness. As the Court stated in *Strickland*, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

Here, the record showed that Mr. Meiners initially strangled Victim with duct tape while they were still inside the vehicle (Tr. 260). Mr. Meiners then pulled Victim out of the vehicle and beat him while he was on the ground (Tr. 260-261; *see* Tr. 327). Other evidence showed that Mr. Meiners beat, kicked, and stomped on Victim (Tr. 454-455; *see* Tr. 468-469). Finally, the evidence showed that Mr. Meiners stood on Victim's throat and sang, "Ain't no rest for the wicked," until Victim had no pulse (Tr. 263, 454-455). Victim's hands and wrists were also bound behind his back with duct tape, and he was left in a field (Tr. 341-342, 382-383, 386-387).

In light of such evidence—and at the time Mr. Meiners's case was on direct appeal—appellate counsel reasonably concluded that there was no evidence that Mr. Meiners did not knowingly cause Victim's death. Indeed, before *Jackson*, Missouri courts had repeatedly held that, where there was overwhelming evidence that the defendant "knowingly" caused the victim's death, it was not error to refuse to submit an instruction based on "recklessly" causing the victim's death. *See*, *e.g.*, *State v. Lowe*, 318 S.W.3d

812 (Mo.App. W.D. 2010) ("Because a person is presumed to have intended for death to follow from acts that are likely to produce that result, a defendant's intentional use of a deadly weapon on a vital part of a victim's body to inflict a fatal injury transcends recklessness so that no rational fact finder could conclude that he did not act knowingly."); *State v. Stidman*, 259 S.W.3d 96, 104 (Mo.App. S.D. 2008) (shooting the victim seven times in the head transcended recklessness); *State v. Newberry*, 157 S.W.3d 387, 391-392, 397 (Mo.App. S.D. 2005) (striking the victim in the head with the claw end of a hammer with sufficient force to break the skull and penetrate two inches into the brain transcended recklessness).

Mr. Meiners asserts that there was evidence that showed that he acted recklessly, namely, that he did not prepare to kill Victim beforehand by bringing "instruments" or a weapon to commit the murder (App.Br. 25). But failing to bring a weapon did not prove that Mr. Meiners did not knowingly cause Victim's death when he strangled, beat, and stomped on Victim, bound his hands with duct tape, and stood on his throat until he felt no pulse. Failing to prepare beforehand would support an inference that Mr. Meiners did not deliberate, but it did not prove that Mr. Meiners was unaware that his conduct was practically certain to cause Victim's death.

Respondent acknowledges that *Jackson*, *Roberts*, and *Randle* have made plain that the evidence in this case required the trial court to give the

requested instruction for involuntary manslaughter. Moreover, respondent also acknowledges that the Court recently stated, "Because the elements of the nested lesser included offense are subsumed within the greater offense and the jury is the sole finder of fact, an appellate court cannot analyze prejudice by assessing the strength of the evidence without essentially accomplishing what *Jackson* specifically prohibits—a 'directed verdict on the differential element.' " *Jensen*, slip op. at 9; *see also State v. Smith*, No. SC95461, slip op. 8, n. 7; 11-12 (Mo. July 11, 2017).[3]

However, at the time Mr. Meiners's appellate counsel was deciding what claims might have a chance of success on appeal, the appellate

[3] To the extent that the Court has foreclosed review of the strength of the evidence when evaluating trial court error in failing to submit an instruction for a "nested" included offense, respondent respectfully suggests that the issue may warrant further consideration in an appropriate case. Whether there is a reasonable probability that the jury *would not* have found the defendant guilty of the greater offense (*i.e.*, whether there was prejudice from the instructional error) is an inquiry separate from—and that should not be conflated with—whether the jury *could not* have found the defendant guilty of the greater offense (*i.e.*, whether the trial court erred in refusing to submit the included offense instruction).

landscape included multiple cases where the reviewing court engaged in a qualitative analysis of the strength of the evidence in determining whether there was reversible error. It was, therefore, reasonable for appellate counsel to conclude that, in light of the evidence in this case, and in light of the state of the law at that time, there was no reasonable probability of success on direct appeal. *See Glass v. State*, 227 S.W.3d 463, 472 (Mo. 2007) ("In reviewing an ineffective assistance of counsel claim, counsel's conduct is measured by what the law is at the time of trial. Counsel will generally not be held ineffective for failing to anticipate a change in the law.").

Moreover, as discussed above, even if the Court were to conclude that there was a sufficient basis to assert the claim on direct appeal, the mere fact that appellant counsel misjudged the chances on direct appeal is not sufficient to show that counsel's performance fell below an objective standard of reasonableness. There is often uncertainty in gauging whether a claim will be successful on appeal, and, consequently, the issue is not merely whether the claim would have been successful on appeal (though that is the ultimate inquiry in assessing prejudice); rather, the issue is whether appellate counsel's review of the record and selection of claims to assert on appeal "was within the range of competence demanded of attorneys in criminal cases." And, here, for the reasons outlined above, Mr. Meiners failed to prove that counsel's performance fell outside that range.

In sum, the evidence showed that Mr. Meiners strangled Victim with duct tape; that he bound Victim's hand's behind his back with duct tape; that he beat, kicked, and stomped on Victim; and that he stood on Victim's throat to cause Victim's death. It did not fall below an objective standard of reasonableness for appellate counsel to conclude—based on Missouri case law prior to *Jackson*—that the record did not obligate the trial court to submit an instruction on involuntary manslaughter and that there was no reasonable probability the claim would succeed on appeal. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Meiners's Rule 29.15 motion.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 8,467 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word.

JOSHUA D. HAWLEY
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent