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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1341

State of Minnesota,
Respondent,

vs.

Jose Raul Herrera-Torres,
Appellant.

Filed January 11, 2021
Affirmed
Connolly, Judge
Concurring in part, dissenting in part, Gaïtas, Judge

Todd County District Court
File No. 77-CR-17-725

Keith Ellison, Attorney General, Edwin W. Stockmeyer, III, Matthew G. Frank, Assistant Attorneys General, St. Paul, Minnesota; and

Charles G. Rasmussen, Todd County Attorney, Long Prairie, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges his conviction for second-degree intentional murder, arguing that ineffective assistance of counsel entitles him to a new trial. We conclude that appellant's counsel's performance was deficient in regard to the two issues appellant asserts: first, requesting a self-defense jury instruction that was not applicable, and second, failing to consult with appellant concerning whether to request a jury instruction on lesser-included offenses, specifically on the lesser-included offense of first-degree heat-of-passion manslaughter. We affirm appellant's conviction because we also conclude that neither of the deficient performances prejudiced appellant; there is no reasonable probability that the result of appellant's trial would have been different with different jury instructions.

FACTS

During the day on July 27, 2017, appellant Jose Raul Herrera-Torres and the victim who lived together, exchanged text messages while at their respective jobs. Appellant told her, "I am very sad because of what happened." In another exchange, he asked, "Will you leave me?" and she replied, "I have no more forgiveness for you." Later, he said, "Sorry, my love" and she responded "I am not going to forgive you for threatening me with a knife."

When police arrived at their residence that evening, they found the victim dead on the floor with multiple stab wounds in her neck, abdomen, cheek, and both hands. She was 4'7" tall and weighed 113 pounds. Appellant's driver's license indicated that he was 6'2"

tall and weighed 182 pounds. The evidence thus established that appellant was 69 pounds heavier and 19 inches taller than the victim.

There was blood on a knife near the victim's body and on the walls and floors of the kitchen, living room, and one bedroom. DNA from the blood matched either appellant's or the victim's DNA.

The following morning, police arrested appellant at a hospital. After killing the victim, he had left their residence and spent the night driving around central Minnesota; he even stopped at an ATM to withdraw $400 and then had breakfast and later bought and consumed tequila before going to the hospital. He had stab wounds in his hands and arms and cuts on his knees and legs, some of which were consistent with attempts at self-harm.

Appellant was charged with second-degree intentional murder. Two public defenders, lead counsel and co-counsel, were appointed to defend him.[1] After talking with appellant, who told them and subsequently testified that he did not intend to kill the victim and that he was acting in self-defense, they elected to rely exclusively on these two alternative defenses.

The district court instructed the jury on the elements of second-degree intentional murder.

> First, the death of [the victim] must be proven.
> Second, [appellant] caused the death of [the victim].
> Third, [appellant] acted with the intent to kill [the victim]. To find appellant had "an intent to kill" you must find

[1] We note that appellant's lead attorney was later convicted of felony possession of child pornography and has been subject to attorney discipline. Neither circumstance has any relevance to appellant's ineffective-assistance-of-counsel claim.

> [he] acted with the purpose of causing death, or believed the act would have that result.

The jury found appellant guilty as charged.

Appellant moved to stay his direct appeal to enable him to develop a record on his ineffective-assistance-of-counsel claim. His motion was granted, and the matter was remanded to the district court, where he moved for a new trial. Following an evidentiary hearing, that motion was denied. He challenges the denial.

DECISION

"When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). "We review a district court's application of the *Strickland* [*v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)] test de novo because it involves a mixed question of law and fact. If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017); *see also Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (applying *Strickland*).

A successful claim of ineffective assistance of counsel requires the defendant to demonstrate both deficient performance of counsel (the performance prong) and sufficient prejudice to the defendant caused by that deficient performance (the prejudice prong). *See Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068 (setting out the requirements that "[counsel's] representation fell below an objective standard of reasonableness" and "there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Appellant raises two issues in his assertion of ineffective assistance of counsel: first, counsel's failure to ask for the general self-defense jury instruction instead of the jury instruction used when the victim's life has been taken, unless the defendant claims that he did not intend to take the victim's life (the self-defense issue); and second, counsel's failure to adequately research and to discuss with appellant the possibility of requesting a jury instruction on lesser-included offenses (the lesser-included-offenses issue). The district court concluded that the self-defense issue failed the prejudice prong and the lesser-included-offenses issue failed the performance prong. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700, 104 S. Ct. at 2071. Therefore, the district court denied appellant's petition for postconviction relief seeking a new trial based on ineffective assistance of counsel.

