Cite as 2009 Ark. 260 (unpublished)

ARKANSAS SUPREME COURT

No. CR 08-550

STEVEN SPARKS Appellant v. STATE OF ARKANSAS Appellee	**Opinion Delivered** May 7, 2009 APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, CR 2004-323, HON. WILLIAM A. STOREY, JUDGE AFFIRMED.

PER CURIAM

In 2005, a jury found appellant Steven Sparks guilty of three counts of rape and three counts of terroristic threatening and sentenced him to an aggregate term of 552 months' imprisonment. The Arkansas Court of Appeals affirmed. *Sparks v. State*, CACR 05-600 (Ark. App. Jun. 27, 2007). Through counsel, appellant filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1 that was denied. He now brings his appeal of the order denying postconviction relief.

Appellant raises five points of error on appeal. In the first four points, appellant alleges that the trial court erred in failing to find ineffective assistance of counsel. He first asserts ineffective assistance by counsel's failure to object to restraints at trial or request a jury instruction as to the restraints. Next, appellant asserts ineffective assistance by counsel's failure to investigate and subpoena witnesses. Appellant's third point asserts ineffective assistance by counsel's failure to investigate and seek a cure for discovery issues as to missing portions of

video tapes of the victims. Appellant's last claim of ineffective assistance asserts counsel's failure to investigate the law and act appropriately concerning speedy trial and other procedural issues involving appellant's incarceration in another state, the power to subpoena witnesses who were out of state, and procedure as to a motion for directed verdict. In appellant's last point on appeal, he asserts error in the trial court's failure to consider a motion to submit an amended extended petition.

We note initially that appellant's brief is deficient, in that he fails to abstract the testimony from the trial record. In determining a claim of ineffective assistance of counsel, the totality of the evidence before the factfinder must be considered. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). In addition, appellant raises a claim concerning sufficiency of the evidence at trial through his allegations concerning a directed verdict. Under other circumstances, we would order appellant to submit a compliant brief in accord with Arkansas Supreme Court Rule 4-2(b)(3). We do not order rebriefing, however, as it is clear here that our analysis of appellant's points on appeal do not require reference to the record. Moreover, we need not resort to the trial record when addressing appellant's sufficiency-of-the-evidence challenge because the court of appeals' decision on direct appeal includes a summary of the evidence introduced at trial.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on

the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007) (per curiam). 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. *Id.*

A petitioner making a claim of ineffective assistance must first show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Harrison v. State*, 371 Ark. 474, 268 S.W.3d 324 (2007). In doing so, the claimant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* As to the second prong of the test, the petitioner must show that there is a reasonable probability that the fact-finder's decision would have been different absent counsel's errors. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

In appellant's first point on appeal, he alleges ineffective assistance of counsel based upon trial counsel's failure to object to appellant's restraints at trial or to request a jury instruction concerning the restraints. We do not reach the merits of the claim. The record from the postconviction proceedings does not indicate that the issue was argued below and the trial court clearly did not provide a ruling on the issue in its order. This court has repeatedly stated that we will not address arguments, even constitutional arguments, raised for

the first time on appeal. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005); *see also Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). An appellant has an obligation to obtain a ruling on any issue to be preserved for appeal. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

In appellant's second point on appeal, he alleges ineffective assistance because trial counsel failed to investigate and subpoena witnesses. The trial court found that trial counsel had not subpoenaed or called certain witnesses, that the decision not to call the witnesses was based upon counsel's professional judgment that the testimony would not have been beneficial to the defense, and that the decision did not fall below an objective standard of reasonableness. The trial court further found that, as to each alleged error asserted, appellant had failed to demonstrate that there was a reasonable probability that the result of the proceedings would have been different absent the error.

The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice that denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987). Trial counsel must use his or her best judgment to determine which witnesses will be beneficial to his client and, in assessing the attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment that experienced advocates could endlessly debate. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). On appeal, appellant contends that counsel did not exercise diligence in

investigating the potential witnesses or the procedures to obtain testimony from those potential witnesses who were not within the state. We cannot say the trial court clearly erred in determining that appellant failed to establish actual prejudice.

A petitioner carries the burden to prove his allegations for postconviction relief. *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990); *Porter v. State*, 264 Ark. 272, 570 S.W.2d 615 (1978) (holding under prior law). The fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, itself, proof of counsel's ineffectiveness. *Rankin v. State*, 365 Ark. 255, 227 S.W.3d 924 (2006). It is incumbent on a petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Harris v. State*, CR 07-1247 (Ark. June 26, 2008) (unpublished per curiam) (citing *Weatherford v. State*, 363 Ark. 579, 586, 215 S.W.3d 642, 649 (2005)).

