

# ARKANSAS SUPREME COURT

No. CR 07-1247

EDDY STANLEY HARRIS, JR.  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered June 26, 2008

APPEAL FROM THE CIRCUIT COURT  
OF PULASKI COUNTY, CR 2003-2315,  
HON. JOHN W. LANGSTON, JUDGE

AFFIRMED.

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## PER CURIAM

In 2005, a jury found appellant Eddy Stanley Harris, Jr., guilty of two counts of capital murder and sentenced him to two consecutive terms of life imprisonment without parole. This court affirmed the judgment. *Harris v. State*, 366 Ark. 190, 234 S.W.3d 273 (2006). In 2006, appellant timely filed through counsel a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied by the trial court in two separate orders. The initial order found that a number of appellant's claims in the petition were without merit, granted a motion to amend the petition, and ordered a hearing on the remaining allegations in the petition and amendment. In the second order, the trial court found that the remaining allegations were also without merit and denied relief on the petition. Appellant filed a notice of appeal and amended notice of appeal as to the second order, and lodged this appeal.

Appellant raises a single point on appeal in which he contends that the trial court erred by failing to find that trial counsel was ineffective. Within that point, appellant argues that trial counsel failed to subject the State's case to any adversarial testing, that trial counsel was deficient for failure to call a number of witnesses and to contact or interview some of those witnesses, that trial counsel

was ineffective for failing to introduce a police report or cross-examine a detective about the report, that trial counsel was ineffective for failing to object to an in-court identification of the defendant by one of the witnesses, and that trial counsel was ineffective for failing to make an objection to the introduction of a recording of a conversation between appellant and his father.

Appellant raises as ineffective assistance his trial counsel's failure to present any witnesses or effectively contest the State's case. Appellant did not receive a ruling as to that issue, as a separate issue, in the appealed order. 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). To the extent that some parts of that argument were addressed by the trial court in reference to the individual witnesses, those arguments are discussed in turn.

As to specific potential witnesses, appellant first contends that trial counsel should have called appellant's father and Keesha Epting to dispute the testimony of two key witnesses, Johilda Harris and her husband, Michael Ford, concerning statements about appellant's participation in the shootings. The trial court found that trial counsel had made strategic decisions not to call those witnesses and that no potential witness's testimony would have impeached Mr. Ford's testimony.

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, \_\_\_ S.W.3d \_\_\_ (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.*

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 through a showing that petitioner was deprived of a fair trial. *Walker v. State*, 367 Ark. 523, 241 S.W.3d 734 (2006) (per curiam). A petitioner making this claim 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, \_\_\_ S.W.3d \_\_\_ (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*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (March 20, 2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Where the trial court has determined a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then a decision not to call a witness or challenge a statement may not be a proper basis for relief under Rule 37.1. *See Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam). 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).

Here, Johilda Harris and Michael Ford testified at trial concerning conversations with appellant and his father in which appellant failed to deny, and later admitted, his involvement in the murders. At the hearing on the Rule 37.1 petition, appellant's father testified that he was available as a witness to refute that those conversations took place as Ms. Harris and Mr. Ford testified.

Keesha Epting testified that she was called to court for the trial but did not testify, and could have provided an account concerning an occasion when Ms. Harris later recanted her statements to the police about the conversations.

Trial counsel testified that he discussed with appellant whether his father should testify, and made a decision not to call appellant's father because he had been arrested for threatening a witness, had some temper issues, and counsel did not believe that he would make a good witness. The trial court found that trial counsel did not put Ms. Epting on the stand as a matter of trial strategy because Ms. Epting was subpoenaed and counsel was aware of her potential testimony. The trial court reasoned that because Ms. Epting's testimony only concerned Ms. Harris's recanting her statement and did not impeach Mr. Ford's testimony, there was support for reasonable professional judgment as to the decision.

Appellant argues that trial counsel could not have reasonably decided to forego presenting some counter to Ms. Harris's testimony. He contends that Mr. Ford's testimony was not as persuasive as Ms. Harris's because he only testified as to statements that he had heard spoken to his wife in his presence rather than what was said directly to him, and that by refuting Ms. Harris's testimony, Ms. Epting's testimony also refuted Mr. Ford's testimony.