I. Deficient Performance

We are aware that "[j]udicial scrutiny of counsel's performance must be highly deferential," that "[t]here are countless ways to provide effective assistance in any given case," and that we "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 689-90, 104 S. Ct. at 2065-66. We nevertheless conclude that appellant's counsel's performance was deficient, or fell below an objective standard of reasonableness, in regard to both the self-defense issue and the lesser-included-offenses issue.

A. The Self-Defense Jury Instruction

Minnesota has both a general self-defense jury instruction, 10 *Minnesota Practice*, CRIMJIG 7.05 (2015), which is based on Minn. Stat. § 609.06, subd. 1(3) (2014) (providing that a person may use "reasonable force . . . upon or toward the person of another without the other's consent" if the force is "used by any person in resisting or aiding another to resist an offense against the person") and a specific self-defense jury instruction when the life of another has been taken intentionally, 10 *Minnesota Practice*, CRIMJIG 7.06 (2015), which is based on Minn. Stat. § 609.065 (2014) (providing that "[t]he intentional taking of a life is not authorized by section 609.06, except when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death").

"The Minnesota Supreme Court has repeatedly stated that it is error to provide the justifiable-taking-of-life instruction, instead of the general self-defense instruction, when the defendant asserts self-defense but claims that the [victim's] death was not the intended result." *State v. Pollard*, 900 N.W.2d 175, 179 (Minn. App. 2017) (citing *State v. Carradine*, 812 N.W.2d 130, 143-44 (Minn. 2012); *State v. Hare*, 575 N.W.2d 828, 832-33 (Minn. 1998); *State v. Robinson*, 536 N.W.2d 1, 2-3 (Minn. 1995); and *State v. Marquardt*, 496 N.W.2d 806, 806 (Minn. 1993)). Appellant both asserted self-defense and claimed that the victim's death was not his intended result. Therefore, requesting the justifiable-taking-of-life instruction instead of the general self-defense instruction was deficient performance by appellant's counsel.

B. The Absence of a Jury Instruction on Lesser-Included Offenses

"Defense counsel, as the professional advocate and intermediary of the accused, is charged with the control of and responsibility for the conduct of the defense during trial." *State v. Leinweber*, 228 N.W.2d 120, 125 (Minn. 1975). "[W]hen an offense has been proved against [the defendant], and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest." Minn. Stat. § 611.02 (2016). "[W]here a defendant is confronted with a specific single charge, . . . defense counsel after full investigation advises defendant of the probability of acquittal and accordingly prepares to meet that charge." *Leinweber*, 228 N.W.2d at 124.

Testimony at the postconviction hearing demonstrated that appellant's counsel, without either "full investigation" or any discussion with appellant, restricted the defense of appellant to convincing the jury either that appellant lacked the intent requisite for second-degree intentional murder or that appellant believed his intentional taking of the victim's life was necessary to resist or prevent an offense by the victim that appellant reasonably believed would expose him to great bodily harm or death.

Lead counsel, after agreeing that the district court had not been asked to instruct the jury on any lesser-included offense, was asked to tell the district court "a little bit about what went into that decision." He replied, "From my recollection, not a lot. I don't think we ever really discussed it." He agreed that there were several lesser-included offenses to second-degree intentional murder, but, when he was asked if he did any research into a possible jury instruction on those offenses or read any statutes or caselaw discussing what instructions might be appropriate, he answered, "No." He also answered "No" when asked

if he discussed the topic with appellant, told appellant that he could ask for an instruction on lesser-included offenses, or told him that the sentencing outcome would be different depending on which offense he was convicted of. Co-counsel testified that he briefly mentioned to lead counsel the possibility of asking for instructions on lesser-included offenses, but lead counsel did not pursue the matter and neither of them did any research.

Like their conduct in regard to the self-defense issue, the conduct of both lead counsel and co-counsel in regard to the lesser-included offenses issue fell below an objective standard of reasonableness. Thus, we conclude that the deficient performance prong of the *Strickland* test is met in regard to both issues.[2]

II. Sufficient Prejudice

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700, 104 S. Ct. at 2071. In regard to both issues in his ineffective-assistance claim, appellant has failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 103 S. Ct. at 2068. A reasonable probability of a different result is a probability "sufficient to undermine confidence in the

[2] The district court concluded that appellant's argument on the lesser-included-offenses issue "fail[ed] the performance prong outlined in *Strickland*" and therefore did not address the prejudice prong. *See Strickland*, 466 U.S. at 700, 104 S. Ct. at 2071 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). We affirm the district court's conclusion that the ineffectiveness claim in regard to the lesser-included-offenses issue was defeated, but we base our conclusion on failure of the prejudice prong, not the performance prong. An appellate court "will not reverse on appeal . . . a correct decision simply because it is based on incorrect reasons." *Kahn v. State*, 289 N.W.2d 737, 745 (Minn. 1980).

outcome," and actual prejudice must be shown to reverse a conviction on the basis of ineffective assistance of counsel. *Id.* at 693-94, 104 S. Ct. at 2068.