Although appellant asserts that a number of witnesses were identified for counsel that could have been interviewed and that testimony from those witnesses would have been beneficial, he did not call those witnesses at the postconviction relief hearing or offer evidence as to what testimony would have been provided at trial. Appellant failed to demonstrate that any of the witnesses that he alleged counsel should have investigated and called at trial would have provided admissible evidence sufficient to meet his burden to show a reasonable probability that the fact-finder's decision would have been different. Appellant provided only conclusory statements that the testimony would have been key to his defense, without a

demonstration as to the testimony that would have been available. Conclusory statements cannot be the basis of postconviction relief. *Id.*; *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

Appellant next contends trial counsel was ineffective for failure to investigate and seek a cure for discovery issues as to missing portions of video tapes of the victims. The State asserts that appellant did not include the claim in his petition or receive a specific ruling as to the issue, although the issue was raised during the proceedings and the trial court did find that counsel requested and was provided full and complete discovery. In any event, as with the previous claim, it is evident that appellant made no demonstration of prejudice. The record contains only conclusory allegations that counsel could have discovered information that would have enabled a more effective confrontation of the witnesses. Appellant never identifies any such information or explains how the witnesses could have been better cross-examined.

As to appellant's final claim of ineffective assistance, that counsel failed to investigate the law and act appropriately concerning speedy trial and other procedural issues involving appellant's incarceration in another state, the power to subpoena witnesses who were out of state, and procedure as to a motion for directed verdict, appellant again failed to carry his burden to show prejudice. Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

Appellant argues that counsel did not adequately research issues concerning his right to be brought to trial within 180 days after appellant filed notice under the Interstate

Agreement on Detainers, Arkansas Code Annotated § 16-95-101 (Repl. 2006). He asserts prejudice because he was not brought to trial within that time frame. However, the time limits are tolled during periods when the prisoner is removed from the custodial place of incarceration to a place other than the demanding jurisdiction. *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983). There was testimony at the postconviction relief hearing that appellant was in another state for a period of time. We cannot say that the trial court clearly erred in finding that appellant failed to show prejudice under the circumstances.

Appellant additionally argues that trial counsel failed to research potential issues concerning compliance by the prosecutor with Arkansas Rule of Criminal Procedure 29.1 as to promptly filing for a detainer. He asserts that the State failed to show compliance with the rule. The burden is not upon the State to demonstrate compliance. Rather, appellant carried the burden to show that any objection would have been meritorious. Trial counsel is not ineffective for failing to make an argument that is meritless. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). As to these claims, and, as previously discussed as to appellant's claim concerning witnesses, appellant clearly failed to demonstrate the alleged errors resulted in prejudice.

As to the last subpoint within this claim, that counsel failed to research the law as to a motion for directed verdict, appellant argues that application of the standard in *United States v. Cronic*, 466 U.S. 648 (1984), is appropriate. The presumption-of-prejudice exception to *Strickland* is recognized in very few cases, which fall within one of three categories, as follows:

(1) where assistance of counsel has been denied completely during a critical stage of the proceedings; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; (3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *See Bell v. Cone*, 535 U.S. 685 (2002). It is not apparent how the situation here falls within one of these categories and appellant does not develop any argument as to how the circumstances fit. This court will not research and develop arguments for appellants. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007).

Here, appellant did not demonstrate that, had counsel moved for directed verdict, the motion should have been granted. As the court of appeals noted in the opinion on direct appeal, appellant's daughter, step-daughter, and son, each testified about being raped by appellant years before and about his threats against them and their mother. Appellant made no showing that the evidence presented against him was not sufficient and the trial court did not clearly err in finding that there was sufficient evidence to support the verdict or that appellant failed to satisfy the second prong of the *Strickland* test.

Finally, appellant alleges error by the trial court for failure to consider his motion to submit an extended petition and to provide a ruling on the issues raised in the motion. The trial court appears to have considered the motion when appellant raised his concerns in the hearing, but found that the issues raised in the motion were cumulative.

We review a circuit court's denial of leave to amend a Rule 37.1 petition by an abuse-of-discretion standard. *Butler v. State*, 367 Ark. 318, 239 S.W.3d 514 (2006) (per curiam). We

determine whether the trial court's decision was arbitrary or groundless. *Id*. Here, it was not clear that the proposed amendment was denied, but to the extent that it was denied, the denial was not groundless. The issues raised in the motion concerned discovery and the allegedly missing audio from video tapes of the victim's statements, while the petition raised only broad claims of failure to investigate. The issues in the motion were more specific, but, as discussed in the previous point, the trial court's order did appear to address the issues. As already noted, it is the petitioner's burden to obtain a ruling on any omitted issue, in any case.

Affirmed.