

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-18-683

RODNEY RAYBURN

APPELLANT

Opinion Delivered: February 13, 2019

V.

APPEAL FROM THE ARKANSAS
COUNTY CIRCUIT COURT,
NORTHERN DISTRICT
[NO. 01SCR-15-105]

STATE OF ARKANSAS

APPELLEE

HONORABLE DAVID G. HENRY,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

Following appellant Rodney Rayburn’s conviction of one count of rape and one count of criminal attempt to commit rape and his unsuccessful appeal of the judgment,¹ he filed a timely petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 (2017) in the Arkansas County Circuit Court. Rayburn now appeals the denial of the petition by the circuit court, alleging that his trial counsel was ineffective for several reasons. Because none of Rayburn’s claims merit postconviction relief under the Rule, we affirm.

At Rayburn’s trial, evidence was presented to the jury that indicated Rayburn had raped his minor daughter, H.R., at least fifteen times over the course of seven years. He was sentenced to twenty-five years of imprisonment on the count of rape and fifteen years on the count of criminal attempt to commit rape with the sentences to run consecutively. On

¹See *Rayburn v. State*, 2018 Ark. App. 84, 542 S.W.3d 882.

direct appeal, he argued the circuit court abused its discretion when admitting evidence of incidents other than the ones with which he had been charged, and that the circuit court's admission of cumulative testimony of prior bad acts was prejudicial to him and deprived him of a fair trial. In affirming the circuit court, we held that the evidence fell within the pedophile exception of Rule 404(b) of the Arkansas Rules of Evidence and was more probative than prejudicial. *Id.* The mandate was issued on April 19, 2018.

Rayburn largely raises the same arguments on appeal that he raised in his Rule 37.1 petition, although he significantly expands on them in his appeal. Rayburn alleges that his trial counsel was ineffective because he (1) failed to call an expert witness to rebut the State's expert; (2) failed to conduct a thorough investigation to support an effective defense and to discover mitigating evidence; (3) failed to properly cross-examine the State's witnesses; and (4) failed to request a change of venue. Without conducting an evidentiary hearing, the circuit court entered its order denying Rayburn's petition on July 2, 2018.²

When reviewing a circuit court's ruling on a Rule 37.1 petition, we will not reverse the circuit court's decision granting or denying postconviction relief unless it is clearly erroneous. *Kemp v. State*, 347 Ark. 52, 55, 60 S.W.3d 404, 406 (2001). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing

²Arkansas Rule of Criminal Procedure 37.3(c) provides that an evidentiary hearing should be held in a postconviction proceeding unless the petition, files, and record of the case conclusively show that the prisoner is entitled to no relief. See *England v. State*, 2018 Ark. App. 137, 543 S.W.3d 553. As occurred here, the circuit court, in its discretion, can deny postconviction relief without a hearing if it concludes that the petitioner is entitled to no relief. *Mancia v. State*, 2015 Ark. 115, 459 S.W.3d 259.

the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

The benchmark question to be resolved in judging a claim of ineffective assistance of counsel is 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. *Norris v. State*, 2013 Ark. 205, 427 S.W.3d 626 (per curiam). A Rule 37 petitioner's ineffective-assistance-of-counsel claims are analyzed under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a petitioner to show that his counsel's representation was deficient, and he suffered prejudice as a result. "Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable." *State v. Barrett*, 371 Ark. 91, 96, 263 S.W.3d 542, 546 (2007).

Pursuant to *Strickland* and its two-pronged standard, first a petitioner raising a claim of ineffective assistance must 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. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007). A petitioner making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness, such that counsel committed errors so serious as to not be functioning as counsel at all. *Flores v. State*, 350 Ark. 198, 205–06, 85 S.W.3d 896, 901 (2002). A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Springs v. State*, 2012 Ark. 87, 387 S.W.3d 143. The burden is on the petitioner to overcome this

presumption by identifying specific acts or omissions by counsel that could not have been the result of reasoned professional judgment. *Bond v. State*, 2013 Ark. 298, at 7–8, 429 S.W.3d 185, 191–92.

Second, the petitioner must show that, considering the totality of the evidence before the fact-finder, counsel’s deficient performance so prejudiced petitioner’s defense that he was deprived of a fair trial. *Springs, supra*. The petitioner must show there is a reasonable probability that, but for counsel’s errors, the fact-finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.*

A petitioner bears the burden of providing sufficient facts to affirmatively support any claims of ineffective assistance of counsel. *See, e.g., Smith v. State*, 2010 Ark. 137, at 12, 361 S.W.3d 840, 848 (per curiam). Thus, conclusory statements, without more, cannot form the basis of postconviction relief. *Id.*; *Hooks v. State*, 2015 Ark. 258, at 7–8, 465 S.W.3d 416, 421 (per curiam) (“Neither conclusory statements nor allegations without factual substantiation are sufficient to overcome the presumption that counsel is effective and cannot provide a basis for postconviction relief.”). Because Rayburn did not present sufficient facts in his petition or in his appellate brief to support his ineffective-assistance-of-counsel claims, Rayburn’s appeal fails under the *Strickland* standard. *E.g., Feuket v. State*,

2015 Ark. 43, at 4, 454 S.W.3d 734, 738 (Unless appellant can satisfy both prongs of *Strickland*, he cannot prevail on an ineffective-assistance-of-counsel claim).