> *Strickland* makes it clear that there is no presumption of prejudice in an ordinary case involving a claim of ineffective assistance of counsel where there is no claim of a conflict of interest by defense counsel; rather, the defendant must show that counsel's errors "actually" had an adverse effect in that but for the errors the result of the proceeding probably would have been different. In determining whether the defendant has made the requisite showing, the court must consider the totality of the evidence before the judge or jury.

Gates v. State, 398 N.W.2d 558, 562 (Minn. 1987) (citing *Strickland* and rejecting the view "that it was not necessary for the defendant to show actual prejudice").[3] "Further, an analysis of prejudice must be made in the context of the totality of the evidence before the [jury]." *Id*. at 563.

[3] We note that the prejudice prong of an ineffective-assistance claim in regard to jury instructions requires that counsel's error in seeking or not seeking a particular instruction cause actual damage to the defendant. The cases appellant relies on as supplemental authority are inapposite because they concern whether a defendant is entitled to a new trial because the district court erred in refusing a request for a jury instruction on a lesser-included offense are therefore inapplicable. *See, e.g.*, *Keeble v. U.S.*, 412 U.S. 205, 205-06, 93 S. Ct. 1993, 1994-95 (1973) (a case arising from an offense committed on an Indian reservation and holding that the district court erred in refusing to give a requested lesser-included-offense instruction on the ground that the lesser-included offense, unlike the offense of which the defendant was convicted, was not among the offenses enumerated in the Major Crimes Act of 1885); *State v. Luby*, No. A19-1255, 2020 WL 4281016, at *5-6 (Minn. App. July 27, 2020) (concluding that the district court's refusal to give a lesser-included offense resulted from improperly weighing the evidence, failing to view the evidence in the light most favorable to the defendant, and failing to recognize that the evidence at trial warranted the instruction). The issue here is whether the result of appellant's trial would have been different if his counsel had sought a different self-defense jury instruction or a jury instruction on lesser-included offenses and neither case mentions that issue.

A. The Self-Defense Jury Instruction

Here, the evidence before the jury included: (1) a medical examiner's testimony that the victim's death was caused by exsanguination from five sharp-force injuries to her neck, one of which caused hemorrhage; to three penetrating and intersecting stab wounds to the abdomen, one of which was 13 centimeters deep and penetrated the vertebrae; and to numerous sharp-force injuries to both hands, consistent with her having grabbed a knife blade; (2) the information that appellant was 19 inches taller and 69 pounds heavier than the victim; and (3) the information that DNA from the blood on the knife next to the victim's body and on surfaces in the house where the body was found belonged to appellant and to the victim.

The jury also heard appellant's *uncontradicted* testimony that (1) he and the victim struggled over the knife, fell, and "the knife went inside her stomach"; (2) he "got concerned" and "flip[ped] her over and pul[led] the knife away; (3) she got up on her knees, pulled the knife away from him, and cut his knee and thigh; (4) he pushed her down, got the knife, and fought with her until she stopped fighting back; (5) he was scared; (6) he left the house without calling police or an ambulance; (7) he spent the entire evening driving many miles from the murder scene, and (8) he had breakfast and stopped at an ATM before going to the hospital, where he presented self-inflicted wounds.

The evidence before the jury, which appellant concedes was adequate to convict him of second-degree intentional murder, did not support either his self-defense argument or his lack-of-intent argument. The credibility of both of those arguments was further reduced by appellant's failure to explain why the victim had been stabbed repeatedly and

forcefully in the neck and in the abdomen, why it was necessary for him to continue to attack her once he had taken the knife, or why he made no attempt to get medical assistance for her.

In this case, there is no reasonable probability that, if counsel had sought the general self-defense instruction, the jury would have decided appellant's treatment of the victim was merely the use of reasonable force exercised to resist her offense against him.

B. The Absence of a Jury Instruction on Lesser-Included Offenses

Appellant argues that his counsel should have requested jury instructions on three lesser-included offenses: first-degree heat of passion manslaughter, second-degree unintentional felony murder, and second-degree culpable-negligence manslaughter. *See State v. Johnson*, 719 N.W.2d 619, 625-26 (Minn. 2006) (setting out the three lesser-included offenses of second-degree intentional murder). Appellant asserts that "there was a rational basis to acquit him of the charged offense [i.e., second-degree intentional murder] but convict him of one or all the lesser-included offenses."

