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SUPREME COURT OF ARKANSAS
No. CR-17-882

ADAM EUGENE LANE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 17, 2019

PRO SE APPEAL FROM THE
SEBASTIAN COUNTY CIRCUIT
COURT, FORT SMITH DISTRICT
[NO. 66FCR-15-90]

HONORABLE J. MICHAEL FITZHUGH,
JUDGE

AFFIRMED.

COURTNEY HUDSON GOODSON, Associate Justice

Following appellant Adam Eugene Lane’s conviction on drug-related charges and unsuccessful appeal of the judgment, he filed in the trial court a timely petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2017). *See Lane v. State*, 2017 Ark. 34, 513 S.W.3d 230 (affirming Lane’s convictions as a habitual criminal offender with simultaneous possession of drugs and a firearm, possession of methamphetamine with intent to deliver, and possession of drug paraphernalia). Lane appeals the denial of the petition by the trial court. He alleges error in the trial court’s decision denying relief and asserts that the court should have found ineffective assistance of counsel and trial and appellate error. Lane additionally alleges error in the trial court’s denial of his request for representation in his Rule 37 proceedings. Because none of Lane’s claims merit postconviction relief under the Rule, we affirm.

I. *Background*

Our opinion on direct appeal provides greater detail, but a brief summary of the facts in the case is necessary for an understanding of the issues. Lane was on parole when his parole officer and the police went to the hotel where Lane was staying with a female companion. The hotel manager used an electronic key to let the officers into the room, and the officers entered without a warrant or announcing themselves. The officers found ten bags of methamphetamine and a handgun in the room. After his arrest, while in jail, Lane signed a statement that the drugs found were his. His attorney moved to suppress or exclude the evidence from the search and to exclude the statement, and both motions were denied.

On appeal, this court held that the warrantless entry was valid but that the officers were required to knock and announce before entering. *Id.* While holding that the officers were required to knock and announce under the circumstances, this court nevertheless affirmed the decision not to suppress the evidence. *Id.* Although there was a constitutional violation, exclusion was not warranted because the relationship between discovery of the evidence and the constitutional violation was sufficiently attenuated to outweigh the deterrence benefits. *Id.* This court considered Lane's argument on appeal concerning the denial of his motion to exclude the statement and affirmed because the statement did not include a plea offer under Arkansas Rule of Evidence 410. *Id.* This court declined, however, to consider arguments for exclusion based on Arkansas Rule of

Evidence 403 or hearsay because the first had not been preserved for appeal and the second had not been argued to the trial court. *Id.*

II. *Issues on Appeal*

Lane largely raises the same arguments on appeal that he raised in his Rule 37.1 petition.¹ He alleges that his attorney was ineffective for failing to object to the admission of his statement on hearsay and Rule 403 grounds, for failing to move for a directed verdict on the grounds that the evidence did not demonstrate his knowledge of the contraband to establish possession,² for incorrectly advising him that the evidence would be excluded if the officers were required to adhere to the “knock and announce” requirement, and for failing to object to the introduction of the methamphetamine. Lane intertwines allegations of trial error about the trial court’s decisions to admit the contested evidence throughout his ineffective-assistance claims, and he would also challenge the holding by this court that the exclusionary rule did not apply under the circumstances of the case.

¹Those arguments raised below that Lane does not reassert on appeal are abandoned. *Ramirez v. State*, 2018 Ark. 32, 536 S.W.3d 614.

²Lane alleged in his petition that appellate counsel, rather than trial counsel, was ineffective for failing to make the motion on this basis. For his direct appeal, Lane was represented by a different attorney who had not been trial counsel and therefore could not have made an objection at trial. In its order denying relief, the trial court treated the issue raised in the petition as a claim that trial counsel had failed to make the motion as alleged, and it found separately that Lane had made only conclusory claims about ineffective assistance by appellate counsel. Lane refers to “counsel” in his brief and raises no issue referring to appellate counsel. The State contends that this amounts to a new argument on appeal that has not been previously raised. Lane sufficiently identified the issue to obtain a ruling on it, however, and it should not therefore be treated as a new argument that was not addressed by the trial court.

Finally, he alleges error in the denial of his motion for counsel for the Rule 37 proceedings.

III. *Abstract*

The State first urges that all of Lane's points on appeal be affirmed because he failed to provide an adequate abstract of the proceedings in his brief as required by Arkansas Supreme Court Rule 4-3(h) (2017). However, because Lane's briefs were filed under Rule 4-7 rather than Rule 4-3, he was not required to provide an abstract.