Rayburn's first claim is that trial counsel was ineffective because he failed to call an expert witness to rebut the testimony of the State's expert. As he does throughout his subsequent claims, Rayburn greatly expands the scope and nature of the argument presented to the trial court. An appellant in a Rule 37.1 proceeding is limited to the scope and nature of the arguments made to the trial court, and new arguments cannot be raised on appeal. *E.g.*, *Gordon v. State*, 2018 Ark. 73, at 9, 539 S.W.3d 586, 593.

In Rayburn's Rule 37 petition, he asserted that trial counsel was ineffective because he failed to call an expert witness to rebut the testimony of the sexual-assault nurse examiner (S.A.N.E. nurse) that "there is only one (1) way to test a person for herpes/simplex." The petition made no reference to challenging the nurse's credibility with evidence that Rayburn did not have the herpes simplex 1 virus. Likewise, the petition presented no claim of trial-counsel ineffectiveness based on a failure to challenge the nurse's professional expertise or to allege that she was a "mere paid advocate of the state." As such, these arguments, which Rayburn raises for the first time on appeal, will not be considered by this court.

Rayburn's second claim, that trial counsel was ineffective because he failed to perform the investigation necessary to build an effective defense and present mitigating evidence, is intertwined with the argument in support of his first claim. Rayburn alleges that he does not have the herpes simplex 1 virus, and that his trial counsel was ineffective because he failed to obtain medical evidence supporting this allegation.

However, Rayburn's appellate argument has been expanded from what was presented to the trial court, and new arguments, including new factual substantiation, cannot be raised on appeal. *Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000). Although the petition referred to trial counsel's failure to obtain medical evidence in favor of Rayburn, the petition's only reference to herpes simplex 1 concerned testimony on the manner of testing for the virus. The petition submitted to the trial court does not assert, in any way, that Rayburn does not have herpes simplex 1 or that trial counsel was ineffective because he failed to have Rayburn tested for the virus. His appellate argument, however, relies almost entirely on these new allegations. Because Rayburn's appellate argument expands the argument presented to the trial court with new allegations of trial-counsel ineffectiveness and new factual substantiation related to the trial testimony on herpes simplex 1, the argument is not preserved for our review. See, e.g., *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000).

Rayburn's third claim, that trial counsel was ineffective because he failed to cross-examine the State's witnesses properly, is not clearly delineated in his brief. His conclusory allegations are insufficient to meet his burden on his ineffective-assistance-of-counsel claim. Moreover, his petition for postconviction relief presented to the trial court reveals no challenge to trial counsel's cross-examination of the State's witnesses. We do not consider issues raised for the first time on appeal. *Rasul v. State*, 2015 Ark. 118, 458 S.W.3d 722. We are therefore precluded from addressing this argument here.

Rayburn argues, as he did before the trial court, that his trial counsel was ineffective for failing to request a change of venue based on his mother-in-law's employment as a

custodian at the county courthouse.³ He alleges that this influenced the jury and that his trial counsel should have moved for a change of venue. On appeal, he also expands the argument and maintains that pretrial publicity created a greater likelihood that the jury was influenced by prior knowledge of the case. He further enlarges the argument contained in his Rule 37.1 petition by alleging that one of the jurors was a grade-school teacher of his wife, the victim's mother.

We have repeatedly held that “the decision of whether to seek a change of venue is largely a matter of trial strategy and is therefore not an issue to be debated under Rule 37.” *Shadwick v. State*, 2017 Ark. App. 243, at 4, 519 S.W.3d 722, 727–28. Additionally, trial counsel cannot be said to be ineffective for failing to make a motion or argument when an appellant fails to show that the motion or argument would have been meritorious. *E.g., id.* at 5, 519 S.W.3d at 728. Appellant bears the burden of providing facts that affirmatively support his claim of prejudice. *E.g., Jones v. State*, 2014 Ark. 448, at 6, 486 S.W.3d 743, 748. Conclusory statements and allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant postconviction relief. *E.g., id.* at 6–7, 486 S.W.3d at 748.

Rayburn's attempt to bolster his change-of-venue claim with new factual allegations fails. His petition for postconviction relief makes no mention of pretrial publicity. Likewise, the petition contains no reference to a relationship between his family and an unidentified juror, who Rayburn now alleges was his wife's grade-school teacher. Because he has again expanded and embellished the allegations contained in his Rule 37.1 petition, the alleged

³Rayburn's mother-in-law is the victim's grandmother.

facts cannot be considered in our review of the trial court's denial of postconviction relief. *See, e.g., Gordon*, 2018 Ark. 73, at 9, 539 S.W.3d at 593 (the appellate court is precluded from addressing new factual substantiation added on appeal). Accordingly, we affirm.

For the reasons stated herein, we affirm the circuit court's denial of Rayburn's petition for postconviction relief.

Affirmed.

HARRISON and MURPHY, JJ., agree.

Rodney W. Rayburn, pro se appellant.

Leslie Rutledge, Att'y Gen., by: *Jason Michael Johnson*, Ass't Att'y Gen., for appellee.