1. First-Degree Heat-of-Passion Manslaughter

He argues that the "most apposite" lesser-included offense was first-degree heat-of-passion manslaughter. "An intentional killing may be mitigated to first-degree manslaughter" if two conditions are met. *Id.* at 626. The first is subjective: "the killing must be done in the heat of passion," and the second is objective: "the passion must have been provoked by words and acts of another such as would provoke a person of ordinary self-control under the circumstances." *Id.* Appellant argues that the jury could have found

that he "was in the heat of passion because [the victim], his long-time, live-in partner, . . . said she was leaving him, and attacked and repeatedly cut him with a knife."

But appellant's text-message exchanges with the victim earlier that day indicate that he thought the victim might be leaving him, so he would not have been surprised, or in the heat of passion, when she did say she was leaving him. Moreover, the fact that, prior to being killed, a victim in a relationship with the killer indicates an intent to break off that relationship does not justify or minimize the killing. The text messages also show that appellant had recently threatened the victim, a woman far smaller than himself, with a knife. Certainly this would have given the victim a reason to attempt to keep the knife away from him.[4]

Finally, according to appellant's own testimony, the cuts that the victim inflicted on him did not prevent him from leaving her either dead or bleeding to death, getting dressed, driving for several hours around central Minnesota, buying gas in a town 58 miles south of their residence at 12:20 a.m., cutting his own forearms, passing out, waking up, trying unsuccessfully to withdraw some cash in another town at 6:11 a.m., withdrawing cash back in his own town at 8:02 a.m., getting breakfast at 8:07 a.m., and buying and consuming tequila before seeking medical attention at a hospital where he was found to have self-inflicted wounds on his forearms and some small cuts, some of which were not self-inflicted, on his hands.

[4] The only account we have of what actually happened between appellant and the victim during the struggle over the knife is, of course, his own account, but the lack of medical evidence on his condition immediately and for about 12 hours after her alleged attacks on him is itself significant.

Appellant argues further that, although he repeatedly testified that he did not intend to kill the victim, "[e]ven if the jury concluded that [he] intended to kill, there was a rational basis to acquit [him] of intentional murder but find him guilty of first-degree heat-of-passion manslaughter." But our supreme court has recently issued an opinion that rejects appellant's argument. *See Eason v. State*, 950 N.W.2d 258, 264 (Minn. 2020) (citing *State v. Buchanan*, 431 N.W.2d 542, 549 (Minn. 1988) and Minn. Stat. § 609.20(1) (2018)). In *Eason*, the victim had passed out after being choked by the defendant. *Id.* at 261-62. When the defendant was looking for items to steal, he tripped over the victim, who then woke and went for a 30-inch sword. *Id.* at 262, n.1. The defendant grabbed the weapon. *Id.* The victim's injuries included 16 blunt force injuries, four chop wounds to the head, two or three stab wounds to the trunk, and cuts on his hands; his body showed signs of strangulation, and his heightened carbon monoxide level suggested he was still breathing after the defendant set fire to the house and left. *Id.* at 261.

Eason considered supreme-court precedent on the issue of what words and acts would provoke a defendant of ordinary self-control into acting in the heat of passion, contrasting *Johnson*, 719 N.W.2d at 628 (concluding that the victim's act of shooting the defendant in the head would provoke a person of ordinary self-control into a heat of passion) with two cases that concluded there was not sufficient provocation for heat-of-passion defense: *Stiles v. State*, 664 N.W.2d 315, 322 (Minn. 2003) (victim's act of reaching for a gun when defendant was aggressor did not provoke heat of passion) and *State v. Hale*, 453 N.W.2d 704, 706-07 (Minn. 1990) (victim's grabbing a knife after

defendant smacked her did not provoke heat of passion). *Eason*, 950 N.W.2d at 265 ("We conclude that this case is closer to *Stiles* and *Hale* [than to *Johnson*].").

We conclude that appellant's case also is closer to *Stiles* and *Hale* than to *Johnson*: the victim's action against appellant, i.e., inflicting wounds that did not prevent him from spending the night driving around the state and waiting until the next morning to get medical attention, was far less than the victim's shooting the defendant in the head in *Johnson* and much closer to the victims' reaching for weapons in *Stiles* and *Hale*. The other support appellant advances for his heat-of-passion argument is unpersuasive: the victim's accusing appellant of cheating on her would not have provoked a reasonable person to any physical violence, much less to the plethora of stab wounds to the neck and abdomen inflicted by appellant. Because caselaw indicates that the victim's acts would not have been sufficient to provoke a person of ordinary self-control into a heat of passion, appellant could not have been convicted of first-degree heat-of-passion manslaughter and therefore was not prejudiced by the failure to instruct the jury on this lesser-included offense.

