

SUPREME COURT OF ARKANSAS

No. CR11-539

MICHAEL GILLILAND

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered April 19, 2012

APPEAL FROM THE HOT SPRING
COUNTY CIRCUIT COURT,
[NO. CR2008-243-2]HONORABLE PHILLIP H.
SHIRRON, JUDGEAFFIRMED.**JIM HANNAH, Chief Justice**

Michael Gilliland appeals an order of the Hot Spring County Circuit Court denying his Rule 37 petition for postconviction relief. Gilliland asserts that the circuit court erred in denying his petition because his counsel was ineffective for failure to make specific and timely objections to the State's rebuttal testimony. We find no error and affirm.

Gilliland was convicted of the rape and second-degree sexual assault of his fourteen-year-old stepdaughter, M.M., and was sentenced to life imprisonment and twenty years, respectively. This court affirmed his conviction and sentence. See *Gilliland v. State*, 2010 Ark. 135, ___S.W.3d ___.

The effectiveness of counsel is assessed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *Polivka v. State*, 2010 Ark. 152, at 8, ___ S.W.3d ___, ___. "The benchmark for judging any claim of ineffectiveness must be 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.” *Strickland*, 466 U.S. at 686.

Under *Strickland*, a convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction has two components. *Strickland*, 466 U.S. at 687. The defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment and that the deficient performance prejudiced the defense. *Id.* This requires petitioner to show that counsel’s errors were so serious as to deprive him or her of a fair trial, “a trial whose result is reliable.” *Id.* Petitioner bears the burden of identifying 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.” *Isom v. State*, 2010 Ark. 495, at 2–3. In appeals of postconviction proceedings, this court will not reverse a circuit court’s decision granting or denying postconviction relief unless it is clearly erroneous. *State v. Brown*, 2009 Ark. 202, at 8, 307 S.W.3d 587, 593.

Gilliland argues that trial counsel was ineffective for failure to make timely and specific objections to rebuttal testimony offered by the State regarding Gilliland’s treatment of M.M. and J.M., M.M.’s older sister, on a trip from Virginia to Arkansas. He asserts that trial counsel knew that his treatment of J.M. on the trip was not relevant to the charges and that it was intended to inflame the jury against him. He argues that trial counsel should have objected based on relevance, specifically under Arkansas Rules of Evidence 403 and 404(b). Gilliland further argues that he received the maximum sentences available on the charges evidencing that the jury was prejudiced by this improper rebuttal evidence.

In his testimony at trial, Gilliland introduced the subject of the Virginia trip and his treatment of J.M. and M.M. In response to a question regarding his relationship with J.M. and M.M., Gilliland provided a long, rambling narrative that included a detailed discussion of the trip to Virginia and his treatment and discipline of M.M. and J.M. during the course of that trip. He testified that he had confined J.M. to the car but denied that he had deprived her of food or otherwise mistreated her.

After the defense rested, the State told the court that it would put Gilliland's ex-wife M.L. on the stand to rebut Gilliland's testimony that he did not know how to make methamphetamine. Gilliland's counsel objected, asserting that this was a "side issue." The circuit court overruled the objection concluding that Gilliland had opened the door to the issue and that it had been openly discussed in prior testimony. When put on the stand, both M.L. and J.M. testified without objection to Gilliland's treatment of J.M. during the trip from Virginia to Arkansas. Their testimony rebutted a number of assertions Gilliland made regarding J.M.'s care. Gilliland's counsel objected twice during the course of the State's rebuttal case, both times arguing that a response was beyond the scope of the question. Both objections were sustained. Gilliland argues that his counsel were ineffective for failure to provide timely and specific objections to stop the rebuttal inquiry into his treatment of J.M. on the return trip.

To establish ineffective assistance of counsel based on failure to object, this court has held that it is not enough to show that a failure to object prevented an issue from being addressed on appeal. The *Strickland* test requires a showing of "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." "[T]he standard for judging the effectiveness of counsel requires a showing of more than the failure to raise an issue; the petitioner must establish

prejudice at trial under *Strickland*.” Moreover, to the extent that appellant’s argument is based on receiving a more severe sentence than he would have had the jury sentenced him, we note that a claim of prejudice based on the severity of the sentence is an issue for a plea for executive clemency and is unavailing in a Rule 37.1 petition.

Atkins v. State, 2011 Ark. 398, at 3–4. Had counsel made the objections Gilliland asserts should have been made, they would have been properly overruled because Gilliland himself introduced the issue of the Virginia trip and his treatment of J.M. and thus opened the door to the very testimony he now finds objectionable. An appellant suffers no prejudice from the admission of the testimony where he or she opens the door to the line of questioning. *Edwards v. Stills*, 335 Ark. 470, 503, 984 S.W.2d 366, 383 (1998). The showing of prejudice required under *Strickland* is lacking. We find no merit to Gilliland’s claims of ineffective assistance of counsel.

Affirmed.