IV. *Standard of Review*

This court reviews the trial court's decision on Rule 37.1 petitions for clear error. *Gordon v. State*, 2018 Ark. 73, 539 S.W.3d 586. 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. *Lacy v. State*, 2018 Ark. 174, 545 S.W.3d 746.

V. *Trial Error*

The trial court in its order treated some of Lane's claims of ineffective assistance as also raising independent claims of trial error on the issues. Lane does not raise independent claims, with the one noted exception, as separate points on appeal, but his claims of ineffective assistance on appeal are interwoven with allegations of trial error. The trial court correctly found that Lane's claims, to the extent that the allegations raised trial

error, were not claims cognizable in Rule 37 proceedings. *McClinton v. State*, 2018 Ark. 116, 542 S.W.3d 859.

The trial court also addressed the issue Lane raised concerning allegations of error in this court's conclusions about alleged trial error in the admissibility of the evidence and found that the matter was law of the case, yet that claim was also one that is not cognizable under the Rule. Whether Lane took issue with the decision of either the trial court or the appellate court, Rule 37 is not available as a direct challenge to the admissibility of evidence or to raise questions of trial error, even questions of constitutional dimension. *Id.*

VI. *Ineffective Assistance*

Our standard for ineffective-assistance-of-counsel claims is the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Gordon*, 2018 Ark. 73, 539 S.W.3d 586. The benchmark for judging a claim of ineffective assistance of counsel must be “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. To prevail on a claim of ineffective assistance of counsel, the petitioner must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced his defense. *Gordon*, 2018 Ark. 73, 539 S.W.3d 586. A court must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Douglas v. State*, 2018 Ark. 89, 540 S.W.3d 685. Unless a petitioner makes both showings, the allegations do not meet the benchmark on review for

granting relief on a claim of ineffective assistance. *McClinton*, 2018 Ark. 116, 542 S.W.3d 859.

Although the trial court appears to have found that Lane's ineffective-assistance claims for failure to object to the admission of evidence were also not cognizable as issues involving trial error, those claims are collateral attacks of the type that are appropriately raised and considered under Rule 37.1(a). *See, e.g., Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43. The trial court, nevertheless, correctly determined that none of the ineffective-assistance claims was sufficient to merit relief under the standard.

A petitioner seeking postconviction relief on a claim of ineffective assistance that is based on a failure to make a motion or objection must show that counsel could have made a successful argument in order to demonstrate the prejudice required under the *Strickland* test. *Gordon*, 2018 Ark. 73, 539 S.W.3d 586. Failure to make a meritless objection or motion does not constitute ineffective assistance of counsel. *Id.* Lane's claims, in each point, failed to satisfy the second prong of the *Strickland* test by failing to demonstrate that counsel could have made a meritorious argument.

A. Hearsay

As to Lane's claims that counsel should have made an objection to the admission of his statement on hearsay grounds, he demonstrated no sound basis for the objection. Statements such as Lane's, which was a statement made by a party to the proceedings, do not come within the definition of hearsay under our evidentiary rules. Ark. R. Evid. 801(d)(2)(i) (2017). A statement made by a defendant and offered against him or her at

trial constitutes an admission of a party opponent. *Smith v. State*, 2009 Ark. 453, 343 S.W.3d 319 (citing *Ward v. State*, 350 Ark. 69, 73, 84 S.W.3d 863, 865–66 (2002)).

B. Rule 403

Likewise, Lane’s claim that trial counsel should have obtained a ruling on the Rule 403 ground for excluding the statement that counsel had included in the motion in limine also fails because Lane does not demonstrate that the argument would have been successful if it had been preserved for appeal. Under Rule 403, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,” allowing a trial court to refuse to admit evidence that is unfairly prejudicial to the defendant, even if it might be relevant. *Lard v. State*, 2014 Ark. 1, 431 S.W.3d 249. Evidence offered by the State is often likely to be prejudicial to the accused, but the evidence should not be excluded unless the accused can show that it lacks probative value in view of the risk of unfair prejudice. *Id.*