2. Second-Degree Unintentional Felony Murder

The lesser-included offense of second-degree felony murder requires that the defendant "cause[] the death of a human being, without intent to effect the death of any person, while committing . . . a felony offense." Minn. Stat. § 609.19, subd. 2(1) (2016). Appellant agrees that "it was undisputed that [he] caused [the victim's] death and that he did so by stabbing her—a second-degree assault with a dangerous weapon, Minn. Stat. § 609.222, subd. 1 (2016)." He argues that "because the jury could have had a reasonable

doubt over whether [he] intended to kill [the victim], it could have acquitted [him] of intentional murder and found him guilty of felony murder." But the jury had heard the number, extent, location, and severity of the wounds appellant inflicted on the victim with the knife; it had heard no other explanation as to why appellant inflicted so many and such serious wounds; and it had heard appellant testify that he left the wounded victim without any attempt to provide medical assistance. "[A] defendant's statements as to his intentions are not binding on the jury if [the] defendant's acts demonstrate a contrary intent." *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). The jury here could not have had a reasonable doubt that appellant intended to kill the victim, and therefore it could not have convicted him of second-degree unintentional felony murder. Appellant was not prejudiced by the lack of a jury instruction on the lesser-included offense of second-degree unintentional felony murder.

3. Second-Degree Culpable-Negligence Manslaughter

This lesser-included offense occurs when a person "causes the death of another . . . by the person's culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." Minn. Stat. § 609.205(1) (2016). It is "intentional conduct which an actor may not intend to be harmful, but which an ordinary and reasonably prudent [person] would recognize as involving a strong probability of injury to others." *State v. Zupetz*, 322 N.W.2d 730, 733 (Minn. 1982).

Appellant argues that, if the jury "credited [appellant's] testimony that the knife impaled [the victim] when she and [appellant] tripped over furniture," it could have

concluded "that [appellant] engaged in intentional conduct that an ordinary person would recognize involved a strong probability of injury" because he "fought with [the victim] over a knife in a room full of furniture, a clearly reckless act." But while falling over furniture on to a knife might have explained *one* of the victim's wounds as resulting from appellant's culpable negligence in fighting with her, it would not have explained the many wounds that caused her death.

Appellant relies on *State v. Penkaty*, 708 N.W.2d 185, 206 (Minn. 2006) (a stabbing case holding that denying the defendant's request for an instruction on the lesser-included offense of second-degree culpable-negligence manslaughter was one of several errors that, cumulatively, denied the defendant his right to a fair trial). His reliance is misplaced: in that case, the defendant testified that the fatal wound was caused by the victim lunging at him while he held two knives, not by him stabbing the victim. *Penkaty*, 708 N.W.2d at 206. The jury, if it credited this testimony, "could have concluded that [the defendant] was guilty of second-degree culpable negligence manslaughter." *Id.* Here, there was no alternative explanation for the victim's death from multiple stab wounds. Appellant has not shown prejudice from the absence of a jury instruction on second-degree culpable-negligence manslaughter.

Thus, the lack of a jury instruction on any of the lesser-included offenses did not prejudice appellant. There is no reasonable probability that, if counsel had sought instructions on lesser-included offenses, the jury would have acquitted appellant of second-degree intentional murder by deciding that any element of that crime was not met, i.e., that the victim was not dead, that appellant did not kill her, or that appellant neither acted with

intent to kill her nor believed that repeated stabbing in the neck and abdomen would kill her.

Nor is there a reasonable probability that the jury would have convicted him of any of the three lesser-included offenses. First, the jury could not have convicted him of first-degree heat-of-passion manslaughter because the victim's conduct in inflicting a few minor knife wounds on appellant while they fought over a knife would not have provoked a person of ordinary self-control into a heat of passion. Second, it could not have convicted him of second-degree unintentional felony murder because the evidence of the number, location, extent and severity of the victim's wounds would have precluded a finding of no intent. Finally, it could not have convicted him of second-degree culpable-negligence manslaughter because there was no evidence explaining how all the victim's wounds could have resulted from appellant's negligence in fighting a person far smaller than himself for a knife in a furnished room.

Appellant's counsel's performance on the self-defense issue and the lesser-included-offenses issue was deficient, but the overwhelming weight of the evidence supporting the jury's verdict shows that no substantial prejudice to appellant resulted from those deficiencies.

Affirmed.

GAÏTAS, Judge (concurring in part, dissenting in part)

I agree with the majority that the performance of Herrera-Torres's trial attorneys was deficient because they requested the wrong self-defense jury instruction and they failed to consider submitting lesser-included offenses to the jury. But I respectfully depart from the majority's determination on the question of prejudice, specifically regarding the impact of defense counsel's failure to consider a lesser-included-offense jury instruction for first-degree heat-of-passion manslaughter.[1] Because I conclude there is a reasonable probability that the outcome of the trial would have been different if Herrera-Torres's attorneys had contemplated requesting a jury instruction for first-degree heat-of-passion manslaughter, I would reverse his conviction and remand for a new trial on that basis. *See State v. Nicks*, 831 N.W.2d 493, 509 (Minn. 2013) (stating that reversal is warranted when defendant shows there is a reasonable probability that "but for counsel's errors, the result of the trial would have been different").

