

SUPREME COURT OF ARKANSAS

No. CR 11-251

ADAM DAVIS, JR.

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 17, 2011

PRO SE APPEAL FROM THE
GARLAND COUNTY CIRCUIT COURT,
CR 2007-365, HON. JOHN HOMER
WRIGHT, JUDGE

AFFIRMED.

PER CURIAM

Appellant Adam Davis, Jr., appeals from the circuit court's order denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1. In 2008, Davis was convicted of capital murder and attempted first-degree murder, each having a firearm enhancement, and was sentenced to life imprisonment without parole plus 720 months' imprisonment. Appellant appealed to this court, and we affirmed. *Davis v. State*, 2009 Ark. 478, 348 S.W.3d 553. On December 16, 2009, appellant filed his Rule 37.1 petition, which the circuit court denied. He now appeals from that order,¹ and we affirm.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Payton v. State*, 2011 Ark. 217 (per curiam). A finding is clearly

¹In a previous appeal, appellant challenged the circuit court's order denying his motion for leave to file an amended Rule 37.1 petition exceeding the ten pages allowed by the rule. *Davis v. State*, 2010 Ark. 366 (per curiam). We dismissed the appeal, observing that such a decision was within the circuit court's discretion. Subsequent to our dismissal, the circuit court entered the order now on appeal, which disposed of appellant's original Rule 37.1 petition and denied him postconviction relief.

erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed.

Id.

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

In his petition, appellant asserted that his trial counsel was ineffective for a litany of failures, including the failure to adequately consult with him; thoroughly conduct pretrial investigation; keep him informed; adequately defend; use prior statements of witnesses; prepare for sentencing; make a directed-verdict motion sufficient for appellate review; move for a reduction in sentence; and properly object to the use of color photographs. However, each

allegation is entirely conclusory in nature in that there was no factual substantiation to demonstrate how counsel's conduct specifically prejudiced his defense.

Appellant does not explain what legally relevant information he possessed that counsel failed to obtain through consultation with him or through pretrial investigation, nor does appellant explain what information counsel failed to relay to him. Appellant has neglected to explain how counsel failed to adequately defend him. Instead, he merely asserts that counsel should have hired experts and failed to significantly cross-examine the State's witnesses, without detailing what assistance those experts could have provided or what relevant information could have been obtained through cross-examination. In addition, appellant does not delineate which prior statements by witnesses could have been used or how they would have been beneficial to his defense.

Appellant fails to explain how counsel inadequately prepared for sentencing. While he states that counsel could have presented evidence of his brain damage, he has in no way demonstrated that, had such evidence been presented, there was a reasonable probability that the outcome would have differed. In addition, appellant does not explain how a motion for reduction of sentence, if made, would have been successful, nor has he demonstrated that, had an objection to color photographs been made at the appropriate time, it would have been successful, much less demonstrated any prejudice that he suffered from the failure to so object.

Finally, appellant makes much of trial counsel's failure to properly preserve for appeal purposes the circuit court's denial of his directed-verdict motion. Indeed, this court, in appellant's direct appeal, held that his challenge to the circuit court's denial was not preserved

for our review due to counsel's failure to renew appellant's directed-verdict motion at the close of all the evidence, after he reopened his case to admit four documents into evidence. *Davis*, 2009 Ark. 478, 348 S.W.3d 553. We have observed that, in dealing with a postconviction motion in such a situation, the question for the trial court is whether anything occurred between when the first motion was denied and the conclusion of all the evidence that would have caused the court to grant the motion had it been properly renewed. *Miller v. State*, 2011 Ark. 114 (per curiam). Once the trial court determines that no such event occurred, and, thus, no prejudice resulted from the failure to renew the motion, an appeal of that decision requires this court to review whether the evidence was sufficient for presentation of the case to the jury. *Id.*

In this case, the trial court found that "there was sufficient evidence from which the jury could return a verdict of guilt as to both charges." We agree, as the record supports the circuit court's finding. While appellant's defense was that he did not have the requisite mental state for the offenses, the law is well settled that a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

Under Arkansas law, a person commits capital murder if "[w]ith the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person." Ark. Code Ann. § 5-10-101(a)(4) (Repl. 2006). Premeditation and deliberation may be formed in an instant, and a jury can infer premeditation and deliberation from circumstantial evidence, such as the type and character of the weapon used; the nature, extent, and location of wounds inflicted; and the conduct of the accused. *Winston v. State*, 372 Ark. 19, 269 S.W.3d 809

(2007). Appellant, testifying in his own defense, admitted to hitting his wife's car from behind and then getting out of his truck and shooting her. In addition to appellant's admission, the medical examiner testified that appellant's wife suffered two wounds from a shotgun, one on the back of her left shoulder and another in her back, as well as two wounds from a handgun to her head and cheek.

With respect to the charge of attempted murder in the first degree, a person commits first-degree murder if, with a purpose of causing the death of another person, the person causes the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). A person attempts to commit an offense if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be. Ark. Code Ann. § 5-3-201(a)(2) (Repl. 2006). At trial, appellant admitted shooting his wife's friend. Velma Davis, the victim who survived, testified that, after falling in an attempt to run away from the scene, she looked up, saw appellant standing there, smiling and holding a shotgun with which he then shot her in the back and left her lying in the street.

The evidence clearly demonstrates that appellant was not prejudiced by his trial counsel's failure to properly renew his motion for directed verdict at the close of all the evidence. While appellant was unable to challenge the sufficiency of the evidence in his direct appeal, there was substantial evidence to support the verdicts. Appellant failed to satisfy the second prong of *Strickland*, and we hold that the trial court's denial of relief on this basis was not clearly erroneous.

Cite as 2011 Ark. 493

In sum, the trial court did not clearly err in determining that counsel was not ineffective. Accordingly, we affirm the denial of postconviction relief.

Affirmed.