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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-18-205

	Opinion Delivered: October 3, 2018
JAMES NEAL BYNUM APPELLANT	APPEAL FROM THE SCOTT COUNTY CIRCUIT COURT [NO. 64CR-14-104]
V.	HONORABLE JERRY RAMEY, JUDGE
STATE OF ARKANSAS APPELLEE	REVERSED AND REMANDED

KENNETH S. HIXSON, Judge

Appellant James Neal Bynum appeals after the Scott County Circuit Court entered an order denying his petition for postconviction relief filed pursuant to Arkansas Rule of Criminal Procedure 37.1. Mr. Bynum raises three points for reversal. Mr. Bynum first argues that the trial court erred in finding that his petition was untimely filed 120 days after the mandate from his direct appeal was issued by the court of appeals. Next, Mr. Bynum contends that the trial court erred in ruling that his trial counsel, who also represented Mr. Bynum in the direct appeal, was not ineffective. Finally, Mr. Bynum argues that the trial court erred in denying his petition without conducting a hearing. We reverse and remand for a new trial because Mr. Bynum was denied effective assistance of counsel.

Mr. Bynum was charged with ten counts of fourth-degree sexual assault committed against A.H. He was also charged with one count of second-degree sexual assault committed

against T.H. and one count of second-degree sexual assault committed against C.P. A jury trial was held, wherein each of the victims testified.

A.H. testified that he was twenty-six years old at the time of the trial. A.H. stated that, when he was fourteen, he was friends with one of Mr. Bynum's sons. Over the course of the next year, he would spend the night at the Bynums' house and sometimes accompany them on trips. A.H. stated that Mr. Bynum "seemed like a cool guy" at first and that he built a trust with A.H. A.H. stated that one night when he was staying at the Bynums' house, he was awakened by Mr. Bynum, and Mr. Bynum forced his hands down A.H.'s pants. A.H. indicated that this was the first of about twenty to fifty times that Mr. Bynum sexually assaulted him. A.H. stated that it would happen when they went camping and at any time Mr. Bynum could get him alone. A.H. recounted another occasion when they had traveled to a gun show in Tulsa, Oklahoma, and Mr. Bynum performed oral sex on him in a hotel room.

T.H. testified that he had been friends with another one of Mr. Bynum's sons in 2013 when T.H. was eleven years old. T.H. lived at the Bynums' house for about four weeks and would go with them on vacations. T.H. testified that during that time, Mr. Bynum put his hands in T.H.'s pants and touched his "private parts" on two occasions. The first time it happened in a hotel room during a vacation trip with Mr. Bynum's family in Hot Springs. The next time it occurred in Mr. Bynum's home after T.H. had fallen asleep on a recliner with Mr. Bynum.

C.P. testified that he was twenty-four years old at the time of the trial and that he was friends with one of Mr. Bynum's sons. C.P. met Mr. Bynum after he had begun playing

basketball in the Boys and Girls Club when he was ten years old. C.P. also played basketball on Mr. Bynum's team from age eleven through age fourteen. During that time, C.P. would join Mr. Bynum and other children on hunting trips, to gun shows, and to the zoo. C.P. testified that he woke up in the middle of the night at Mr. Bynum's home to Mr. Bynum touching him in his shorts and putting his hand on his "privates." C.P. testified that a second incident took place in a hotel room in Tulsa, Oklahoma, after having traveled there for a gun show. He testified that he woke up on that occasion to Mr. Bynum trying to perform oral sex on him.

The jury convicted Mr. Bynum of ten counts of fourth-degree sexual assault and two counts of second-degree sexual assault. Mr. Bynum was sentenced to prison terms of six years for each of the ten fourth-degree sexual-assault convictions and twenty years for each of the two second-degree sexual-assault convictions, to be served consecutively for a total of 100 years in prison. This was the maximum sentence allowable for these twelve convictions.