As the record reveals, Herrera-Torres did not have the opportunity to present the jury with alternatives to the charged offense of second-degree intentional murder. The lead defense attorney acknowledged that he did not even consider lesser-included offenses, and did not discuss this option with Herrera-Torres. The second chair, who had no previous criminal trial experience, admitted that he spoke with Herrera-Torres about lesser-included

[1] I concur with the majority's determination that Herrera-Torres was not prejudiced by the attorneys' failure to request the correct self-defense instruction, in and of itself. Additionally, I agree that the attorneys' failure to consider the lesser-included offenses of second-degree unintentional murder and second-degree culpable-negligence manslaughter was not prejudicial.

offenses only *after* the jury's verdict. And then, the issue came up because a *juror* inquired about a manslaughter instruction during a post-verdict conversation; the second chair conveyed that discussion to Herrera-Torres. As the majority concludes, the failure to even consider submitting jury instructions on lesser-included offenses was constitutionally deficient performance.

In my view, the attorneys' deficient performance prejudiced Herrera-Torres. To prove prejudice resulting from an attorney's deficient performance, a criminal defendant must show that there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. *Nicks*, 831 N.W.2d at 508 (citing *State v. Scruggs*, 484 N.W.2d 21, 25 (Minn. 1992)). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome" of a proceeding. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984).

I believe that Herrera-Torres was prejudiced by the failure of his attorneys to consider an instruction on the lesser-included offense of heat-of-passion manslaughter. Preliminarily, in my view, the trial evidence justified an instruction on this lesser-included offense. A jury instruction on a lesser-included offense is warranted when (1) the lesser offense is included within the charged offense and (2) the evidence provides a rational basis to acquit the defendant of the charged offense and to convict the defendant of the lesser-included offense. *State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005). In considering a request for a jury instruction on a lesser-included offense, the trial court must view the evidence in the light most favorable to the defendant. *Id.* at 597.

First-degree heat-of-passion manslaughter is a lesser-included offense of the charged offense in this case, second-degree intentional murder. *State v. Johnson*, 719 N.W.2d 619, 625-26 (Minn. 2006) (citing *State v. Leinweber*, 228 N.W.2d 120, 123 (Minn. 1975)). Moreover, the evidence at trial provided a rational basis to acquit Herrera-Torres of second degree murder and to convict him of the lesser offense.

> An intentional killing may be mitigated to first degree manslaughter if two elements are present: (1) the killing must be done in the heat of passion, and (2) the passion must have been provoked by words and acts of another such as would provoke a person of ordinary self-control under the circumstances.

Id. at 626 (quotation omitted); *see* Minn. Stat. § 609.20(1) (2016). Viewing the trial evidence in the light most favorable to Herrera-Torres—where his live-in intimate partner threatened him with a knife just days before, accused him of cheating on her, told him she was leaving him, and then a violent altercation involving a knife ensued, resulting in multiple stab wounds to the victim and injuries to Herrera-Torres—the jury could have found both elements satisfied. *See, e.g.*, *Johnson*, 719 N.W.2d at 628 (concluding manslaughter instruction was required where defendant and romantic partner "engaged in an increasingly heated argument that escalated into a physical altercation in which [partner] shot [defendant], provoking [defendant] to shoot her back just seconds later"); *State v. Shannon*, 514 N.W.2d 790, 793 (Minn. 1994) (concluding manslaughter instruction was

required where defendant and romantic partner engaged in a heated argument that turned physical).[2]

Although Herrera-Torres testified that he did not intend to kill the victim, and intent to kill is an element of first-degree heat-of-passion manslaughter, *see* Minn. Stat. § 609.20(1), an instruction on this lesser-included offense was still warranted. Even when

