

**SUPREME COURT OF ARKANSAS**

No. CR11-1251

COREY LAMBERT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 5, 2012

PRO SE MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF AND FOR USE OF TRIAL TRANSCRIPTS [JEFFERSON COUNTY CIRCUIT COURT, CR 2008-875, HON. JODI RAINES DENNIS, JUDGE]

APPEAL DISMISSED; MOTION MOOT.

**PER CURIAM**

Appellant Corey Lambert has lodged an appeal in this court from an order that denied his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2011). He filed a motion in which he seeks an extension of time to file his brief and the use of the trial transcript. Because appellant's petition for postconviction relief was clearly without merit, we dismiss the appeal, and the motion is moot.

An appeal from an order that denied a petition for a postconviction remedy will not be permitted to go forward where it is clear that the appellant could not prevail. *Watson v. State*, 2012 Ark. 27 (per curiam); *Riddell v. State*, 2012 Ark. 11 (per curiam); *Hendrix v. State*, 2012 Ark. 10 (per curiam); *Croft v. State*, 2010 Ark. 83 (per curiam); *Crain v. State*, 2009 Ark. 512 (per curiam). Appellant stated four grounds for relief in his petition. All of appellant's stated grounds allege ineffective assistance of counsel in connection with the State's failure to introduce certain actual physical evidence—a gun and some cash—during appellant's jury trial. Appellant did not establish a basis to support a finding of ineffective assistance on those claims.



The Arkansas Court of Appeals affirmed appellant’s convictions on charges of attempted murder in the first degree, aggravated robbery, and theft of property.<sup>1</sup> *Lambert v. State*, 2011 Ark. App. 258. The evidence presented at trial was that, on a day in 2008, a man wearing a red jacket and red pants came into the Stitch and Clean in Pine Bluff, demanded money from the employee behind the counter at gun point, and left on foot with all the money in the cash register. Minutes later, while an officer was still questioning the employee, appellant—wearing a red jacket and red pants—was apprehended a short distance away.

A witness, who had noticed appellant as he walked in front of her house after the robbery, testified that she saw a police officer in a marked car approach. When the police officer stopped the car and got out, appellant fired at the officer, and the officer fired back, wounding appellant. The employee from the cleaners came to the scene of the shooting and identified appellant as the robber. Money taken from appellant’s jacket pocket at the shooting scene, which matched what was taken in both amount and denominations, was returned to the owner of the cleaners after the scene was processed by the police.

During testimony at appellant’s trial, the Stitch and Clean employee and the officer who took appellant into custody each identified pictures of a gun that had been photographed on the ground at the scene of the shooting. The testimony indicated that the gun in the photograph was the weapon used in the robbery and the gun fired by appellant at the officer. The photographs were introduced into evidence, but the actual gun was not. Photographs that depicted the money found in the pocket of appellant’s red jacket at the scene of the shooting

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<sup>1</sup>Appellant received an aggregate sentence of 720 months’ incarceration on the charges.



were also introduced into evidence.

In his Rule 37.1 petition, appellant alleged that counsel was ineffective because she failed to object to the introduction of the photographs of the gun, because she failed to object to the introduction of the photographs of the money, because she failed to make a pretrial motion that sought to limit the scope of testimony in order to prevent references to the gun or the money, and because she failed to object at trial to testimony concerning the gun or the money. Appellant asserted in support of these claims (1) that the evidence should not have come in because he disputed that he had either the gun or the money when he was taken into custody, (2) that counsel should have challenged the chain of evidence, (3) that counsel should have challenged the fact that the State did not produce the gun or the money for examination, and (4) that counsel did not properly cross-examine the officer who took the gun into evidence and returned the stolen money. Appellant did not, however, identify through these assertions any viable basis that counsel could have raised to successfully contest the introduction of the photographs or the testimony.

In making a determination on a claim of ineffective assistance of counsel, this court considers the totality of the evidence. *Williams v. State*, 2011 Ark. 489, 385 S.W.3d 228. We assess the effectiveness of counsel under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hale v. State*, 2011 Ark. 476 (per curiam). Under the *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.* In



addition, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.*

A defendant making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Miller v. State*, 2011 Ark. 114 (per curiam). In order to meet the second prong of the test, a claimant must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Delamar v. State*, 2011 Ark. 87 (per curiam). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

In order to demonstrate prejudice for a failure to object, appellant must have submitted facts to support the proposition that counsel could have raised a specific, meritorious argument and that failing to raise that specific argument would not have been a decision supported by reasonable professional judgment. *Simmons v. State*, 2012 Ark. 58 (per curiam). Appellant did not identify any meritorious argument that counsel might have made concerning the introduction of the photographs or the testimony concerning the gun or the money. Appellant alleged that counsel should have challenged the "chain of custody," but he did not indicate in what way the chain may have been defective. While appellant asserted that the testimony was not proper because the evidence depicted in the photographs was not admitted or retained as evidence, he provided no authority or support for the claim.

Photographs are ordinarily admissible when helpful to explain testimony. *Sweet v. State*, 2011 Ark. 20, 370 S.W.3d 510. Photographs may be admissible, even when prejudicial, if those photographs assist the trier of fact in any of the following ways: by shedding light on some issue,



by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Id.* In this case, the photographs corroborated the testimony by the witnesses that appellant had the gun and had worn the jacket that had the money in the pocket. Several witnesses testified that the photographs of the gun depicted a gun that they saw at the scene of the shooting. Several witnesses identified the jacket in the photographs as the jacket that appellant had worn. Moreover, the officer who had taken the photographs testified to that effect, and he recounted having found and counted the money in the jacket. This testimony provided a sufficient foundation for admission of the photographs. *See Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005) (photographs were adequately authenticated when witnesses testified that photographs accurately depicted the events).

As for appellant's allegations that the witness testimony concerning the gun and the money was improper, in that the State did not retain the money or introduce into evidence either the money or the gun, the claims fail because the State was not required to produce the money or the gun. A witness may testify concerning tangible objects that are involved in a criminal case without producing the articles. *Wingfield v. State*, 363 Ark. 380, 214 S.W.3d 843 (2005). An accused has no constitutional right to confrontation in the case of physical objects as opposed to witnesses who testify against him. *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986).

Trial counsel cannot be ineffective for failing to make an objection or an argument that is without merit. *Strain v. State*, 2012 Ark. 42, 394 S.W.3d 294 (per curiam). In order to carry his burden to demonstrate prejudice, a petitioner must show, when making a claim of ineffective



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assistance for failing to raise an objection or make an argument, that the objection or argument would have been successful if made. *See Reese v. State*, 2011 Ark. 492 (per curiam); *see also Abernathy v. State*, 2012 Ark. 59, 387 S.W.3d 477 (per curiam). The Rule 37.1 petition containing such a claim must advance an argument upon which counsel might have based a successful motion. *See Sandoval-Vega v. State*, 2011 Ark. 393, 384 S.W.3d 508 (per curiam).

Because appellant failed to demonstrate that counsel might have raised a successful challenge to the testimony about the gun, the testimony about the money, or the admission of the photographs, none of appellant's grounds for relief demonstrated prejudice. The trial court, therefore, did not err in denying postconviction relief, and appellant cannot prevail on appeal.

Appeal dismissed; motion moot.