

ARKANSAS SUPREME COURT

No. CR 07-683

ROSS LAMAR BURNETT, SR.
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered January 15, 2009

APPEAL FROM THE CIRCUIT COURT
OF DREW COUNTY, CR 2001-55,
HON. SAMUEL B. POPE, JUDGE;
MOTION TO WITHDRAW AS
COUNSEL

AFFIRMED; MOTION GRANTED.

PER CURIAM

In 2001, a jury found appellant Ross Lamar Burnett, Sr., guilty of capital murder and sentenced him to life imprisonment without parole. This court affirmed the judgment. *Burnett v. State*, CR 02-336 (Ark. Jun. 26, 2003) (per curiam). In 2003, appellant filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1, which was denied following a hearing on the merits.

Counsel previously representing appellant had submitted a brief to this court that was deficient and we ordered rebriefing and issued a writ of certiorari. *Burnett v. State*, CR 07-683 (Ark. Feb. 28, 2007) (per curiam). Motions concerning amendment of the rule 37.1 petition had been included in the record originally provided, but the original petition was not provided until the supplemental record was received. Counsel now representing appellant, Mr. J. Brent Standridge, has submitted a new brief to this court in which he contends that there is no merit to the appeal. In addition, Mr. Standridge has filed a motion in which he requests permission to withdraw as counsel.

Anders v. California, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(j)(1) set

requirements for the withdrawal of counsel for a defendant in a criminal case after a notice of appeal has been filed on the basis that an appeal is without merit. While a “no-merit” brief is typically filed in a direct appeal from a judgment, this court permits the filing of no-merit briefs in postconviction appeals. *See Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005) (per curiam); *Brady v. State*, 346 Ark. 298, 57 S.W.3d 691 (2001) (per curiam). One of our staff attorneys provided appellant with a copy of the no-merit brief and motion as required by Rule 4-3(j), and appellant has not submitted any additional points for reversal.

On a no-merit review of an order entered in a Rule 37.1 proceeding, we consider preliminary procedural matters, including any denial of an evidentiary hearing, and those rulings contained within the order denying postconviction relief, as an appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). Here, the trial court granted a hearing on the petition. It is not clear whether there was a denial of leave to amend the petition, but the issues addressed in the order were limited to those set out in the original petition. Any other issues raised by any amendments were not preserved for appeal.

We first consider whether the trial court’s denial of a motion for appointment of an investigator for the Rule 37.1 proceeding was in error. A proposed amendment to the petition and the motion requesting appointment of an investigator were premised upon appellant’s allegations that one of the jury members had responded falsely concerning whether he knew the victim. Such a claim of juror misconduct is a direct attack on the verdict and not a cognizable claim in a Rule 37.1 proceeding. *Howard*, 367 Ark. at 29, 238 S.W.3d at 33 (citing *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995)). As the motion for an investigator was based upon a claim that was not

cognizable, the trial court did not err in denying that motion.

As to the grounds for relief addressed in the order denying postconviction relief, the trial court ruled as to six claims of ineffective assistance of counsel and one claim that jury selection was not fair and impartial. This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006). 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. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam).

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Harris v. State*, ___ Ark. ___, ___ S.W.3d ___ (Jun. 26, 2008) (per curiam). Under the *Strickland* test, a claimant must show that counsel's performance was deficient, and the claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). Counsel is presumed effective and allegations without factual substantiation are insufficient to overcome that presumption. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam); *see also State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

Appellant's first claim of ineffective assistance alleged that counsel failed to adequately present a defense by showing that appellant stabbed the victim in self defense and that counsel failed to introduce evidence of previous altercations between the victim and appellant or of the victim's

propensity for violence. Appellant's second claim was that counsel had failed to call witnesses that appellant requested he call. The trial court found that appellant failed to provide proof of these allegations at the hearing.

We hold that appellant did not meet his burden to provide factual substantiation for his claims. Although the petition alleged that there were a number of incidents demonstrating altercations with the victim and a number of witnesses who appellant had requested testify, appellant did not present testimony at the hearing, aside from his own, as to any evidence that trial counsel would have had available to present at trial. Appellant did not testify in his own behalf at trial. Appellant presented no witnesses at the postconviction hearing in order to demonstrate that they would have been available as witnesses at his trial and would have provided additional admissible evidence that counsel had failed to utilize.

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. at 91, 263 S.W.3d at 546. The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). It is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). Here, appellant failed to produce any witnesses to demonstrate the alleged evidence or its admissibility. The only witness identified during the postconviction-relief hearing had testified at appellant's trial.

Appellant next claimed that trial counsel was ineffective for failing to prevent admission of

a board introduced as the board the victim used during the altercation. Appellant contended trial counsel should have objected on the basis that the chain of custody was not adequately established. The trial court found that appellant failed to show prejudice from the alleged error.

We hold that appellant did not demonstrate prejudice. The victim's having a board was consistent with appellant's statement introduced at trial and the defense at trial. Although appellant testified at the postconviction-relief hearing in contradiction to his statement introduced at trial, that he did not stab the victim, the evidence presented at trial was consistent with an altercation occurring between appellant and the victim, in which the victim used a stick or board. As to the second prong of the *Strickland* test, the petitioner must show that there is a reasonable probability that the factfinder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, ___ S.W.3d ___ (2008). Here, appellant failed to show how an objection by counsel, even if successful, could have changed the outcome of the trial.

Appellant's next claim of ineffective assistance on which he received a ruling alleged that counsel filed a number of frivolous motions. Again, the trial court found that appellant had failed to demonstrate prejudice. It did not clearly err. Appellant did not argue or show any potential effect on the outcome of the trial as a result of the filing of the motions.

Appellant also contended counsel was ineffective for failing to request defense investigators or experts. The trial court found appellant failed to meet his burden of proof to show that further investigation would have produced additional evidence to support the defense. Appellant complained that all investigators in the case were employed by the State, but he did not allege facts to show that, had counsel retained independent investigators, the investigation would have produced results that could have changed the outcome of the trial. Without a showing as to the witnesses or

evidence that would have been discovered through further investigation, appellant failed to show prejudice. *See Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001).

Further, appellant did not provide a basis on which counsel could have supported a motion for an investigator. *See Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993) (holding that a motion for an expert must be supported by a showing of ascertainable need). Counsel is not ineffective for failing to make an argument that is meritless. *Small*, 371 Ark. at 253, 264 S.W.3d at 517.

In appellant's last claim of ineffective assistance, he contends that counsel misled the jury by references during opening statements as to the victim's having struck another individual with a board and to warnings shouted during the altercation between appellant and the victim. The trial court found that there was no showing of confusion. As the no-merit brief notes, appellant indicated during the hearing that he had abandoned his claims as to improper arguments to the jury. Moreover, even if counsel's opening statement was not entirely consistent with the evidence presented, his closing statement and the jury instructions both adequately addressed that issue. As to the references by counsel to the victim's altercation with another individual, those statements were clearly intended to portray the victim as having a propensity for violence, rather than implying that appellant was the aggressor, as the claim in the petition asserted. Thus, this claim has no merit.

Finally, appellant alleged that the jury was not fair and impartial. The trial court found in its order denying postconviction relief that appellant had presented no evidence in support of the claim. As noted above, the claim, which was premised on a juror or jurors responding falsely in voir dire, is not one that is cognizable in a proceeding under Rule 37.1. We, therefore, affirm the denial of postconviction relief and grant Mr. Standridge's motion to withdraw.

Affirmed; motion granted.