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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CR-22-329

	Opinion Delivered February 15, 2023
SETH BRADLEY SMITH APPELLANT	APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, WESTERN DISTRICT
V.	[NO. 16JCR-17-1519]
STATE OF ARKANSAS APPELLEE	HONORABLE RANDY F. PHILHOURS, JUDGE
	AFFIRMED

BRANDON J. HARRISON, Chief Judge

Seth Bradley Smith appeals the circuit court's denial of his petition for postconviction relief. He asserts that his trial counsel was ineffective by failing to make a specific motion for directed verdict on the lack of proof that he acted knowingly. We affirm the circuit court's order.

In November 2019, a jury found Smith guilty of the second-degree murder of his infant son, and he was sentenced to eighteen years' imprisonment. This court affirmed his conviction in May 2021. *Smith v. State*, 2021 Ark. App. 255. In November 2021, Smith filed in the circuit court a pro se petition for postconviction relief under Ark. R. Crim. P. 37 (2021), claiming ineffective assistance of counsel and requesting an evidentiary hearing. Smith alleged that (1) the circuit court erred in denying his motion for directed verdict, or alternatively, that his trial counsel had been ineffective in failing to make a specific motion for directed verdict on the ground that there was no evidence that he had acted knowingly;

(2) the circuit court erred in denying his motion to suppress; (3) the circuit court erred in allowing the State to introduce information from the autopsy report without calling the medical examiner who performed the autopsy to testify at trial.

Without convening a hearing, the circuit court denied Smith's petition. The circuit court's written order explained that three of Smith's points—the denial of his directed-verdict motion, the denial of his motion to suppress, and allowing the State to introduce information from the autopsy report—had been decided on direct appeal, and Rule 37 does not provide an opportunity for an appellant to reargue points that were settled on direct appeal. *Pitts v. State*, 2021 Ark. App. 242, 624 S.W.3d 700.

On Smith's remaining point—that his trial counsel failed to properly preserve his challenge to the sufficiency of the evidence that Smith acted knowingly—the court found that a review of Smith's Rule 37 petition, the court file, the court of appeals decision, and the 1,415-page appeal record conclusively showed that Smith is not entitled to relief. The circuit court found that the expert evidence presented at trial, including the opinion memorandum from Arkansas State Crime Laboratory Chief Medical Examiner Charles Kokes, demonstrated that the child's injury was not an accident and thus excluded any hypothesis consistent with Smith's innocence. Dr. Kokes's memorandum provided in part:

> The photographs and tissue slides in this case show findings indicative of non-accidental closed-head injury. These changes included subdural hemorrhage, subarachnoid hemorrhage, optic nerve sheath hemorrhage, and retinal hemorrhages. In addition to documenting fatal head trauma, the autopsy photos depict other injuries described in the autopsy report. These included contusions on the undersurface of the chin and upper front and side surfaces of the neck, a contusion on the back right outer surface of the neck, contusions of the tongue, contusion hemorrhage in the 3rd intercostal spaces, and contusions on both upper arms and the left knee.

> In summary, the findings in this case clearly support traumatic brain injury as the primary cause of death. These findings documented in the autopsy report are typical of these seen in cases of fatal, non-accidental head trauma involving infants. The neck contusions/intramuscular hemorrhage are contributory causes. These injuries, along with other injuries described above, do show they were deliberately inflicted and inconsistent with any reasonable accidental scenario. The consultant notes, such as they are, do not offer a satisfactory defensible alternative explanation for [the child]'s death.

The circuit court concluded,

> Intent is seldom proved by direct evidence, but a jury can infer intent from the circumstances of the killing and improbable explanations of incriminating conduct. *Steggall v. State*, 340 Ark. 184, 190–191, 8 S.W.3d 538, 543 (2000). There is substantial evidence sufficient to prove intent when it excludes any other hypothesis consistent with innocence. *Walker v. State*, 324 Ark. [106], 109, 918 S.W.2d [172], 173 [(1996)].
>
> Assuming Miller failed to properly preserve Smith's sufficiency challenge, it would not have triggered an appellate court reversal. When a defendant challenges the sufficiency of the evidence, appellate courts only consider the evidence that supports the guilty verdict. *Stipes v. State*, 315 Ark 719, 720, 870 S.W.2d, 388 (1994). Here there was evidence of intent that supported the jury's guilty verdict. So Smith can't prove the appellate court's decision would have been different and is entitled to no Rule 37 relief.