[2] I do not believe that the Minnesota Supreme Court's recent decision in *Eason v. State*, 950 N.W.2d 258 (Minn. 2020), supports the conclusion that a first-degree heat-of-passion manslaughter instruction was unwarranted here. The defendant in *Eason* broke into the home of a stranger to steal and killed the homeowner during the burglary. *Id.* at 261-62, 262 n.1. The victim reached for a sword to defend himself, and in turn, the defendant killed him with the sword. *Id.* Ultimately, the jury convicted the defendant of first-degree intentional felony murder. *Id.* at 263. In concluding that the victim's act of reaching for the weapon did not provide a basis for submitting a first-degree heat-of-passion manslaughter instruction to the jury, the supreme court cited two other cases where the defendant had acted as the aggressor. *Id.* at 265 (citing *State v. Stiles*, 664 N.W.2d 315 (Minn. 2003), and *State v. Hale*, 453 N.W.2d 704 (Minn. 1990)). *Stiles* and *Hale*, like *Eason*, are factually distinct from this case. *Stiles* involved a first-degree murder during the course of a robbery. 664 N.W.2d at 317. There, the supreme court determined that the victim's act of reaching for a gun while he was being robbed at gunpoint could not mitigate the defendant's conduct to first-degree manslaughter because the defendant was the aggressor. *Id.* at 322. The *Hale* case, unlike *Eason* and *Stiles*, involved intimate-partner violence. *Hale*, 453 N.W.2d at 706. But again, in *Hale* the defendant was the initial aggressor. *Id.* The defendant testified that the victim confronted him for being intoxicated, he slapped her, and then she pulled out a knife. *Id.* According to the defendant, he cut himself while reaching for the knife, and then he hit and stabbed the victim. *Id.* The evidence also showed that the victim had been strangled and beaten on the head with a coat rack. *Id. Hale* is also distinguishable because the issue on appeal was not whether the jury should have been allowed to consider a lesser-included-offense. Rather, the defendant asked the supreme court to reduce his first-degree murder conviction to a first-degree manslaughter conviction, which the supreme court declined to do. *Id.* at 707. Here, in contrast to *Eason*, *Stiles*, and *Hale*, there was evidence that the victim was the initial aggressor; Herrera-Torres testified that the victim punched him in the nose and then attacked him with a knife (after wielding a knife during a previous interaction). And thus, even setting aside Herrera-Torres's testimony, viewing the evidence in the light most favorable to Herrera-Torres, a jury could have rationally concluded that the evidence supported a conviction of first-degree heat-of-passion manslaughter.

a defendant's own testimony does not support a conviction of a lesser-included offense, a lesser-included-offense instruction is appropriate "if the record on the whole provides a rational basis for acquitting the defendant of the charged offense and convicting him of the lesser offense." *State v. Griffin*, 518 N.W.2d 1, 3 (Minn. 1994). In *Leinweber*, for example, the defendant testified that the shooting was accidental, but also requested an instruction on heat-of-passion manslaughter. 228 N.W.2d at 123-24. The Minnesota Supreme Court held that the trial court's refusal to instruct on the lesser-included offense was error, observing that the jury could credit or reject any part of the defendant's testimony, and any other testimony, and infer from the evidence that the killing was done in the heat of passion. *Id.* at 122, 124 ("Where such inferences are supported by the evidence, it was prejudicial error to deny the requested instruction on first-degree manslaughter and a new trial must be ordered."). Likewise, in *Dahlin* the supreme court found error where the district court denied a requested instruction on the lesser-included offense of second-degree intentional murder even though the defendant's trial theory was that he was not the shooter. 695 N.W.2d at 600-01.[3]

Because the evidence at trial, viewed in the light most favorable to Herrera-Torres, provided a rational basis for an acquittal of second-degree murder and a conviction of first-

[3] The majority distinguishes between cases where a district court rejected a timely request for a lesser-included-offense instruction and cases where trial counsel presumably considered but did not request such an instruction, observing that appellant has not relied on the latter set of authority on appeal. But it seems even more prejudicial where, as here, the district court did not provide a lesser-included-offense instruction because defense counsel did not think to ask for one. Because, in my view, this circumstance bolsters the argument that appellant was prejudiced, the caselaw concerning a district court's refusal to give an instruction is sufficiently analogous to the merits of this appeal.

degree heat-of-passion manslaughter, the trial court would have had a duty to provide an instruction on the lesser-included offense if it had been requested by the defense. "It is . . . well established that where the evidence warrants a lesser-included offense instruction, the trial court *must* give it." *Id.* at 597; *see also State v. Bellcourt*, 390 N.W.2d 269, 273 (Minn. 1986) (stating that "where the evidence warrants an instruction" on a lesser-included offense, "the trial court must give it").

But here the attorneys did not even consider requesting this instruction, and their decision not to pursue the instruction was not strategic—it was simply error. Had the attorneys properly considered the full array of available lesser-included offenses, there is a reasonable probability that they would have elected to pursue a first-degree heat-of-passion manslaughter instruction.[4] This lesser-included offense closely mirrored the state's evidence. An instruction would have allowed the jury to convict of a less serious offense, even if the jury rejected Herrera-Torres's version of the events. And the maximum presumptive sentence for first-degree heat-of-passion manslaughter was 103 months, or eight-and-a-half years, under our state's sentencing guidelines, Minn. Sent. Guidelines 4.A