Lane failed to show that counsel’s argument that the statement should be excluded under Rule 403 was meritorious, either by showing that there was a risk of unfair prejudice or that the statement lacked probative value. Lane does not appear to attack the probative value of the statement, which is clearly evidence of a guilty conscience and therefore highly probative of guilt. The test of admissibility of evidence over an objection to relevancy is whether the fact offered into proof affords a basis for rational inference of the fact to be proved. *Conte v. State*, 2015 Ark. 220, 463 S.W.3d 686. Any evidence that is relevant to

explain the act, show a motive, or illustrate the accused's state of mind, may be independently relevant and admissible. *Id.*

Instead, Lane contends that the statement, when considered with his codefendant's testimony, was prejudicial and confusing. Lane's codefendant—his female companion at the hotel—testified that she had entered a guilty plea to possession of the gun and drugs,³ in contrast to Lane's written statement in which he indicated that he wished to “take the charges” and that she had no knowledge of his “activities.” While the jury would have been required to assess the credibility of the two conflicting statements, Lane's codefendant's testimony did not make Lane's statement unduly confusing and its admission was not unfairly prejudicial.

C. Directed Verdict

Next, Lane contends that counsel was ineffective for failing to move for a directed verdict on the basis that there was no evidence that he knew of the presence of the gun and the other contraband. The trial court found that there was evidence of simultaneous possession and that a proper motion in that regard would not have been successful.⁴ That finding was not clearly erroneous.

³Lane's codefendant did not clarify in her trial testimony whether the gun or drugs were in fact owned by her, although Lane implies that she claimed actual possession. As discussed below, her plea could certainly have been based on a case of joint constructive possession with Lane.

⁴Trial counsel made a motion for directed verdict on general grounds of insufficient evidence. He did not make a motion on the more specific basis that Lane alleges would have been successful.

In drug cases, it is not necessary for the State to prove that an accused physically held the contraband, as possession of contraband can be proved by constructive possession, which is the control or right to control the contraband. *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234. Constructive possession exists when joint occupancy of the premises occurs and there are additional factors linking the accused to the contraband. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147. Those additional factors include (1) that the accused exercised care, control, or management over the contraband; and (2) that the accused knew the matter possessed was contraband. *Id.* It is the last of the two factors that Lane asserted below was not satisfied, and he reasserts his claim that counsel should have made a motion for directed verdict on that basis on appeal. In particular, he argues that the gun was wrapped in a bandanna so that he could not have known what it was.

The control and knowledge factors can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Conley*, 2014 Ark. 172, 433 S.W.3d 234. In addition, an accused's suspicious behavior coupled with proximity to the contraband may be clearly indicative of possession. *Loggins v. State*, 2010 Ark. 414, 372 S.W.3d 785. Here, the circumstances were that the gun and some of the drugs⁵ were found in the bed between where Lane had been and where his codefendant lay. That intimate proximity, where Lane only had to lay his hand on the gun—even if it was wrapped

⁵Some of the drugs were found beside Lane's side of the bed. None were found on his codefendant's side of the bed. The State contended that the bags the drugs were in was the paraphernalia that was found.

as he contends—to become aware of its presence, along with Lane’s suspicious behavior in making a statement attempting to absolve his codefendant of responsibility, linked him to the contraband.

There was therefore some evidence of knowledge to support presenting the question to the jury, despite Lane’s contention to the contrary. The State urges that this issue is not one appropriate for review. This court may consider this type of claim, that is, a claim that presents an issue of whether counsel should have argued a specific basis in his motions for directed verdict so as to have the motions granted as a matter of law. See, e.g., *Ortega v. State*, 2017 Ark. 365, 533 S.W.3d 68. We go no further, however, because a petitioner cannot challenge the weight and sufficiency of the evidence through a Rule 37 proceeding by framing the question as an allegation of ineffective assistance of counsel. *Springs v. State*, 2012 Ark. 87, 387 S.W.3d 143. Because a motion made on the basis that Lane would have had counsel raise could not have been successful as a matter of law, we hold that it was not clear error for the trial court to conclude that counsel was not ineffective.

D. Advice on the Suppression of Evidence for a Knock-and-Announce Violation

In Lane’s next claim of ineffective assistance, he alleges that trial counsel incorrectly advised him that, because the officers had committed a knock-and-announce violation in conducting the search, the evidence would be suppressed. The trial court found that Lane’s allegations were conclusory and without factual substantiation. We agree that Lane failed to provide sufficient factual substantiation for the claim.

