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SUPREME COURT OF ARKANSAS
No. CV-19-261

JESSIE HILL

APPELLANT

V.

WENDY KELLEY, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

APPELLEE

Opinion Delivered: January 20, 2022

PRO SE APPEAL FROM THE LINCOLN
COUNTY CIRCUIT COURT
[NO. 40CV-18-170]

HONORABLE JODI RAINES DENNIS,
JUDGE

AFFIRMED.

KAREN R. BAKER, Associate Justice

Appellant Jessie Hill appeals from the Lincoln County Circuit Court’s dismissal and denial of a pro se petition for writ of habeas corpus filed pursuant to Arkansas Code Annotated section 16-112-101 (Repl. 2016) in the county of his incarceration, seeking relief from a Grant County capital-murder conviction and a Ouachita County first-degree murder conviction. On appeal, Hill contends that he is entitled to habeas relief because he was “charged and prosecuted on unconstitutionally vague, void, and invalid insufficient criminal informations that failed to give Hill or any citizen of common intelligence fair notice of what the law demands” and that the State’s proof of his mere presence in proximity to the instruments of the crimes failed to establish he had committed a crime. Hill further raises claims regarding sufficiency of the evidence, trial error, ineffective assistance of counsel, and

improper jury instructions. Because Hill failed to establish that he was entitled to issuance of the writ, we affirm the circuit court's order.¹

I. *Background*

Hill is incarcerated pursuant to a judgment entered in September 1995 in Grant County that reflects a conviction for capital murder in the death of Arbrady Moss for which he was sentenced to life without parole.² This court affirmed the judgment. *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996).

Hill was subsequently convicted in Ouachita County of first-degree murder in the shooting death of Billy Ray Lee and was sentenced as a habitual offender to 720 months' imprisonment to be served consecutively to the sentence of life without parole that he received in the Grant County capital-murder case. No appeal was taken because Hill's pro se motion to file a belated appeal was denied. *Hill v. State*, CR-96-710 (Ark. Nov. 4, 1996) (unpublished per curiam).

II. *Writ of Habeas Corpus*

A writ of habeas corpus is proper when a judgment and commitment order is invalid on its face or when a trial court lacked jurisdiction over the case. *Foreman v. State*, 2019 Ark.

¹The circuit court's order denied relief on a motion for writ of mandamus filed by Hill below. Hill fails to raise any arguments on appeal with respect to the denial of the mandamus petition; therefore, those claims are abandoned. *Holloway v. State*, 2017 Ark. 265.

²Moss was driving Hill and Demarcus Tatum to the bus station, and after a short while, Hill demanded Moss's vehicle. Moss refused. Hill repeatedly struck Moss in the head with a marble rolling pin and left Moss's body in a ditch along the roadside. Tatum and Hill took the vehicle and left. Tatum testified that Hill committed the murder.

108, 571 S.W.3d 484. Jurisdiction is the power of the court to hear and determine the subject matter in controversy. *Baker v. Norris*, 369 Ark. 405, 255 S.W.3d 466 (2007). When the trial court has personal jurisdiction over the appellant and also has jurisdiction over the subject matter, the court has authority to render the judgment. *Johnson v. State*, 298 Ark. 479, 769 S.W.2d 3 (1989).

A petitioner who does not allege his or her actual innocence and proceed under Act 1780 of 2001 must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing, by affidavit or other evidence, of probable cause to believe that he or she is being illegally detained. Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2016). Proceedings for the writ are not intended to require an extensive review of the record of the trial proceedings, and the circuit court's inquiry into the validity of the judgment is limited to the face of the commitment order. *Jones v. Kelley*, 2020 Ark. 290. Unless the petitioner can show that the trial court lacked jurisdiction or that the commitment order was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Fields v. Hobbs*, 2013 Ark. 416.

III. *Standard of Review*

A circuit court's decision on a petition for a writ of habeas corpus will be upheld unless it is clearly erroneous. *Hobbs v. Gordon*, 2014 Ark. 225, 434 S.W.3d 364. A decision 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 made. *Ratliff v. Kelley*, 2018 Ark. 105, 541 S.W.3d 408.

