Cite as 2010 Ark. 295

SUPREME COURT OF ARKANSAS

No. CR 08-1154

	Opinion Delivered June 17, 2010
MARQUES D. TAVRON Appellant v. STATE OF ARKANSAS Appellee	APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, CR 2006-2376, HON. CHRISTOPHER PIAZZA, JUDGE AFFIRMED.

PER CURIAM

In 2006, a jury found appellant Marques D. Tavron guilty of capital murder and sentenced him to life imprisonment without parole. On appeal, this court affirmed the judgment. *Tavron v. State*, 372 Ark. 229, 273 S.W.3d 501 (2008). Counsel for appellant timely filed in the trial court a verified petition under Arkansas Rule of Criminal Procedure 37.1 (2009) that was denied. Appellant appeals the order. We find no error and affirm the denial of postconviction relief.

In his petition, appellant alleged ineffective assistance of trial counsel. The claim was based upon appellant's assertion that counsel failed to appropriately argue for admission of a written statement that appellant had given to a fellow jail inmate, Ray Lewis. This statement concerned the events leading up to the murder, and appellant contends that it should have been admitted for the purpose of impeaching Lewis. Lewis testified that appellant had admitted to him while in jail that the murder was planned and that appellant had actively

participated in those plans. Appellant asserted that the statement would have been admissible on the basis that it was necessary to provide the complete statement given to Mr. Lewis. The trial court found that the statement would not have been admissible, that use of the statement would not have made cross-examination more effective, and that the evidence of appellant's guilt was overwhelming and admission of the statement would not have changed the outcome of the trial.

Our standard of review on appeal on a claim of ineffective assistance of counsel applies the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *French v. State*, 2009 Ark. 443 (per curiam). Taking into consideration the totality of the evidence, we determine whether the trial court clearly erred in holding that counsel's performance was not ineffective. *Id.* 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. *Britt v. State*, 2009 Ark. 569, ___ S.W.3d ___ (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 so as to deprive him of a fair trial. *French*, 2009 Ark. 443, at 3; *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam).

Appellant had the burden to prove his allegations for postconviction relief. *Viveros v. State*, 2009 Ark. 548 (per curiam). Counsel is presumed effective, and allegations without factual substantiation are insufficient to overcome that presumption. *Id.* In order to prevail

on any claim of ineffective assistance, a petitioner is required to demonstrate prejudice arising from the alleged error that impacted the outcome of the trial. *See Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam) (actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice). A petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's alleged errors. *Britt*, 2009 Ark. 569, at 4. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* The trial court here was not clearly erroneous in determining that appellant failed to meet his burden of demonstrating prejudice.

On appeal, appellant argues that the written statement, if admitted, would have bolstered appellant's claim made in his recorded statement to police that he was forced by his codefendant to participate in the crime. This written statement that was given to Lewis was largely consistent with the recorded statement to police and was inconsistent with the statement Lewis claimed appellant later made to him. Appellant urges that the written statement was needed to show how Lewis knew details of the crime because the prosecution had pointed to Lewis's knowledge of details in closing argument as an indication of reliability of the statement Lewis claimed appellant later made. Appellant asserts that testimony from Ray Lewis was pivotal because the State emphasized that testimony to fill in gaps in the evidence. Appellant contends that, because the written statement was a missing portion of a confession, it would have had a most significant impact on the outcome of the trial.[1]

[1] Appellant also argues in his reply brief that appellant was effectively denied the right to cross-examine the witness because the statement was not introduced. An issue, however,

We cannot say that the trial court was clearly erroneous in concluding that there was overwhelming evidence of appellant's guilt apart from the testimony provided by Ray Lewis. Appellant does not dispute that there was an abundance of physical evidence that the murder was committed, or that appellant was involved in the crime. He does dispute that there was evidence, aside from the testimony Lewis provided, of appellant's participation in the planning of the crime. Our review of the record, however, discloses strong evidence from which the jury could have concluded that appellant actively and willingly participated in both the planning and execution of the crime.

Appellant's statement was that he was forced by Martinous Moore, one of his codefendants, at gunpoint and through threats to appellant's mother, to leave in the victim's car, destroy evidence, and remain silent about the crime. There was a witness, however, who testified that appellant came up to him while Moore was in the car with the victim and announced that the victim was about to be "hit," showing a gun tucked into his pants.

In addition, another witness testified that she heard a conversation in which appellant and his codefendants discussed setting the victim up for a "lick." She testified that, prior to the victim's arrival at the parking lot where he was abducted, appellant received a number of phone calls from the codefendant who was arranging the drug deal. She also testified that appellant left the motel room to go to the victim's car only after Moore had already left.

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may not be raised for the first time in a reply brief. *Dunlap v. State*, 2010 Ark. 111 (per curiam).

These actions were consistent with appellant's willing participation in planning and acting on plans to kidnap or rob the victim.[2]

A confession is typically very highly probative evidence, but in this case the particular confession was less probative than under other circumstances. Ray Lewis was not the only witness who provided evidence from which the jury could infer intent. Even though the prosecution may have emphasized the testimony in closing argument, Lewis's credibility was questionable as a felon. Moreover, counsel did effectively cross-examine Lewis by obtaining an admission that appellant had provided the statement to Lewis, with its details of the crime, even though the written statement was not admitted into evidence.

The trial court did not commit reversible error in finding that appellant failed to demonstrate the prejudice necessary under the second prong of the *Strickland* test. There was other evidence of both appellant's willing participation in, and his intent to commit, the offense that was the underlying felony. As a result, appellant did not show that there was a reasonable probability that the fact-finder's decision would have been different absent counsel's alleged error.

Affirmed.

CORBIN, J., not participating.

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[2] The jury was instructed as to accomplice liability for a capital murder charge stemming from a murder committed during the course or commission of either kidnapping or aggravated robbery.