[4] At oral argument, counsel for the state made much of the fact that Herrera-Torres did not take the stand during the postconviction hearing and testify that he would have accepted an instruction on first-degree heat-of-passion manslaughter. I am not willing to hold this against Herrera-Torres for two reasons. First, where Herrera-Torres's attorneys did not inform him of his right to request the instruction, he did not impliedly or expressly waive it in the first instance. *See Dahlin*, 695 N.W.2d at 588 (noting that a defendant can impliedly or expressly waive an instruction); *see also State v. Jordan*, 136 N.W.2d 601, 604 (Minn. 1965) (characterizing a defendant's entitlement to an instruction on a warranted lesser-included offense as a "right"). It seems unfair to now impose some affirmative obligation on him to demand the instruction. And second, there is no legal requirement for a defendant to expressly waive an instruction on a lesser-included offense on the record. Thus, it would be inappropriate to impose a converse requirement here.

& 5.A (2016); this is considerably less than the 306-month sentence that Herrera-Torres faced, and actually received, for second-degree murder.

When an appellate court determines that a requested lesser-included offense instruction was warranted by the evidence, and the denial of that instruction prejudiced the defendant, reversal of the resulting conviction is required. *See Griffin*, 518 N.W.2d at 4. In determining whether a defendant was prejudiced by a trial court's failure to give a requested lesser-included offense instruction, appellate courts consider the instructions actually given and the jury's verdict. *Dahlin*, 695 N.W.2d at 599. For example, the supreme court found prejudice in *Dahlin* because the denial of an instruction for the lesser-included offense of second-degree murder forced the jury to choose between convicting the defendant of first-degree murder and acquitting him of a crime where he clearly had some culpability. *Id.* at 601. The supreme court observed that "[s]uch either-or framing of guilt or innocence is appropriate only in exceptional cases." *Id.* By contrast, in *State v. Shepherd* the supreme court found no prejudice in the district court's denial of a second-degree unintentional-felony-murder instruction where the jury was instructed on first-degree premeditated murder, second-degree intentional murder, and first-degree heat-of-passion manslaughter, and found the defendant guilty of first-degree premeditated murder. 477 N.W.2d at 514, 516 (Minn. 1991), *abrogated in part by Dahlin*, 695 N.W.2d at 599 n.2.[5]

[5] In *Dahlin*, the Minnesota Supreme Court emphasized that a reviewing court should not evaluate the sufficiency of the evidence in deciding whether a district court's refusal to provide a requested lesser-include-offense instruction prejudiced a defendant. 695 N.W.2d at 599 n.2. Rather, the inquiry must focus "on the instructions given and the verdict

Considered through the lens of these cases, I believe Herrera-Torres was prejudiced by his attorneys' failure to consider and request an instruction on first-degree heat-of-passion manslaughter. There is a reasonable probability that the result of the trial would have been different if the jury had received an instruction on this lesser-included offense. *See Strickland*, 466 U.S. at 693-94, 104 S. Ct. at 2068.

Herrera-Torres's jury was not instructed on any lesser-included offenses. The jury was forced to make a choice, therefore, between finding Herrera-Torres guilty of second-degree murder and acquitting him outright, even though there was evidence suggesting he was responsible for killing D.G. Yet "[s]uch either-or framing of guilt or innocence is appropriate only in exceptional cases," *Dahlin*, 695 N.W.2d at 601, and this is not one of those cases. The jury clearly rejected Herrera-Torres's testimony that the killing was unintentional. But because there was no lesser-included offense instruction given, the jury had no option other than to find him guilty of second-degree intentional murder. As the United States Supreme Court has observed:

> [I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some offense*, the jury is likely to resolve its doubts in favor of conviction.

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rendered." *Id.* To the extent that *Shepherd* and other cases relied on a sufficiency-of-the-evidence evaluation in determining prejudice, the supreme court instructed that "they should no longer be followed." *Id.*

Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 1997-98 (1973) (emphasis added).

Moreover, compounding this problem, the jury was given the wrong self-defense instruction. Although that error does not warrant reversal of Herrera-Torres's conviction, it magnified the prejudice stemming from the lack of a lesser-included-offense instruction by making the jury's choices even narrower.

Finally, given the 17-year or greater difference between the sentences for second-degree murder and for first-degree manslaughter, I cannot find that the attorneys' failure to pursue an instruction on the lesser offense was not prejudicial. *See Johnson*, 719 N.W.2d at 625-26 (finding prejudicial error where "[t]he difference between the presumptive sentence for second-degree intentional murder and first-degree heat-of-passion manslaughter is 224 months, or more than 18 years," and "there was a rational basis for a jury to acquit [the defendant] of second-degree murder and convict him of heat-of-passion manslaughter").

The benchmark for judging any ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. Because of counsel's deficient performance, I am not confident in the outcome of Herrera-Torres's case. Thus, I respectfully dissent from the majority's decision to affirm his conviction.