IV. Claims for Relief³

On appeal, Hill contends that he was charged in a vague information that failed to allege any overt act that did more than “recit[e] [] verbatim unconstitutionally vague language of conduct of a hypothetical defendant” in an ordinary case of capital murder and first-degree murder. Citing *Bailey v. United States*, 516 U.S. 137 (1995), Hill argues that the State failed to prove “active employment” or use of deadly physical force, physical force, or unlawful physical force, particularly with regard to the lack of evidence connecting him by DNA or latent fingerprints with a firearm or deadly weapon in the deaths of Lee or Moss—i.e., the State was required to prove he had direct physical contact with the .22 revolver and marble rolling pin in the respective criminal cases.⁴ Hill further argues that the evidence was

³Hill filed a pro se petition for writ of habeas corpus and writ of audita querela. Audita querela actions for obtaining relief from a judgment have been abolished, and a petition for writ of audita querela is treated as a petition for writ of error coram nobis with the same grounds for relief and applicable procedural rules. *Whitney v. State*, 2018 Ark. 138. A petition for leave to proceed is necessary because the trial court can entertain a petition for coram nobis or audita querela after a judgment has been affirmed on appeal only after we grant permission. *Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61. Hill should have sought leave from this court prior to seeking relief, which would have been proper in the Grant County Circuit Court. Moreover, although Hill did not need to seek leave from this court with respect to the Ouachita County case, he sought relief in the wrong court—the Lincoln County Circuit Court. *Ray v. Kelley*, 2020 Ark. 184, 598 S.W.3d 837 (When a judgment of conviction was entered on a plea of guilty or nolo contendere or when the judgment of conviction was not appealed, a petition for writ of error coram nobis is filed directly in the trial court.). Nevertheless, Hill challenges only the dismissal and denial of habeas relief and raises no arguments regarding the denial of audita querela relief on appeal, and those claims are abandoned. *Holloway*, 2017 Ark. 265.

⁴Hill repeatedly argues that his “actual real-world primary private individual conduct” could not produce the result of the actual commission of the crime charged.

insufficient, that trial counsel was ineffective in both of his criminal cases, that a litany of errors, biases, and misconduct occurred at the hands of the trial court and the State, and that the jury should have been instructed on lesser-included offenses in the Grant County capital-murder case. None of Hill's claims entitle him to habeas relief.⁵

Citing *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019), Hill contends that he was charged with an unconstitutionally vague, void, and invalid criminal information that failed to give fair notice of what the law demanded of him. Specifically, Hill argues that the criminal information only makes clear the underlying crime that is charged and not “any physical element particularly necessary of proving deadly physical force, physical force, or unlawful physical force necessary requiring the showing of criminal use or having had actively employed a firearm or deadly weapon other than a firearm to constitute a complete offense[.]” This argument was not raised below, and arguments not raised below, even constitutional ones, are waived on appeal. *Henson v. Craddock*, 2017 Ark. 317, 530 S.W.3d

⁵In his petition below, Hill argued that he was actually innocent, the trial court lacked jurisdiction, and he lacked the mental state to assist counsel in making an actual-innocence defense at trial—arguments he has failed to specifically raise on appeal. Although Hill argued in his habeas petition that *Bailey* provides an avenue for him and other similarly situated petitioners that they need not be required to prove actual innocence through the use of the postconviction process encompassed in Arkansas Code Annotated sections 16-112-201 et seq., Arkansas Code Annotated section 16-112-103(a)(2) provides that the procedures for persons who “allege actual innocence shall be in accordance with § 16-112-201 et seq. [Act 1780].” Notwithstanding the fact that Hill failed to reassert his actual-innocence claim on appeal, this court would not hear the issue if he had done so. See *Peeler v. State*, 2021 Ark. 118; see also *Stephenson v. Kelley*, 2018 Ark. 143, 544 S.W.3d 44. Claims that are raised below but have not been reasserted on appeal are considered abandoned; as such, Hill's innocence, jurisdictional, and mental-deficiency arguments are abandoned. *Ratliff v. Kelley*, 2018 Ark. 105, 541 S.W.3d 408.