On direct appeal to this court, Mr. Bynum argued that the ten counts of fourth-degree sexual assault against A.H. should be reversed and dismissed as time-barred by the statute of limitations. The State did not contest this issue and conceded error. We agreed, and we reversed and dismissed those ten convictions. *Bynum v. State*, 2017 Ark. App. 41, 511 S.W.3d 860. We held that the charges were filed after the applicable statute of limitations, which required the charges to be filed within three years of A.H.'s eighteenth birthday, had expired. Although Mr. Bynum had failed to make a statute-of-limitations challenge before the trial court, that issue may be considered for the first time on appeal

because it implicates a court's jurisdiction to hear the case and cannot be waived. In the direct appeal, Mr. Bynum also challenged his second-degree sexual-assault conviction against T.H. and C.P., arguing that the trial court lacked jurisdiction over those offenses because they occurred outside the trial court's jurisdiction, and also that the convictions were not supported by substantial evidence. We held that the trial court did have jurisdiction over those offenses because, while separate incidents of criminal conduct occurred in Hot Springs and in Tulsa, Oklahoma, both T.H. and C.P. testified that they had also been sexually assaulted by Mr. Bynum in his home, and there was nothing to suggest that his home was located anywhere but in Scott County. We further held that substantial evidence supported those convictions. Thus, we reversed and dismissed Mr. Bynum's ten convictions for fourth-degree sexual assault, and we affirmed his two convictions for second-degree sexual assault.[1]

After our mandate was issued, Mr. Bynum filed a petition for postconviction relief pursuant to Rule 37.1.[2] In support of his petition, Mr. Bynum alleged that he received ineffective assistance of counsel for six reasons. However, because he argues only two of these on appeal, we limit our analysis to these two claims:

> At trial, counsel failed to make a statute-of-limitations challenge to the ten counts of fourth-degree sexual assault committed against A.H. Had counsel raised the issue, the trial court would have dismissed the ten counts related to A.H., in which

[1]In the direct appeal, we declined to address new arguments raised by Mr. Bynum for the first time in his reply brief, which included the argument that we reverse and remand the second-degree sexual-assault charges for retrial on account of irreparable prejudice caused by the testimony relating to the ten counts of fourth-degree sexual assault.

[2]Mr. Bynum also filed an amended petition, with leave of the trial court, slightly supplementing his arguments. In this opinion, these will be referred to collectively as his "petition."

> case A.H. would not have been allowed to testify or at least there would have been a limiting instruction. This failure by counsel resulted in prejudice because Mr. Bynum was sentenced to consecutive maximum prison terms on all counts.
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> Counsel allowed both T.H. and C.P. to testify about incidents that occurred outside the trial court's jurisdiction. One of these occurred in Tulsa, Oklahoma, and the other in Hot Springs. Counsel was ineffective for not requesting a limiting instruction when the witnesses testified about those events. Without evidence of these events that occurred outside the trial court's jurisdiction, the verdict or the sentencing would have been different.

The trial court entered an order denying Mr. Bynum's petition for postconviction relief. In the order, the trial court mistakenly found that the court of appeals mandate from the direct appeal had been issued on January 25, 2017.[3] The trial court thus found that Mr. Bynum's initial petition, which was filed on May 25, 2017, was filed 120 days after the mandate. The trial court noted that pursuant to Rule 37.2(c)(ii), the petition must be filed within 60 days of the date the mandate is issued by the appellate court.

Although the trial court mistakenly concluded that Mr. Bynum's petition was not filed within 60 days of the mandate, the trial court did not dismiss the petition for lack of timeliness. Instead, the trial court ruled on the merits of Mr. Bynum's petition, making exhaustive findings explaining its reasons for denying the petition.

In the trial court's order, it found that a hearing on the petition was unnecessary because review of the court dockets, transcripts, and pleadings showed that the petition was without merit. The trial court then made its findings in support of its decision. Because a review of the arguments raised in this appeal will necessarily involve a review of the trial court's findings, we recite them here. In pertinent part, the trial court found:

[3]January 25, 2017, was the date we delivered the opinion. The mandate was not issued until March 30, 2017.

