Cite as 2011 Ark. 433

SUPREME COURT OF ARKANSAS

No. CR 08-335

MICHAEL TODD DAVIS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 13, 2011

APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT, CR 2005-145, HON. MICHAEL MEDLOCK, JUDGE

AFFIRMED.

PER CURIAM

In 2006, appellant Michael Todd Davis was convicted of first-degree murder and kidnapping and was sentenced to life plus 480 months' imprisonment. This court affirmed. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007).

Subsequently, appellant timely filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2007) based on trial counsel's failure to preserve certain matters for appeal. The petition was denied, and appellant brings this appeal. We affirm.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Carter v. State*, 2011 Ark. 226 (per curiam). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.*

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective

assistance of counsel, the sole question presented is whether, based on a totality of the evidence, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Mingboupha v. State*, 2011 Ark. 219 (per curiam). Under the two-pronged *Strickland* test, a petitioner raising a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *Id.* As to the second prong of *Strickland*, the claimant must demonstrate that counsel's deficient performance prejudiced his defense to such an extent that the petitioner was deprived of a fair trial. *See id.* Such a showing requires that the petitioner demonstrate a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

In appellant's petition, he asserted that his trial counsel was ineffective for failing to proffer at trial a jury instruction on the lesser-included offense of manslaughter because counsel's failure to do so precluded consideration on appeal of his argument that the trial court erred in failing to so instruct the jury.[1] After holding a hearing on the petition, the trial court entered its order, wherein it noted that the jury was instructed on both first-degree and

[1]In addition, appellant asserted that trial counsel was ineffective with respect to the filing of a motion to sever; however, appellant does not pursue that argument on appeal. All arguments made below but not raised on appeal are abandoned. *Shipman v. State*, 2010 Ark. 499 (per curiam).

second-degree murder, as well as on the defense of insanity, and found it "difficult to find counsel was deficient on this issue as the jury rejected [appellant's] insanity defense and returned the guilty verdict on the charge with the most serious degree of intent."

At issue here is the allegation that appellant's trial counsel failed to adequately preserve for appeal appellant's claim that he was entitled to an instruction on manslaughter. In order to meet the second prong of the *Strickland* test under the circumstances presented here, appellant must have demonstrated that the argument that counsel failed to preserve would have had merit. *Jones v. State*, 2010 Ark. 470 (per curiam). This he failed to do.

The relevant portion of the manslaughter statute provides that a person commits manslaughter if "[t]he person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse." Ark. Code Ann. § 5-10-104(a)(1)(A) (Repl. 2006). Appellant contends that he was entitled to this instruction regarding the murder of his wife because marital discord existed at the time of the murder and because his wife had threatened to leave him, both of which he claims were sufficient to trigger an extreme emotional disturbance. We have held that it is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005). However, we have made it clear that we will affirm a trial court's decision not to give an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Id.*

In *Boyle v. State*, 363 Ark. 356, 214 S.W.3d 250 (2005), we reiterated our prior

holdings that, in order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as "physical fighting, a threat, or a brandished weapon." 363 Ark. 356, 362, 214 S.W.3d 250, 253 (2005) (quoting *Kail v. State*, 341 Ark. 89, 94, 14 S.W.3d 878, 881 (2000)). Passion alone will not reduce a homicide from murder to manslaughter. *Id.* The record in appellant's case reveals no provocation, such as physical fighting, a threat, or a brandished weapon; instead, appellant points to the emotions he suffered as a result of marital discord and the threat of his wife's leaving him.

We have specifically rejected, however, the notion that such emotions warrant the giving of the manslaughter instruction. In *Kail v. State*, we held that, "[d]espite feelings of individuals who are suffering marital discord, the frustration, anger, and resentment that can result fails to constitute, on its own, a rational basis for giving an instruction on voluntary manslaughter." 341 Ark. 89, 94, 14 S.W.3d 878, 880 (2000). The testimony at appellant's trial revealed that in the hours immediately prior to the murder of his wife, appellant and his family ate dinner and watched a movie, and appellant later went to take a shower and go to bed. It is at that point that he returned with a gun and shot his wife. Because the instruction requested by appellant required a basis in fact indicating that appellant killed his wife in the moment following provocation in the form of physical fighting, a threat, or a brandished weapon, and no evidence of such was presented at appellant's trial, no rational basis existed upon which the trial court could have instructed the jury on manslaughter due to extreme

emotional disturbance.

Lacking any rational basis for the instruction, appellant failed to demonstrate any merit to the argument that he was entitled to an instruction on manslaughter. By failing to do so, there was no basis for postconviction relief, and the circuit court did not clearly err in denying appellant's petition. Accordingly, we affirm the circuit court's order.

Affirmed.