Smith has now appealed this decision.

We assess the effectiveness of counsel under a two-prong standard as set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a petitioner 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. *Walton v. State*, 2013 Ark. 254 (per curiam). There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and an appellant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel that, when viewed from counsel's

perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Id.*

Second, the petitioner must show that this deficient performance prejudiced his defense so as to deprive him of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). Normally, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). However, to prevail on a claim of ineffective assistance of counsel based on counsel's failure to preserve an issue for appeal, a petitioner must show that, had the issue been preserved, the appellate court would have reached a different decision. *Strain v. State*, 2012 Ark. 42, 394 S.W.3d 294. In other words, the petitioner must demonstrate that the appellate court would have found that the evidence adduced at trial was insufficient to support a conviction and would have overturned his conviction for that reason. *Id.*

To that end, in evaluating a petitioner's claim, this court applies the standards we use when sufficiency claims are raised on direct appeal. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. In reviewing a sufficiency challenge, we assess the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Armstrong v. State*, 2020 Ark. 309, 607 S.W.3d 491. We will affirm a judgment of conviction if substantial evidence, direct or circumstantial, exists to support it. *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture.

Armstrong, *supra*. Circumstantial evidence, in particular, is substantial when it excludes every reasonable hypothesis consistent with innocence; whether it does so is usually a jury question. *Williams*, *supra*.

We will reverse the circuit court's decision granting or denying postconviction relief only when that decision is clearly erroneous.[1] *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). 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.*

A person commits murder in the second degree if he or she knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-103(a)(1) (Repl. 2013). A person acts knowingly with respect to the person's conduct or the attendant circumstances when he or she is aware that his or her conduct is of that nature or that the attendant circumstances exist. Ark. Code Ann. § 5-2-202(2)(A) (Repl. 2013). A person acts knowingly with respect to a result of the person's conduct when he or she is aware that it is practically certain that his or her conduct will cause the result. Ark. Code Ann. § 5-2-202(2)(B).

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[1]Smith briefly challenges the application of this standard of review in determining whether he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution. In a one-sentence argument, he contends that there is "no support in the precedents of the U.S. Supreme Court for upholding an erroneous dismissal of a defendant's ineffective assistance of counsel claim on the ground that such legal error was not 'clear.'" This argument was not presented to the circuit court, however, and this court will not consider arguments raised for the first time on appeal. *McLemore v. State*, 2022 Ark. App. 512, 657 S.W.3d 190.

This court has noted that a criminal defendant's intent or state of mind is seldom apparent. *Rose v. State*, 2018 Ark. App. 446, 558 S.W.3d 415. One's intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence but may be inferred from the facts and circumstances. *Id.* Because intent cannot be proved by direct evidence, the fact-finder is allowed to draw on common knowledge and experience to infer it from the circumstances. *Id.* Because of the difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

Smith asserts that he was prejudiced by his trial counsel's failure to properly raise and preserve his challenge to the sufficiency of the evidence because there is no evidence that he knowingly caused the death of his son. He admits there is disputed evidence that he shook the baby but insists there is no evidence that he was aware such action was practically certain to result in the child's death. In addition to his own repeated assertions that he had no intent to hurt his child, he also notes the following "facts" adduced at trial: (1) during his interview with police, Smith said that he had never heard of "shaken baby syndrome";[2] (2) testimony from both his fiancé and his mother that he was calm, loving, and affectionate with his son and that he would not do anything to hurt his son; (3) multiple statements made by the detective conducting Smith's interrogation indicating his belief that Smith loved his son and had not meant to hurt him. Further, he argues that his behavior on that particular day was that of a "responsible, caring father"—picking his child up from the

[2]Later in his police interview, Smith stated that he had "heard of people shaking their babies when they lose their cool."

babysitter, changing the baby's diaper, running the child a bath, and promptly calling for help when he realized the baby was having breathing problems. First responders observed that Smith was "visibly distressed."

In contrast, the circuit court cited only a single passage from Dr. Kokes's opinion memorandum to support its conclusion that there was evidence of intent. Smith concedes that Dr. Kokes's memorandum states that the baby's injuries "do show they were deliberately inflicted and inconsistent with any reasonable accidental scenario." However, Smith identifies two flaws in the circuit court's reliance on Dr. Kokes's opinion.