14. That because counsel is presumed to be effective, the defendant must overcome that presumption by establishing that his defense was prejudiced to a significant degree by his counsel's performance. *Johnson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001). As such, defendant must show that there is a reasonable probability that, but for counsel's error, the fact finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different, absent the error. The "decision reached" includes prejudice in sentencing as well as the finding of guilt. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992). A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial.

. . . .

16. That the first allegation is that [by] failing to have the ten (10) counts dismissed by the trial court, which were ultimately dismissed by the appellate court, the trial counsel was ineffective and but for the testimony of these counts the verdict would have been different. This argument is without merit.

Rule 404(b) states that: evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

The first sentence provides the general rule excluding evidence of a defendant's prior bad acts, while the second sentence provides an exemplary, but not exhaustive, list of exceptions to that rule. *Craigg v. State*, 2012 Ark. 387, 424 S.W.3d 264. Evidence is not admissible under Rule 404(b) simply to establish that the defendant is a bad person who does bad things. Rule 404(b) permits the introduction of evidence of prior bad acts if the evidence is independently relevant to make the existence of any fact of consequence more or less probable than it would be without the evidence. *Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325.

Additionally, [there is] a separate "pedophile exception" to the general rule that evidence of a defendant's bad acts cannot be used to prove that the defendant committed the charged crime. *Craigg v. State*, *supra*. The pedophile exception allows the State to introduce evidence of a defendant's similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with the person or class of persons with whom the defendant has an intimate relationship. *Hendrix v. State*, 2011 Ark. 122; *Hortenberry v. State*, 2017 Ark. 261.

> In this particular matter, the testimony of A.H. is not only independently relevant, it also presents admissible evidence of opportunity, intent, preparation and plan. Common threads of the interactions between the Defendant and each of the three (3) accusers exhibit a sufficient degree of similarity between the evidence introduced and the charged sexual conduct. These common threads include the similar ages of the three (3) male accusers during the time of the allegations, age 11-15. They also include that testimony that each of the accusers were friends of a child of the Defendant, that the incidents took place at the home of the Defendant. Defendant treated the accusers to trips, gifts, and favors. Additionally, the testimony of the accusers established a pattern of the Defendant's proclivity for oral sex and fondling of male genitals. Balancing each of these elements establishes that the probati[ve] value of the testimony of A.H. substantially outweighs any prejudicial effect of said testimony. As such, the testimony of A.H. would have been admissible with or without the filed charges.
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> 20. The fifth allegation of the Defendant is that his trial counsel was ineffective for allowing C.P. and T.H. to both testify about incidents allegedly involving the Defendant which occurred outside the jurisdiction of the Court. This argument is without merit. The specific allegations referenced above were addressed by the Court at the October 6, 2015 pretrial hearing. Additionally, those allegations would have been admissible in consideration of Rules 401, 402, 403 and 404(b) of the Arkansas Rules of Criminal Procedure as discussed in paragraph 16 of this Order.
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> 21. That during the above stated trial, the jury took notes, were attentive and were able [sic] placed in a position in which they were able to make informed decisions about the credibility of the witnesses, the evidence and allegations.
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> 22. That in consideration of the totality of the allegations, court record, pleadings, transcripts and sentencing documents, the Court does hereby find that the defendant/petitioner has failed to meet his burden of proof and that his Petition For Relief Under Rule 37, Ark. R. Crim. P., is hereby denied/dismissed.

This appeal followed.