The law is settled that there is a presumption that counsel is competent, and the burden is on the appellant who must show more than mere errors, omissions, mistakes, improvident strategy, or bad tactics. *White v. State*, 301 Ark. 74, 781 S.W.2d 478 (1989). To prove ineffective assistance of counsel, appellant must establish that his counsel's advice was not within the range of competence demanded of attorneys in criminal cases, and he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* In other words, even if trial counsel was mistaken in his advice concerning the suppression of the evidence, Lane was required to show that the results of the proceeding would have been different, but for that error.

Lane knew well before trial that, despite counsel's arguments on the law, the trial court had ruled adversely on his motion to suppress. At the Rule 37 hearing, Lane questioned his attorney about whether he believed that, had he given different advice about whether the evidence ultimately should be suppressed, Lane would have accepted a plea deal on the charges. Counsel's testimony was that Lane's state of mind was such that he was not sure that Lane would have accepted a plea deal, particularly the only one that had been offered, even knowing with certainty that the evidence had not been suppressed and its admission was likely to be affirmed on appeal. Counsel agreed when the trial court noted that Lane had over a month after the suppression hearing to consider his options in that regard and asked if Lane had "rolled the dice." The trial court did not clearly err in finding Lane failed to provide sufficient factual substantiation for his claim because he did

not demonstrate that the result of the proceeding would have been different if counsel had provided the advice Lane contends should have been given to him.

E. Admission of the Methamphetamine

In his final point alleging ineffective assistance, Lane contends that trial counsel should have objected to the admission of the methamphetamine because there were discrepancies between the weight of the items initially seized, the total weight of the items that were tested by the Arkansas State Crime Lab, and the weights of the individual bags. Lane asserts counsel should have challenged the authentication of the evidence and argued a break in the chain of custody. As with the other evidentiary-related ineffective-assistance claims, the trial court incorrectly found that the claim was not cognizable, but it also noted that the deputy prosecuting attorney who was responsible for Lane's prosecution testified during the Rule 37 hearing to explain the discrepancies.

Once again, Lane has failed to carry his burden to demonstrate that the proposed objection that he would have had counsel make would have been meritorious. The issues Lane raises are the type that go to the weight of the evidence and the credibility of the witnesses rather than presenting a question of law for the court. See *Lee v. State*, 2017 Ark. 337, 532 S.W.3d 43; see also *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997). The State introduced evidence that the discrepancies could be explained, and there was therefore no marked difference in the description of the substance by the police officer and the chemist to establish a significant possibility that the evidence tested was not the same as that seized. *Guydon v. State*, 344 Ark. 251, 39 S.W.3d 767 (2001). Lane did not

demonstrate that the evidence would have been excluded based on the proposed challenges to the chain of custody.

F. Counsel for the Rule 37 Proceeding

Lane's last assertion of error by the trial court concerns the denial of his motion for counsel to represent him in the Rule 37 proceedings. Lane contends that he was entitled to counsel to assist him in the Rule 37 proceedings under the United States Supreme Court's holding in *Martinez v. Ryan*, 566 U.S. 1 (2012). For postconviction matters, however, there is no absolute right to counsel. *Williams v. State*, 2017 Ark. 20, 518 S.W.3d 653. This court has specifically rejected the argument that *Martinez* requires appointment of counsel. *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259.

The appointment of counsel in postconviction proceedings is discretionary and not mandated. *Williams v. Porch*, 2018 Ark. 1, 534 S.W.3d 152. The trial court is given its discretion to appoint counsel for Rule 37 proceedings under Arkansas Rule of Criminal Procedure 37.3(b) (2017). The abuse-of-discretion standard is a high threshold that does not simply require error in the circuit court's decision, but requires that the circuit court act improvidently, thoughtlessly, or without due consideration. *Hortenberry v. State*, 2017 Ark. 261, 526 S.W.3d 840.

In order to demonstrate an abuse of discretion by the trial court in declining to appoint counsel, Lane must have made a substantial showing that his petition included a meritorious claim and that he could not proceed without counsel. See *Evans v. State*, 2014 Ark. 6. As discussed above, Lane's claims in the petition did not demonstrate merit. He

asserts that his claims were not fully investigated, but he does not explain how further investigation might have better developed those claims. In his request for representation, Lane did not identify a specific claim that had potential merit and describe with particularity how counsel was needed to develop the claim. Vague, generalized assertions that counsel is needed to examine the claims are not sufficient. Lane therefore did not make the requisite showing.

Affirmed.

HART, J., concurs.

Adam Eugene Lane, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *David L. Eanes Jr.*, Ass't Att'y Gen., for appellee.