First, he asserts, the passage does not answer the question of whether the person who allegedly inflicted the injuries knew that such injuries would result from their actions. In other words, evidence that a person deliberately shook a baby would not prove that the person knew that life-threatening injuries were substantially certain to result from their conduct. Here, the passage from the expert opinion indicates that the baby was shaken but says nothing about the state of mind of the person who did it.

Second, Smith argues that Dr. Kokes could not have "diagnosed" the requisite criminal intent. To support this argument, Smith cites a scholarly article admitted during Dr. Kokes's testimony; the article, titled "Consensus Statement: Abusive Head Trauma in Infants and Young Children," in part explains that medical-expert testimony on the cause of an injury cannot determine the legal questions of who committed the act or the level of intent. Smith asserts that the circuit court misinterpreted Dr. Kokes's opinion as a "diagnosis of murder," but the passage from Dr. Kokes's opinion is only a description of the child's injuries and cause of death, not evidence of Smith's state of mind.

Smith reasons that a motion for directed verdict based on insufficiency of the evidence would have been meritorious and that the second-degree-murder charge against him should never have been submitted to the jury. Further, the jury's confusion on the "knowingly" element of the crime serves to underscore this point. The instruction given to the jury on second-degree murder is as follows:

> **SETH BRADLEY SMITH IS CHARGED WITH THE OFFENSE OF MURDER IN THE SECOND DEGREE. TO SUSTAIN THIS CHARGE, THE STATE MUST PROVE THE FOLLOWING THINGS BEYOND A REASONABLE DOUBT:**
>
> **SETH BRADLEY SMITH KNOWINGLY CAUSED THE DEATH OF [MINOR CHILD] UNDER CIRCUMSTANCES MANIFESTING EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE.**
>
> **DEFINITION**
>
> "KNOWINGLY"- A PERSON ACTS KNOWINGLY (OR WITH KNOWLEDGE) WITH RESPECT TO HIS CONDUCT OR THE CIRCUMSTANCES THAT EXIST AT THE TIME OF HIS ACT WHEN HE IS AWARE THAT HIS CONDUCT IS OF THAT NATURE OR THAT SUCH CIRCUMSTANCES EXIST. A PERSON ACTS KNOWINGLY WITH RESPECT TO A RESULT OF HIS CONDUCT WHEN HE IS AWARE THAT IT IS PRACTICALLY CERTAIN THAT HIS CONDUCT WILL CAUSE SUCH A RESULT.

During deliberations, the jury asked the court the following question: "Does 'knowing' mean that he knew when he shook the baby it was going to die?" The court pointed the jury to the definition of "knowingly" in the jury instructions and advised them to "read it in context with the rest of that instruction" and "apply that definition to what you have decided the facts are."

According to Smith, the only logical explanation for why the jury sought an answer to this question was because one or more jurors had concluded that he may have shaken the

baby but did not know when he did so that the baby would die. Therefore, the jury needed to know, as a matter of law, whether it was necessary for Smith to act "knowingly" with respect to both his conduct and the result of his conduct. The jury instruction, however, does not provide a clear answer to the jury's question. The instruction distinguishes between knowledge with respect to conduct and knowledge with respect to result, but it does not say that both are required for a conviction. Smith posits that the jury probably decided that either knowledge with respect to the conduct or knowledge with respect to the result is sufficient to establish guilt.

Smith concludes that trial counsel's failure to properly raise and preserve a sufficiency challenge to the evidence of the "knowingly" element fell below an objective standard of reasonable attorney performance and constituted ineffective assistance of counsel. And he was prejudiced by this ineffectiveness because there is a reasonable probability that, had the sufficiency challenge been properly raised and preserved, the outcome of his case would have been different. Thus, Smith asks that we grant him postconviction relief on this claim.

The State begins its response by reiterating that evidence of intent is seldom proved by direct evidence and that a jury can infer intent from the circumstances of the killing. The State also challenges Smith's use of the investigating officer's statements that he knew Smith had not intended to hurt his child as evidence that the State had not proved that Smith acted knowingly; at trial, Smith had argued to have his statement suppressed because the officer who took his statement was misleading and deceptive. Moreover, the State asserts, questions and statements by the police are not evidence but merely interview techniques used by officers when questioning a suspect.