We do not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous. *Vaughn v. State*, 2017 Ark. App. 241, 519 S.W.3d 717. A finding is clearly erroneous when, although there is evidence to support it, after reviewing the entire

evidence, we are left with a definite and firm conviction that a mistake has been committed. *Id.* In making a determination on a claim of ineffective assistance of counsel, we consider the totality of the circumstances. *Id.*

Our standard of review also requires that we assess the effectiveness of counsel under the two-prong standard set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234. In asserting ineffective assistance of counsel under *Strickland*, the petitioner must first demonstrate that counsel's performance was deficient. *Sartin v. State*, 2012 Ark. 155, 400 S.W.3d 694. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Id.* The reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.*

Second, the petitioner must show that the deficient performance prejudiced the defense, which requires a demonstration that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Conley*, *supra*. This requires the petitioner to show that there is 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.*

Unless a petitioner makes both *Strickland* showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* We also recognize that "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Anderson v. State*, 2011 Ark. 488, at 3–4, 385 S.W.3d 783, 787 (quoting *Strickland*, 466 U.S. at 697).

Mr. Bynum's first argument on appeal is that the trial court erred in finding that his Rule 37 petition was untimely filed 120 days after the issuance of the court of appeals mandate. Mr. Bynum is correct that the trial court erred in this regard. Our mandate was issued on March 30, 2017,[4] and Mr. Bynum filed his initial petition on May 25, 2017. Thus, he timely filed his petition, since it was filed within 60 days of the issuance of the mandate.[5]

Although the trial court erred in finding that Mr. Bynum's petition was filed outside the 60-day time limit, this mistake is of no moment because the trial court nonetheless ruled on the merits of the petition. In *Todd v. State*, 2017 Ark. App. 587, 535 S.W.3d 638, we affirmed the trial court's order denying postconviction relief even though the trial court had erroneously found that the petition was untimely filed. We held that because there were other valid bases that supported the trial court's denial of the petition, the error regarding timeliness of filing was not cause for reversal. *Id.* In the present case, the trial court addressed and rejected the merits of Mr. Bynum's petition in its order denying relief; it did not dismiss

[4]The trial court's order incorrectly stated that the mandate was issued on January 25, 2017.

[5]The later-filed amended petition was also considered timely because it was filed with leave of the trial court. *See Barrow v. State*, 2012 Ark. 197.

the petition as untimely. Therefore, the trial court's error regarding the timeliness of the petition was harmless, and we review the merits of the trial court's decision.

Mr. Bynum's next argument is that the trial court erred in ruling that his trial counsel was not ineffective in his representation. Mr. Bynum argues that his counsel was ineffective for failing either before trial or at trial to move to dismiss the ten counts of fourth-degree sexual assault committed against A.H. As we held on direct appeal, those charges were barred by the statute of limitations, and we reversed and dismissed those convictions. Mr. Bynum contends that had there been a motion to dismiss at trial, these charges would have been dismissed and A.H.'s testimony would have either been excluded or subject to a limiting instruction. Mr. Bynum thus claims that, in addition to failing to request dismissal of these charges, his counsel was ineffective for not objecting to A.H.'s testimony or requesting a limiting instruction. Mr. Bynum asserts that he was prejudiced by A.H.'s testimony because it was before the jury when it considered the two charges of second-degree sexual assault against T.H. and C.P., and the jury convicted him of these two charges and returned maximum sentences. Mr. Bynum argues that because the jury heard testimony about twelve charges instead of two, this undermined confidence in the outcome of the trial.

Mr. Bynum asserts further that his trial counsel was ineffective for not objecting to the testimony of T.H. and C.P. concerning alleged acts committed by Mr. Bynum against them outside the jurisdiction of the trial court. In particular, he argues that there should have been an objection, or at least a request for a limiting instruction, with respect to the conduct that allegedly occurred in Hot Springs and Tulsa, Oklahoma.