847. To the extent Hill’s argument regarding the criminal information centers on a lack of notice of the charges against him, that is an argument raised for the first time on appeal. We do not address new arguments raised for the first time on appeal or consider factual substantiation added to bolster the allegations made below. *Smith v. State*, 2017 Ark. 236, 523 S.W.3d 354. An appellant is limited to the scope and nature of the arguments made below that were considered by the court in rendering its ruling. *Id.*

The crux of Hill’s “active employment” argument centers on his reliance that *Bailey* provides a theory of “active employment” or an element of “use” that Hill believes changes the requisite proof to be established or charged by the State. This is an argument that Hill has raised in a previous habeas proceeding, and this court has addressed it. Hill had previously argued that *Bailey* entitled him to additional scientific testing of items found at the crime scene in the Grant County case to establish that he did not actively “use” the rolling pin to murder the victim. *See Hill v. Kelley*, 2018 Ark. 118, 542 S.W.3d 852. Here, Hill contends that he was convicted because of his mere presence in proximity to the instruments of the crimes used in absence of latent-fingerprint evidence and expert-witness testimony--meaning the State failed to prove the essential element of use of physical force by having contact with the marble rolling pin, ashtray, or glass bottle in Moss’s death or having physical contact with the trigger of the .22 revolver in Lee’s death. Contrary to Hill’s assertion otherwise, this court has noted that *Bailey* construes the meaning of “use” in a federal criminal statute and “does not purport to be anything other than a statutory decision and does not represent a new rule of constitutional law.” *Id.* at 3, 524 S.W.3d at 854.

Notwithstanding Hill’s attempt to couch his claims for habeas relief as ones involving statutory interpretation and his misplaced reliance on *Bailey*, Hill’s arguments are nothing more than a challenge to the sufficiency of the evidence in both the Grant County and the Ouachita County cases. It is well settled that habeas proceedings are not a means to challenge the sufficiency of the evidence in a case. *Hall v. State*, 2020 Ark. 358. A habeas action does not afford a petitioner the opportunity to retry his or her case.

Hill raises additional grounds on appeal: (1) the evidence was insufficient; (2) trial counsel was ineffective; (3) although he contends that he does not complain about trial error, he complains that illegal tactics were used to obtain his convictions being fully aware that his “actual real-world conduct during the commission of the actual crime of purposely causing the death of Lee or Moss was not sufficient to cause the death of either” and that the trial court, prosecution, and trial counsel prevented him from putting on evidence in support of his defense; and (4) the jury should have been instructed on lesser-included offenses. None of the claims merit issuance of the writ, and the circuit court did not err by declining to issue the writ.

A habeas proceeding is not a substitute for either direct appeal or postconviction relief. *Leach v. Kelley*, 2020 Ark. 200, 600 S.W.3d 568. Habeas proceedings are limited to the face of the commitment order, and as we have noted, habeas proceedings are not a means to challenge the sufficiency of the evidence in a case, nor does a habeas action afford a petitioner the opportunity to retry his or her case. *Id.* Although Hill attempts to raise multiple arguments regarding ineffectiveness of his trial counsel in both of his criminal cases, claims

of ineffective assistance of counsel are not cognizable as a ground for the writ. *Muhammad v. State*, 2020 Ark. 47, 592 S.W.3d 242. In the same vein, Hill's allegations regarding any alleged misconduct by the State or judicial bias would not implicate the facial validity of the judgment and commitment order or the trial court's jurisdiction, and such a claim would not support issuance of the writ. *Harkuf v. Kelley*, 2021 Ark. 107, 622 S.W.3d 638; *Jackson v. Kelley*, 2020 Ark. 255, 602 S.W.3d 743. Furthermore, Hill's jury-instruction argument is nothing more than a claim of trial error that does not affect the trial court's subject-matter jurisdiction, and Hill's claim does not render his sentence facially invalid. *Mitchell v. State*, 2018 Ark. 331. The circuit court did not clearly err when it rejected Hill's claims and denied and dismissed the habeas proceedings.

Affirmed.

Jessie Hill, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.