

SUPREME COURT OF ARKANSAS

No. CR 09-1168

LEVONIA GRAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 22, 2011

PRO SE APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, CR 2007-
4122, HON. WILLARD PROCTOR, JR.,
JUDGE

AFFIRMED.

PER CURIAM

Appellant Levonia Gray appeals an order of the Pulaski County Circuit Court denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). For reversal, appellant argues that his defense attorney at trial was ineffective because he failed to move for a directed verdict. We affirm.

A Pulaski County jury convicted appellant of first-degree battery and first-degree terroristic threatening. Appellant was sentenced as a habitual offender to thirty years' imprisonment and fifteen years' imprisonment, respectively, to be served concurrently. The Arkansas Court of Appeals affirmed. *Gray v. State*, 2009 Ark. App. 360 (unpublished). Appellant then filed in the trial court a petition for postconviction relief.

In his petition, appellant claimed that his counsel was ineffective for failing to move for a directed verdict and that counsel's failure to address whether the victim was battered "by means of a firearm" in a directed-verdict motion resulted in prejudice to him.¹ The circuit court

¹Arkansas Code Annotated section 5-13-201(a)(8) (Supp. 2009) provides that a person commits battery in the first degree if, "[w]ith the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a firearm."



denied appellant's petition, and appellant brings his appeal from that order.

We do not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Ewells v. State*, 2010 Ark. 407 (per curiam) (citing *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 (per curiam); *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918.

In an appeal from a circuit court's denial of postconviction relief on a claim of ineffective assistance of counsel, the sole question presented is whether, based on the totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's performance was ineffective. *Ewells*, 2010 Ark. 407, at 2. First, under the *Strickland* test, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness. *Smith v. State*, 2010 Ark. 137, at 2, 361 S.W.3d 840, 844 (per curiam). Secondly, under *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. *McCraney v. State*, 2010 Ark. 96, 360 S.W.3d 144 (per curiam). 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, at 3. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Appellant argues that the trial court incorrectly denied relief based on ineffective assistance of counsel. At trial, defense counsel declined to move for directed verdict at the close of the State's case. When the prosecutor inquired about a motion for directed verdict and expressed a concern about presenting an ineffective-assistance-of-counsel claim, defense counsel did not respond, but he stated that if the State did not think it had enough evidence, then he would agree to dropping the charges. At that time, defense counsel did not make a motion for directed verdict. After calling one witness, defense counsel rested without making any motion to the circuit court, and the circuit court ruled that there was sufficient evidence to go to the jury.

Appellant contends that counsel's failure to "raise critical issues at trial, which reasonably could have led to a different result on appeal, constitutes ineffective assistance of counsel." Such arguments are challenges to the weight and sufficiency of the evidence, which is a direct attack on the conviction itself and may not be raised in a petition for postconviction relief. *See Robinson v. State*, 295 Ark.



693, 751 S.W.2d 335 (1988) (per curiam). The relevant inquiry is not the weight or sufficiency of the evidence for conviction, but whether there was adequate evidence to support the circuit court's determination that it would have denied the motion for directed verdict had the motion been properly made and renewed. *See Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997).

In the present case, Anthony Tate, the victim, testified that appellant, who lived in the same residence, angrily kicked in his bedroom door, fired one shot at him, and hit him with a gun on the left side of his face, causing the gun to discharge. The bullet struck the victim on the left side of his neck, requiring several stitches to close the wound. Tate also testified that appellant said that he wanted to kill him and that appellant led him outside with one pistol to the back of his head and one pistol to his back. While outside, appellant hit him again on the side of his face with a gun. The victim ran down the street, and appellant shot toward him. Another witness, Damita Marks, testified that appellant came into the house and told her that he had shot Tate. Marks testified that appellant attempted to hide the two guns under a washing machine as the police arrived at the residence.

Here, the testimony of Tate and Marks indicated that Tate's injury resulted from a gunshot wound. Unlike the circumstances in *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003) (holding that striking the victim with the butt of a pistol did not constitute battery "by means of a firearm"), the physical injury to Tate was caused



by the bullet discharged from appellant’s firearm. Appellant failed to establish a reasonable probability that the circuit court would have acquitted him if counsel had presented the “by means of a firearm” argument to the court in a motion for directed verdict. Because appellant failed to demonstrate that he was prejudiced by counsel’s failure to move for a directed verdict, we conclude that appellant failed to satisfy the second prong of *Strickland* and that trial counsel was not ineffective.

Further, appellant’s argument that he was denied due process by counsel’s failure to move for directed verdict also fails. Without a showing of prejudice, appellant was not deprived of his right to a fair trial, and this court will not reverse for a mere potential of error. *Thomas*, 330 Ark. 442, 954 S.W.2d 255. Therefore, we hold that the circuit court’s denial of relief was not clearly erroneous. Accordingly, we affirm.

Affirmed.