OFFICIAL ARKANSAS
SUPREME COURT OPINION

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SUPREME COURT OF ARKANSAS

No. CR11-373

CARLOS KECK

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 5, 2012

APPEAL FROM THE SALINE COUNTY CIRCUIT COURT
[NO. CR-06-669-3]

HON. GRISHAM PHILLIPS, JUDGE

AFFIRMED.

KAREN R. BAKER, Associate Justice

Appellant Carlos Andrew Keck appeals the order of the Saline County Circuit Court denying his petition for postconviction relief under Rule 37.1 of the Arkansas Rules of Criminal Procedure. After an evidentiary hearing, the circuit court denied Keck's petition. Keck argues on appeal that the circuit court erred in denying his petition, which asserted that his trial attorney was ineffective for not objecting or making an attempt to limit expert testimony that he alleges improperly bolstered the victim's testimony. We have jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(8) (2011). We hold that the circuit court properly denied Keck's petition for Rule 37.1 relief, and we affirm.

On September 21, 2006, Keck was charged with the rape of his minor adopted stepdaughter, J.K. In his first trial, the jury deadlocked, and the court declared a mistrial. Upon retrial, a jury convicted Keck of the rape of J.K. and sentenced him to twenty-five years' imprisonment in the Arkansas Department of Correction. The court of appeals

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affirmed on direct appeal, and the relevant facts are set forth in that opinion. *See Keck v. State*, 2009 Ark. App. 559.

On November 20, 2009, Keck filed a petition for postconviction relief pursuant to Rule 37.1. He asserted in his petition that his trial counsel was ineffective because she did not object as hearsay to certain testimony of Dr. Jerry Jones, a pediatrician who examined the victim and testified as an expert witness for the prosecution in the second trial. The circuit court held a hearing on the petition and entered an order on January 28, 2011, denying Keck's petition. From this order, Keck brings this appeal.

We will not reverse a circuit court's denial of postconviction relief unless the decision is clearly erroneous. *Montgomery v. State*, 2011 Ark. 462, 385 S.W.3d 189. A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made. *Id.*

In reviewing a claim of ineffective assistance of counsel, we consider the totality of the evidence. *Id.* Under our standard of review, we assess whether counsel's performance was effective under the two-prong standard that the United States Supreme Court articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.*

To prove a claim of ineffective assistance of counsel, a petitioner must show (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that counsel's particular errors "actually had an effect on the defense." *Lee v. State*, 2009 Ark. 255, at 3, 308 S.W.3d 596, 600 (quoting *Strickland*, 466 U.S. at 693). The question in determining whether an attorney rendered constitutionally ineffective assistance of counsel is "whether the

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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." *Id.*

There is a strong presumption that the trial counsel's representation falls within the wide range of reasonable professional assistance. *Id.* To overcome the presumption, the petitioner must identify specific acts and omissions that, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.* According to the second prong of the *Strickland* test, even if counsel's conduct is shown to be professionally unreasonable, the judgment will stand unless the petitioner can demonstrate that the error had an actual prejudicial effect on the outcome of the proceeding. *Id.* (citing *Strickland*, 466 U.S. at 691). The petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 4, 308 S.W.3d at 601 (quoting *Strickland*, 466 U.S. at 694). To prevail under *Strickland*, a claim of ineffective assistance of counsel must satisfy both prongs of the *Strickland* test. *State v. Brown*, 2009 Ark. 202, 307 S.W.3d 587.

As noted above, Keck was tried twice for the alleged offense. Dr. Jones testified in the second trial but not the first. Keck contends that his trial counsel's failure to object to or limit Dr. Jones's testimony rendered her assistance ineffective and resulted in his conviction.

Dr. Jones testified at trial that the victim did not have a physical injury, but that "[m]ost examinations of sexually abused girls are normal." The following exchanges also occurred during the State's direct examination of Dr. Jones.

> MS. BUSH (PROSECUTOR): Would it be fair to say then that her physical exam was consistent with the history that she gave?