The State contends that the actual proof at trial established that Smith acted knowingly because he was aware that his conduct, which caused his son's fatal injuries, was practically certain to cause his death. He admitted to the police that he had shaken the baby and that his fiancée had previously told him he had been too rough with the baby. He also told police that before the baby had become unconscious, he had "cradled" the baby and moved him up and down, but the baby's head was free. Smith agreed that the baby's head could "slam back and forth" but that it "didn't seem like it [did] to me." Further, Smith initially denied shaking his son, but he later agreed that he had "lost his cool" for a brief instant and had shaken the baby "probably about three or four" times. The State argues that the jury was free to consider Smith's initial denial of shaking the baby as a circumstance indicating that he knew the probable consequence of shaking the baby was death. And all of this evidence combined constitutes substantial evidence of Smith's intent. The State asserts that Smith has failed to show that had his trial counsel properly preserved the sufficiency issue for appeal, this court would have reached a different decision on the issue.

Smith replies to the State's arguments by first noting that the State made no attempt to defend the circuit court's reliance on Dr. Kokes's opinion memorandum as evidence of Smith's mens rea. Next, Smith acknowledges that there are some cases in which forensic evidence has been used to support an inference of intent on the part of the defendant, but those cases, unlike the present case, involve "egregious facts and circumstances which leave virtually no doubt that the perpetrator had a depraved state of mind."[3] He discusses several

[3]Smith made this assertion in his opening brief, albeit in a footnote, but did not include any citations to authority.

cases decided by the Arkansas Supreme Court in which an infant had died from significant head injuries but also showed signs of ongoing abuse. Smith claims that "these are the types of egregious circumstances that must exist for a defendant's state of mind to be legally inferred based on forensic evidence." According to Smith, the forensic evidence must do more than prove the death was nonaccidental. "The evidence must prove that the defendant's conduct was of such a shocking or repetitive nature so as to exclude any reasonable hypothesis that the defendant was unaware that his conduct was substantially certain to cause the child's death."

Smith insists that even viewing the State's expert medical evidence in the light most favorable to the State, "it established nothing more than the bare minimum amount of force that would be necessary to cause the child's death." He reiterates that mere evidence of causation cannot be relied on to determine the defendant's state of mind, and he contends that there is no other evidence in the record from which the jury could infer that he acted with knowledge that his conduct was substantially certain to result in his son's death.

We first correct Smith's erroneous assumption that the circuit court based its decision solely on the information in Dr. Kokes's opinion. While the court did quote that opinion, it also stated that it had reviewed the Rule 37 petition, the court file, this court's opinion on direct appeal, and the 1,415-page appeal record in concluding that Smith was not entitled to relief. Likewise, the jury based its decision on all the evidence in the record, not just the forensic evidence, and this court will in turn review all the evidence supporting the verdict.

Second, we summarize Smith's argument as follows. Evidence that he deliberately shook the baby and the extent of the injuries that resulted from the shaking is not sufficient

to prove intent; the State must also separately prove that he knew that life-threatening injuries were substantially certain to result from his conduct. Only in especially "egregious" cases, which necessarily include ongoing abuse, can forensic evidence be used to "legally infer" a defendant's state of mind.

The case law does not support this distinction. For example, the case of *Hoodenpyle v. State*, 2013 Ark. App. 375, 428 S.W.3d 547, bears a significant resemblance to Smith's case. Jesse Hoodenpyle was convicted by a jury of first-degree battery, which required the State to show that he had knowingly caused serious physical injury to a person twelve years of age or younger. The victim was his two-month-old daughter. The State's evidence showed that the baby had cerebral edema (swelling of the brain tissue); subdural hematomas (bleeding on the surface of the brain and between the two lobes of the brain); and areas of the brain that had direct injury to them. The baby also had retinal hemorrhaging and significant and extensive bleeding in the back of her eyes. There was no medical reason that would account for the baby's condition.