Under the first *Strickland* prong, we must first consider whether Mr. Bynum's counsel was deficient. We have no hesitancy in concluding that he was. At the time the criminal information was filed charging Mr. Bynum with these offenses, the statute of limitations for the ten counts of fourth-degree sexual assault allegedly committed against A.H. had been expired for five years. Notwithstanding this easily ascertainable fact, Mr. Bynum's counsel failed to move to dismiss the time-barred offenses either before or at trial. The jury convicted Mr. Bynum on all these charges, as well as the remaining two charges for second-degree sexual assault, and gave him the maximum sentences. Although Mr. Bynum's counsel was able to get the ten fourth-degree sexual-assault charges dismissed on direct appeal because this is a jurisdictional issue that cannot be waived, this does not negate counsel's ineffectiveness for failing to raise the issue at trial. Such failure by counsel could not have been the result of reasonable professional judgment; it was a serious error falling below the acceptable range of assistance guaranteed by the Sixth Amendment. We also conclude that counsel was ineffective for not objecting to the testimony of T.H. and C.P., or at least asking for a limiting instruction, with respect to the events that occurred outside the trial court's jurisdiction and with which Mr. Bynum was not charged. This, too, could not have been a matter of trial strategy. Having concluded that Mr. Bynum's counsel was deficient, we proceed to the second prong of the two-prong test.

Under the second *Strickland* prong, it was Mr. Bynum's burden to show that the deficient performance prejudiced the defense, which requires a demonstration that counsel's errors were so serious as to deprive the petitioner of a fair trial. This required him to show that there is a reasonable probability—that is, a probability sufficient to undermine the

outcome of the trial—that the decision reached by the jury would have been different absent counsel's errors. The "decision reached" includes possible prejudice in sentencing as well as the finding of guilt. *Lasiter v. State*, 290 Ark. 96, 717 S.W.2d 198 (1986).

We hold that the trial court clearly erred in not finding that Mr. Bynum's counsel's deficient performance prejudiced the defense. In its order denying Mr. Bynum's petition, the trial court found that with or without the ten charges filed against Mr. Bynum pertaining to A.H., A.H.'s testimony would have been admissible under the pedophile exception. However, had counsel moved to dismiss the charges relating to A.H., the trial court would have dismissed those charges and it is unknown under those circumstances whether A.H. would have agreed to testify. But even assuming that A.H. would have nonetheless testified and assuming the testimony would have been admitted under the pedophile exception, this would still not cure the prejudice to the defense. Under this scenario, the jury would have been called on to decide whether Mr. Bynum was guilty of only two charges against two victims as opposed to twelve charges against three victims. We believe the fact of being charged with twelve crimes instead of two was, in itself, prejudicial to Mr. Bynum. Couple that with the fact that, at the jury trial Mr. Bynum received, the jury was given no limiting instruction on A.H.'s testimony, which he would have undoubtedly been entitled to had the charges relating to A.H. been dismissed. Pursuant to Rule 404(b), the jury would have been given a cautionary instruction that evidence of other alleged crimes, wrongs, or acts of the defendant may not be considered to prove that he acted in conformity therewith; that the evidence is not to be considered to establish a particular trait of character he may have, nor is it to be considered to show that he acted similarly or accordingly on the day of

the charged incidents; but that the evidence is merely offered as evidence of such things as opportunity, intent, or plan to commit the charged offenses. *See* AMI Crim. 2d 203-A. Similarly, had counsel raised a proper objection to the testimony of T.H. and C.P. concerning the uncharged acts that allegedly occurred outside the trial court's jurisdiction, at a minimum this testimony would have been subject to a limiting instruction of this nature. Such limiting instructions clearly inure to the benefit of the accused and could reasonably change the outcome of the trial or the sentences imposed. We observe that, at the conclusion of these proceedings in which Mr. Bynum's counsel was deficient, the jury sentenced Mr. Bynum to maximum prison terms on all twelve counts, which were ordered to be served consecutively. Under these circumstances, we hold that there was a reasonable probability that the outcome of the trial would have been different had Mr. Bynum's counsel not been deficient. Because we reverse and remand for retrial for this reason, we need not address Mr. Bynum's remaining argument that the trial court should have conducted a hearing.

Reversed and remanded.

GLOVER and VAUGHT, JJ., agree.

Ernie Witt, for appellant.

Leslie Rutledge, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.