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SUPREME COURT OF ARKANSAS

No. CR 11-216

JERMIKO V. JOHNSON APPELLANT v. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 24, 2012 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT, CR 08-86, HON. JAMES O. COX, JUDGE AFFIRMED.

PER CURIAM

In 2009, appellant Jermiko V. Johnson was found guilty by a jury of sexual assault in the second degree and sentenced as a habitual offender to serve a term of 288 months' imprisonment. The Arkansas Court of Appeals affirmed. *Johnson v. State*, 2010 Ark. App. 700.

In 2011, appellant filed in the trial court a timely, verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The petition was denied, and appellant brings this appeal.

This court has held that it will reverse the circuit court's decision granting or denying postconviction relief only when that decision is clearly erroneous. *See Springs v. State*, 2012 Ark. 87, ___ S.W.3d ___; *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007); *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). We have said, "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." *Williams*, 369 Ark. at 107, 251 S.W.3d at 292 (quoting *Howard*, 367 Ark. at 26, 238 S.W.3d at 31).

When considering an appeal from a circuit court's denial of a Rule 37.1 petition, the sole

question presented is whether, based on a totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), the circuit court clearly erred in holding that counsel's performance was not ineffective. *Anderson v. State*, 2011 Ark. 488, ___ S.W.3d ___; *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Howard*, 367 Ark. 18, 238 S.W.3d 24.

The benchmark for judging a claim of ineffective assistance of counsel 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. Pursuant to *Strickland*, we assess the effectiveness of counsel under a two-prong 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*, 369 Ark. 104, 251 S.W.3d 290. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.* A petitioner making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Abernathy v. State*, 2012 Ark. 59, ___ S.W.3d ___ (per curiam). 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*, 367 Ark. 18, 238 S.W.3d 24. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* The language "the outcome of the trial," refers not only to the finding of guilt or innocence, but also to possible prejudice in sentencing. *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.* "[T]here 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." *Strickland*, 466 U.S. at 697.

Appellant raises three points on appeal. To understand the claims, a brief summary of the events giving rise to the charge against appellant is needed.

A.G. testified at trial that, at the time of the offense appellant, was her mother's boyfriend. She said that when she was nine years old, appellant had sat down beside her while she was watching television. He put his hand into her underwear, inserted his finger into her vagina, and told her that he would hurt her mother if she told anyone what he had done. A.G. testified that she resisted and eventually fled to the bathroom where she found that she was bleeding. After A.G. told her aunt and mother what had happened, appellant was arrested.

As his initial ground for reversal of the order denying postconviction relief, appellant contends that he was not afforded effective assistance of counsel at trial because his attorney failed to subpoena certain witnesses. He first contends that an unnamed doctor who had treated both the victim and her mother could have testified that the mother never told him about "the incident as she alleged at trial." He further asserts that "no evidence of the allegation was there

during the routine scheduled visit during that period." (Presumably, appellant is alleging that the doctor did not find physical proof of the sexual assault.) Appellant also contends that both the victim and her mother were incompetent witnesses and had a history of "exact and similar" hallucinogenic allegations. The claims did not merit granting postconviction relief under the *Strickland* standard.

If a petitioner claims ineffective assistance based on a failure to call a witness, the petitioner must name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Fernandez v. State*, 2011 Ark. 418, ___ S.W.3d ___ (per curiam). The burden was on appellant to establish with substantive, factual support for his claims that the doctor could have provided admissible, relevant testimony or impeachment information. Counsel is presumed to be competent, *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 499 (1992), and conclusory claims are not sufficient to overcome that presumption. *Greer v. State*, 2012 Ark. 158 (per curiam). Appellant's bald assertions that there was a doctor who could have testified to the mother's inconsistent statements or the mother's and victim's hallucinations falls far short of establishing that there was a particular witness who could have offered testimony such that the fact-finder would have had a reasonable doubt as to appellant's guilt.

Appellant also argues in his brief that his attorney should have subpoenaed "the school superintendent of the records," who could have testified that the victim did not call there and report her allegation as she testified at trial to doing. He contends that the school superintendent's testimony, coupled with that of the doctor who knew that the victim and

mother had made false allegations in the past, would have been sufficient to produce a not-guilty verdict. Appellant also makes reference to the mother's failure to turn over her daughter's blood-soiled underwear to the doctor, the school, or the police as proof of his innocence.[1]

As with appellant's previous argument concerning the failure of the doctor to be called as a witness, appellant has not shown that the school superintendent could have offered any specific testimony that would have resulted in the jury's forming a reasonable doubt as to appellant's guilt. In making a determination of counsel's effectiveness, this court considers the totality of the evidence. *Sartin v. State*, 2012 Ark. 155, ___ S.W.3d ___. The evidence in this matter was sufficient to find appellant guilty of the offense. The assessment of the credibility of the victim and her mother was a matter for the jury, *see Matthews v. State*, 2011 Ark. 397 (per curiam), and appellant did not show in his petition that the school superintendent or the doctor could have altered the jury's conclusion that the victim and her mother were credible.

In his second ground for reversal of the order, appellant argues that there was prosecutorial misconduct at his trial in that the prosecution purposely neglected its duty to have the Arkansas Department of Human Services "involve its resources in the matter, opting instead to prosecute an offense" on false allegations. Appellant did not state a ground for postconviction relief. Appellant did not make a showing that the prosecutor was obligated to allow the Arkansas Department of Human Services to intervene rather than filing criminal charges. A claim of prosecutorial misconduct, standing alone, is not grounds for relief under Rule 37.1. *Jones v. State*, 2011 Ark. 523 (citing *Travis v. State*, 2010 Ark. 341 (per curiam)).

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[1]The victim's mother was questioned by the defense at trial about her decision to discard the underwear.

Finally, appellant argues that the prosecution knew that the victim and her mother were mentally incompetent, and the use of their testimony to convict him of the offense was a denial of due process and equal protection of law. The claim must fail, as appellant offered nothing to demonstrate that the victim and her mother were mentally incompetent. Bare assertions of a constitutional violation by the prosecution are not enough to establish a violation of due process or equal protection of law. *See Payton v. State*, 2011 Ark. 217 (per curiam).

Because appellant failed to raise any ground that entitled him to relief under our postconviction rule, the circuit court did not err in denying the petition. The court was not required to hold a hearing on the petition, as there was no substantial ground for relief that appellant supported with facts. The burden is entirely on the claimant to provide facts that affirmatively support his claims of prejudice. *Payton*, 2011 Ark. 217.

Affirmed.