Hoodenpyle first denied that anything had happened with the baby. After being told that the medical findings did not match the history, that the baby's symptoms were consistent with a child who has suffered a head injury, and that the symptoms were progressively getting worse, Hoodenpyle said that he had accidentally dropped the baby onto a mattress on the floor while trying to retrieve her dropped bottle. The doctor advised him that a fall to a hard surface from shoulder height would not have caused the degree of the baby's trauma; only then did Hoodenpyle admit that he had "freaked out" because the

baby would not stop crying, that he had shaken her and she went to sleep, but that it was "not that shaken baby thing." *Id.* at 3–4, 428 S.W.3d at 550.

In his interview with police, Hoodenpyle first said that the baby had fallen out of his arms while he was feeding her. He admitted that he began to panic and shook the baby in an attempt to make her stop crying. He ultimately admitted shaking her two different times, and he stated that, on a scale of one to ten, he "probably shook her a six or seven." *Id.* at 6, 428 S.W.3d at 551. Hoodenpyle said that when he shook her, "there was not a thought in his head that it would ever harm her and that people who shake babies are 'psycho.'" *Id.*, 428 S.W.3d at 551.

Defense counsel moved for a directed verdict, arguing that the State "presented no evidence that Jesse knew his conduct would cause the result of a serious physical injury." The motion was denied. Hoodenpyle argued on appeal that the circuit court erred in denying his motion for directed verdict on this basis. In analyzing Hoodenpyle's argument, this court reasoned:

> While Hoodenpyle stated in his interview with Agent Pickett that he did not mean to harm [the baby] and that he did not shake her out of anger like "shaken baby syndrome," he also admitted in that interview that on a scale of one to ten, he shook her "probably six, seven." The medical evidence indicated that there was severe trauma that did not match the information initially given at admission. Tests revealed that [the baby] had cerebral edema, subdural hematomas on both sides of the surface of her brain as well as between the two layers of her brain, and significant permanent brain damage; additionally, the retinal hemorrhaging was one of the most severe cases of head trauma that Dr. Farst had seen. Dr. Farst testified that there was no medical reason to explain the significant trauma other than an intentional or abusive injury.
>
> Hoodenpyle attempts to deflect any culpability for knowingly injuring [the baby] by stating that he was not asked specifically the history of how the injury occurred until they were at Children's and that he did not know his

> actions could cause the severity of the injuries [the baby] sustained until confronted by Dr. Farst. However, he first told Dr. Farst that he had dropped [the baby], not that he had shaken her; it was not until after Dr. Farst told him that a fall would not produce such extensive injuries that Hoodenpyle admitted that he had shaken [the baby]. It was clear that Hoodenpyle knew the night that he shook [the baby] that something was very wrong; yet he said nothing that night and continued to say nothing until directly confronted. While he claims that he did not knowingly harm his daughter, medical evidence supports a different finding, and it is apparent that the jury believed that Hoodenpyle knowingly caused [the baby]'s injuries.

Id. at 10–11, 428 S.W.3d at 553.

We hold that there is no significant difference between the facts in *Hoodenpyle* and the facts in the present case as it relates to the "knowingly" element. Smith stated multiple times that he had not meant to hurt his son, but he also admitted that he had shaken the baby without holding his head. He did not alert the paramedic at the scene to the possible cause of the baby's injuries. The baby sustained a traumatic brain injury that was "deliberately inflicted." In his police interview, Smith first told the detective that the baby had been crying and suddenly went limp, and he denied shaking the baby to stop the crying. But Smith ultimately admitted to holding the baby around his torso and shaking him back and forth. Smith's failure to timely disclose the shaking incident could be viewed by the jury as an attempt to cover up his connection to the crime. *See Terrell v. State*, 342 Ark. 208, 27 S.W.3d 423 (2000) (jury could have properly considered evidence of cover-up as proof of requisite mental state).

As noted above, to prevail on a claim of ineffective assistance of counsel based on counsel's failure to preserve an issue for appeal, Smith must demonstrate that this court would have found that the evidence adduced at trial was insufficient to support a conviction. Viewing the evidence in the light most favorable to the State, we hold that the evidence is

sufficient to support a conviction and that counsel was not ineffective for failing to preserve the sufficiency-of-the-evidence issue for appeal. Consequently, we hold that the circuit court did not clearly err in denying Smith postconviction relief.

Affirmed.

GLADWIN and KLAPPENBACH, JJ., agree.

Ben Motal, for appellant.

Leslie Rutledge, Att'y Gen., by: *Pamela Rumpz*, Sr. Ass't Att'y Gen., for appellee.