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# SUPREME COURT OF ARKANSAS

No. CR 09-1248

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| MICHAEL ALLEN HATCHER<br>APPELLANT<br><br>V.<br><br>STATE OF ARKANSAS<br>APPELLEE | **Opinion Delivered** September 8, 2011<br><br>PRO SE APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR-2007-507C, HON. STEPHEN TABOR, JUDGE<br><br>AFFIRMED. |

**PER CURIAM**

A jury in Sebastian County convicted appellant Michael Allen Hatcher of manufacturing methamphetamine and possession of drug paraphernalia, for which he was sentenced to a total of twenty-four years in prison. Following the affirmance of the judgments by the Arkansas Court of Appeals in *Hatcher v. State*, 2009 Ark. App. 481, 324 S.W.3d 366, appellant filed in the trial court a petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011), alleging ineffective assistance of counsel. The circuit court denied appellant's petition without a hearing. Appellant now appeals, arguing that the circuit court erred by not finding that his trial counsel was ineffective in three respects.[1] We affirm.

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.*

[1]In his petition, appellant raised other issues, which he does not pursue on appeal. Those issues are considered abandoned. *See State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007).

*Washington*, 466 U.S. 668 (1984), the trial court clearly erred in holding that counsel's performance was not ineffective. *Ewells v. State*, 2010 Ark. 407 (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. *Smith v. State*, 2010 Ark. 137, 361 S.W.3d 840 (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, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam).

With respect 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. *Ewells*, 2010 Ark. 407. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id*.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Jamett v. State*, 2010 Ark. 28, 358 S.W.3d 874 (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. *Watkins v. State*, 2010 Ark. 156, 362 S.W.3d 910; *Polivka v. State*, 2010

Ark. 152, 362 S.W.3d 918.

The trial record reflects that appellant was charged as an accomplice with manufacturing methamphetamine and possession of drug paraphernalia after a search was conducted of appellant's apartment. The testimony disclosed that there was evidence in appellant's home of each step in the process of manufacturing methamphetamine according to the red-phosphorous method.

As his first point on appeal, appellant maintains that his counsel was ineffective for not objecting to testimony given by Phillip Johnston, a chemist at the Arkansas State Crime Lab. Johnston testified on direct examination that elemental red phosphorous was a necessary ingredient for manufacturing methamphetamine and that the photographs taken of appellant's apartment showed that all of the components necessary for manufacturing methamphetamine were present. One mixture tested by Johnston contained methamphetamine, iodine, and phosphorous. On cross-examination, appellant's counsel asked Johnston to explain a notation contained in Johnston's report that he could not confirm that the phosphorous in the mixture was elemental phosphorous. He replied that the instrument he used to test the mixture "doesn't see red phosphorous. It sees phosphorous, so there's a little bit of difference. There's going to be phosphorous, the element left behind, in certain substances if this [red-phosphorous] method is used, but it's not going to be in its pure form, because it's a mix." As a result, Johnston could not conclude within a reasonable degree of certainty that the sample contained red phosphorous.

Appellant contends that Johnston's testimony was contradictory in that he said that all of the necessary ingredients were assembled but that he could not state that this particular

mixture contained red phosphorous. Appellant asserts that this discrepancy in the testimony should have drawn an objection by his counsel. In its order, the circuit court found no contradiction in the testimony, and, further, the court concluded that this was a matter that went to the weight of the testimony but not its admissibility. The circuit court's decision is not clearly erroneous. Variances and discrepancies in the proof go to the weight or credibility of the evidence, and it is for the fact-finder to resolve any conflicts and inconsistencies. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004); *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998); *State v. Long*, 311 Ark. 248, 844 S.W.2d 302 (1992). This court has often held that counsel cannot be found ineffective for failing to make an argument that could not succeed. *Ward v. State*, 350 Ark. 69, 84 S.W.3d 863 (2002); *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Moreover, appellant has not demonstrated prejudice resulting from this claimed contradiction, because any alleged discrepancy is completely overshadowed by the fact that the mixture in question contained methamphetamine.

Appellant next argues that his counsel was not effective because he failed to object to the testimony of Paul Smith. Smith, a narcotics officer with the Fort Smith Police Department, testified that the finished product found in appellant's apartment was "dingy gray." Appellant asserts that this testimony was misleading and prejudicial because the evidence-submission form made no reference to this gray matter and because no finished product was found in the home. This argument is also without merit. Smith's reference to the methamphetamine as being "dingy gray" was merely his own description of the substance, i.e. contrary to appellant's assertion, methamphetamine was found in appellant's apartment, as confirmed by the testimony of Johnston. Although it was not in powder form, the

substance does not have to be in a form to be sold before a manufacture occurs, as manufacturing includes the production and processing of a controlled substance. *See Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989). In our view, any objection made by appellant's counsel would have been unavailing, and appellant's claim does not support a finding that his counsel was ineffective. *Ward*, 350 Ark. 69, 84 S.W.3d 863. As his final point, appellant argues that his counsel was ineffective because he failed to request an instruction on the lesser-included offense of attempted manufacture of a controlled substance. He contends that there was evidence to support the giving of the instruction because no finished product or red phosphorous was found in his home and because his own testimony indicated nothing more than an "intent to manufacture methamphetamine."

While it is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence, it is not error for the court to refuse or fail to instruct on the lesser offense where the evidence clearly shows that the defendant is either guilty of the greater offense charged or innocent. *Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553; *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000). Here, the trial record indicates that all of the items necessary for manufacturing methamphetamine were located in appellant's home and that methamphetamine had in fact been produced. Although appellant professed to have no knowledge of how to complete the manufacturing process, which he said was done by others, appellant admitted that he participated in the process by soaking the pseudoephedrine tablets in HEET, a substance used in methamphetamine production. When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Cook v. State*, 350 Ark. 398, 86

S.W.3d 916 (2002). One cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Id.* Because methamphetamine was produced and appellant admitted taking part in manufacturing the substance, appellant was not entitled to an instruction on the lesser-included offense of attempting to manufacture the substance. Trial counsel is not ineffective for failing to make a meritless argument with regard to jury instructions. *Jones v. State*, 2009 Ark. 309 (per curiam).

Affirmed.