

SUPREME COURT OF ARKANSAS

No. CR 10-461

MELVIN LEE LOCKHART, III
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 29, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
CR 2008-490, HON. CHRISTOPHER
CHARLES PIAZZA, JUDGEAFFIRMED.**PER CURIAM**

Appellant Melvin Lee Lockhart, III, appeals from the denial of his pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). For reversal, appellant challenges the circuit court's ruling on the grounds that his trial attorney rendered ineffective assistance of counsel for failing to move for a directed verdict on a lesser-included charge, for refusing to allow appellant to testify, and for failing to present sufficient evidence on the value of certain stolen property. We affirm.

On February 14, 2008, the State initially charged appellant with capital murder, aggravated robbery, theft of property, possession of a firearm by certain persons, and fraudulent use of a credit card. A Pulaski County jury convicted appellant of first-degree murder and theft of property and sentenced him to life imprisonment for the murder conviction and fifteen years for the theft-of-property conviction with an enhancement of an additional fifteen years for the use of a firearm. The Arkansas Court of Appeals affirmed in *Lockhart v. State*, 2009 Ark. App. 587. The court of appeals held that, because appellant did not move for a directed verdict on

the offense of first-degree felony murder, with the underlying felony of theft, it was precluded from reaching the issue of the sufficiency of the evidence. *Id.* Appellant subsequently timely filed a Rule 37.1 petition, alleging that his trial counsel was ineffective for failing to move for a directed verdict, for allegedly advising him not to testify, and for failing to require the State to present sufficient evidence to support his theft-of-property conviction. After an evidentiary hearing, the circuit court entered an order denying appellant's petition for postconviction relief. From that order, appellant brings this appeal.

On appeal, appellant presents arguments similar to those in his Rule 37.1 petition. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Gaye v. State*, 2009 Ark. 201, 307 S.W.3d 1. 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. *Id.* In making a determination on a claim of ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *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. *Carter v. State*, 2010 Ark. 231, ___ S.W.3d ___; *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___; see *Jammett v. State*, 2010 Ark. 28, ___ S.W.3d ___ (per curiam). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general

requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that the deficient performance prejudiced the defense to the extent that the appellant was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). With respect to the requirement that prejudice be established, a petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Watkins*, 2010 Ark. 156, ___ S.W.3d ___; *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Sparkman*, 373 Ark. 45, 281 S.W.3d 277.

For his first point on appeal, appellant argues that trial counsel's failure to move for a directed verdict on the lesser-included charge of first-degree felony murder amounted to ineffective assistance of counsel. Arkansas Code Annotated section 5-10-102(a)(1) (Repl. 2006) provides:

A person commits murder in the first degree if . . . the person commits or attempts to commit a felony; and [i]n the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life[.]

Here, the evidence adduced at trial included testimony that Toni Boggs and appellant went to the victim's home to rob him and that, once there, appellant stole the victim's wallet, which contained his debit and credit cards. At the time of the commission of the offense, appellant was in the possession of a firearm. According to Boggs, appellant grabbed the victim's

wallet, handed it to Boggs, and told her to leave. When Boggs got into a nearby car, she heard a gunshot, and appellant left the victim's mobile home. The victim was later found lying face-down with a gunshot wound to the back of his head. Appellant told the passengers of the vehicle that they would not have to worry about the victim anymore and showed them the victim's cell phones. Appellant later instructed the passengers to use the victim's debit and credit cards. While appellant was not able to directly appeal any challenge to the sufficiency of the evidence, there was substantial evidence to support appellant's felony-murder conviction. Based on the foregoing evidence, appellant did not demonstrate that he was prejudiced by trial counsel's error in failing to make a directed-verdict motion. Appellant did not prove the second prong of the *Strickland* test, and we will not reverse for a mere potential of prejudice. *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

Next, appellant argues that trial counsel was ineffective and violated his Fifth Amendment right by refusing to allow him to testify. Rule 1.2 of the Model Rules of Professional Conduct states that “[i]n a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” *See State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002). Case law has confirmed this tenet of the scope of representation. *Id.* The accused has the right to choose whether to testify in his own behalf. *Chenoweth v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000). Counsel may only advise the accused in making the decision. *Id.* Furthermore, the defendant who claims ineffective assistance of counsel based on counsel’s failure to let him testify must state specifically what his testimony would have been and demonstrate that his

failure to testify resulted in prejudice to his defense. *Franklin*, 351 Ark. 131, 89 S.W.3d 865.

Here, appellant's trial counsel testified at the hearing that she discussed the issue with appellant and advised him of his constitutional right to testify. She testified that she encouraged him not to testify because the State would ask him about a previous murder conviction. According to trial counsel, appellant weighed his options, decided to heed her advice, and chose not to testify. She asserted that she never prevented appellant from testifying. In denying appellant's Rule 37.1 petition, the circuit court stated that it did not know any attorney who would encourage a client to testify knowing that the jury would learn about a prior murder conviction. On this issue, we defer to the circuit court's superior position to resolve credibility issues. *See Smith v. State*, 2010 Ark. 137, ___ S.W.3d ___. Thus, the circuit court was in a better position to determine appellant's and trial counsel's credibility. For these reasons, we hold that the circuit court properly ruled that appellant failed to show that trial counsel prejudiced the defense with respect to appellant's not testifying at trial.

For his final point on appeal, appellant argues that trial counsel was ineffective for failing to show that the State did not present sufficient evidence to support the theft-of-property conviction. A petitioner cannot question the weight and sufficiency of the evidence through a Rule 37.1 proceeding by framing his question as an allegation of ineffective assistance of counsel. *Stephens v. State*, 293 Ark. 231, 737 S.W.2d 147 (1987). We do not permit an appellant to rechallenge the sufficiency of the evidence at trial in a postconviction proceeding. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Here, appellant's trial counsel moved for a directed verdict on the theft-of-property

charge. As such, appellant's argument is merely a challenge to the sufficiency of the evidence that constitutes a direct attack on the judgment and is not cognizable under Rule 37.1. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). For the foregoing reasons, we hold that the circuit court properly denied appellant's petition for postconviction relief and affirm.

Affirmed.