

SUPREME COURT OF ARKANSAS

No. CR11-1204

THEODIS MITCHELL, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 31, 2012

APPEAL FROM THE ARKANSAS
COUNTY CIRCUIT COURT,
NORTHERN DISTRICT,
[NO. CR09-133]

HONORABLE DAVID G. HENRY,
JUDGE

AFFIRMED.

JIM HANNAH, Chief Justice

Theodis Mitchell appeals an order of the Arkansas County Circuit Court denying his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1. Mitchell was convicted of commercial burglary, terroristic threatening, fleeing, and criminal mischief and was sentenced to a total of 420 months' imprisonment. Mitchell's convictions and sentence were affirmed on appeal. *See Mitchell v. State*, 2011 Ark. App. 397. Mitchell then filed a petition for post conviction relief pursuant to Rule 37.1. The circuit court found that no hearing was necessary because the petition and the files and records in the case conclusively showed that Mitchell was entitled to no relief. The court entered written findings to that effect pursuant to Arkansas Rule of Criminal Procedure 37.3(a) (2011). Mitchell asserts that the circuit court erred in denying his petition and in failing to hold a hearing. We find no error and affirm. Our jurisdiction is pursuant to Arkansas Supreme

Court Rule 1-2(a)(2) (2011).

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, ___ 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.

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The petitioner bears the burden of overcoming a presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Howard v. State*, 367 Ark. 18, 32, 238 S.W.3d 24, 35 (2006). 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. *Isom v. State*, 2010 Ark. 495, at 2–3, ___ S.W.3d ___, ___. Conclusory statements that counsel was ineffective cannot be the basis of postconviction relief. *Anderson v. State*, 2011 Ark. 488, at 5, ___ S.W.3d ___, ___. 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.

Mitchell's petition states as follows:

GROUND FOR RELIEF

Ground 1. Defense Counsel was Constitutionally Ineffective Because

- a. He was not adequately prepared to represent the Defendant/Petitioner in that defense counsel did not renew his motion for a directed verdict to challenge sufficiency of the evidence, and therefore did not preserve the issue on appeal.
- b. He did not submit any lesser included offense instructions, which would have given the option for the jury to consider lesser punishment to administer to him.

Mitchell further asserts in his petition that he “believes that the outcome of his trial would have been much different if not for the performance of his trial counsel and that he should be granted a new trial.” With respect to a hearing on a Rule 37 petition, this court has stated:

It is undisputed that the trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. See *Bilyeu v. State*, 337 Ark. 304, 987 S.W.2d 277 (1999); *Luna-Holbird v. State*, 315 Ark. 735, 871 S.W.2d 328 (1994). This court has previously interpreted Rule 37.3 to “provide that an *evidentiary hearing should be held* in a postconviction proceeding *unless* the files and record of the case conclusively show that the prisoner is entitled to no relief.”

Sanders v. State, 352 Ark. 16, 25–26, 98 S.W.3d 35, 41 (2003) (emphasis in original). Stated another way, “the circuit court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit.” *Bienemy v. State*, 2011 Ark. 320, at 5.

In his Rule 37 petition, Mitchell asserts the conclusion that counsel was ineffective for failure to renew his motion for a directed verdict and for failure to offer instructions on lesser-included offenses. Mitchell fails to offer facts to support his conclusion that the failure to move for a directed verdict and offer instructions on lesser-included offenses in this case

prejudiced him or his defense. Petitioner must show that counsel was ineffective and that prejudice so severe resulted from counsel's error that the petitioner was deprived of a fair trial. Where it is asserted that counsel was ineffective for failure to make a motion or argument, the petitioner must show that the motion or argument would have been meritorious because the failure to make an argument that is meritless is not ineffective assistance of counsel. See *Woody v. State*, 2009 Ark. 413, at 5. In the present case, Mitchell had to show that there was merit to a motions for directed verdict and instruction on lesser-included offenses. Bare assertions of ineffectiveness are not enough. Conclusory statements that counsel was ineffective will not sustain a Rule 37 petition. *Anderson*, 2011 Ark. 488, at 5, ___ S.W.3d at ___.

Affirmed.