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> DR. JONES: Yes. And that, in my diagnosis I recorded sexual abuse suspected on the basis of the history provided to us, the exam was normal. A normal exam is consistent with the history. This is in my clinic note.
>
> . . . .
>
> MS. BUSH: Doctor, is there anything about her medical history at all that discredits, or anything about her medical condition that discredits the history that she gave you?
> DR. JONES: I didn't take the history but there's nothing about the condition that discredits the history that we were given.

Dr. Jones gave the following testimony during cross-examination regarding the form he filled out related to the examination:

> MS. REYNOLDS (DEFENSE ATTORNEY): [I]n this case what you filled out said, it says sexual assault suspected based on available history is what you marked.
> DR. JONES: That is correct.
> MS. REYNOLDS : Okay. Not physical findings.
> DR. JONES: That's correct.
> MS. REYNOLDS : It also says, physical laboratory findings of sexual abuse assault are absent.
> DR. JONES: That's correct.
> MS. REYNOLDS : Okay. But you also marked that that's still consistent because of the history. Is that correct?
> DR. JONES: I said the absence of findings is still consistent with the history.
> MS. REYNOLDS : Okay. With the history. Okay.
> DR. JONES: And it further says, the absence of findings does not negate the history.

Keck urges that the failure to object to the foregoing testimony renders his counsel's representation ineffective. Keck relies primarily on two cases: *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987) and *Purdie v. State*, 2010 Ark. App. 658, 379 S.W.3d 541. These cases are distinguishable.

In *Johnson*, the court noted that the expert had conveyed to the jury his opinion that the victim was telling the truth; however, the court held that the error was in admitting the expert's opinion that "based on the history that this child gave me . . . an act had occurred that

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I considered detrimental to this child's health." *Johnson*, 292 Ark. at 639, 732 S.W.2d at 821. The court expressly defined the issue as follows: "The question here is whether such an opinion may be expressed if it is based on nothing but the 'history' given by the child." *Id.* The court in *Johnson* did not predicate its reversal on an error in admitting the expert's opinion of the victim's truthfulness. However, we have stated that "it is error for the court to permit an expert, in effect, to testify that the victim of a crime is telling the truth." *Hill v. State*, 337 Ark. 219, 224, 988 S.W.2d 487, 490 (1999) (citing *Logan v. State*, 299 Ark. 255, 773 S.W.2d 419 (1989); *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986); *Johnson*, 292 Ark. 632, 732 S.W.2d 817).

In *Purdie*, the court of appeals held that the circuit court abused its discretion in admitting the expert testimony of a forensic examiner that the victim's testimony was not fabricated or coached. *Purdie*, 2010 Ark. App. 658, at 10, 379 S.W.3d at 547. In *Purdie*, the court of appeals discussed its prior decision in *Cox v. State*, 93 Ark. App. 419, 220 S.W.3d 231 (2005). In *Cox*, the court of appeals reversed the trial court's admission of expert testimony where a forensic examiner testified, "I believe the interview tape that the jury has seen to be highly credible," and "I believe her to be credible, as credible as any child I've believed to be credible." *Cox*, 93 Ark. App. at 421–22, 220 S.W.3d at 233.

In the instant case, Keck asserts that Dr. Jones opined that the victim was telling the truth and gave a diagnosis of rape. Dr. Jones stated, "In my diagnosis I recorded sexual abuse is suspected on the basis of history provided to us, the exam was normal." He did not give a diagnosis of rape nor did he testify that the child was telling the truth. Rather, in his testimony

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regarding the victim's truthfulness, he stated that the lack of physical findings did not discredit her history. The doctor did not testify that he believed the victim had been sexually abused, and he did not comment directly on the veracity of the victim.

The failure of defense counsel to object to or otherwise attempt to limit Dr. Jones's testimony was not ineffective assistance. Trial counsel's performance did not fall below an objective standard of reasonableness. Because Keck fails to meet the first prong under *Strickland*, we need not consider the second prong.

Affirmed.

Gregory E. Bryant, for appellant.

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.