A proceeding on a Rule 37.1 petition does not provide a forum to debate trial tactics or strategy, even if the strategy proves improvident. *Id.* Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). Although another attorney may have chosen a different course, trial strategy, even if it proves unsuccessful, is a matter of professional judgment. *Id.* The trial court did not clearly err in finding

that the decision not to call Ms. Epting was a matter of strategy based upon reasonable professional judgment. Appellant's arguments challenge the prudence of counsel's decision, but are not sufficient to undercut the basis for the decision as reasonable professional judgment. While another attorney may have reached a different conclusion, counsel could have reasonably concluded Ms. Epting's testimony did not refute Mr. Ford's and was not of value.

The trial court's findings as to trial counsel's having made a tactical decision not to call appellant's father and its conclusion that the decision was supported by reasonable professional judgment were also not clearly erroneous. The bases articulated by counsel were sound. The transcript of appellant's father's testimony at the hearing on the Rule 37.1 petition indicates that his presentation on the witness stand was indeed problematic, and those concerns, in combination with counsel's additional concerns about a display of temper and cross-examination concerning an arrest for threatening a witness, provided good support for the decision. Appellant's father's value as a witness was undermined by his relationship to appellant, in any case. The additional concerns provided a reasonable basis for counsel to fear that appellant's father's testimony could harm appellant's case more than help it.

Appellant next contends the trial court erred in determining that trial counsel was not ineffective for failure to call witnesses to impeach Ms. Harris by providing testimony as to her reputation for a lack of truthfulness. Appellant argues that counsel should have called appellant's father and Jackie Cobbs for such testimony. Appellant further contends that Ms. Cobbs could have provided alibi testimony.

The trial court did not provide a ruling specifically as to Ms. Cobbs's testimony concerning Ms. Harris's veracity. Even if the trial court's findings as to other witnesses for that testimony were

applicable, the ruling reflects the same reasonable basis for a tactical decision as in the previous discussion concerning counsel's failure to discredit Ms. Harris's testimony. Mr. Ford's testimony would have remained unchallenged. For the reasons previously discussed, we also agree with the trial court's finding that the decision not to call appellant's father was a matter of trial strategy.

As for Ms. Cobbs's alibi testimony, the trial court found that the decision was once again a matter of trial strategy based upon Ms. Cobbs's reluctance to testify and the fact that her testimony would not clearly provide an alibi for the specific time of the murders. Despite appellant's assertion that Ms. Cobbs's testimony was precise, we agree with the trial court's finding. While Ms. Cobbs indicated that she was aware of appellant and his friends being in the game room of the house all day, she did not have a specific recollection of that time frame to place the appellant in the house. Moreover, we note that trial counsel testified that appellant had told him that he was at the scene of the murder when it occurred. The trial court did not include that testimony as a basis for the ruling, but counsel would certainly have had a reasonable basis not to call any witness for alibi purposes under those circumstances.

Appellant next contends that trial counsel was ineffective for failure to call four witnesses who gave statements to the police that appellant argues excluded appellant as a participant in the murders. Appellant did not present those witnesses at the hearing on the Rule 37.1 petition. He complains that counsel did not interview or speak to these witnesses. He contends counsel could not therefore reasonably have made a decision not to call the witnesses. The trial court found that the witnesses' statements did not exclude appellant.

Appellant failed to carry his burden of proof on this issue because he failed to produce the witnesses at the hearing on the Rule 37.1 petition. Whether counsel committed an error or not by

failing to investigate or failing to call a witness, appellant was required to demonstrate prejudice under the second prong of the *Strickland* test. 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, \_\_\_ S.W.3d \_\_\_ (2007). 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 which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). It is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Weatherford*, 363 Ark. at 586, 215 S.W.3d at 649.

Here, appellant contended that the witnesses would have provided important testimony based upon their statements to the police. He did not show that the witnesses would have been available to testify or would have provided admissible sworn testimony at trial consistent with the statements. Moreover, only one of the four potential witnesses claimed to have seen the murders so as to potentially identify the participants and exclude appellant. Because there was no testimony that established a definitive number of participants present at the shootings and there were bushes at the scene in which some participants may have hidden, the witnesses' testimony did not exclude appellant's participation. In addition, both counsel and one of the investigating officers testified at the hearing on the Rule 37.1 petition that this witness would have had very significant issues concerning her veracity as to previous testimony on an unrelated matter. Under these circumstances, appellant did not demonstrate that he was prejudiced by a failure to call the witnesses.

The same is true as to two additional witnesses that appellant contends trial counsel failed to investigate or call, Vishay Franklin and Cameron Brazwell. Appellant contends that Ms. Franklin

and Mr. Brazwell would have impeached the testimony of Jarvis McKeller. Appellant alleges trial counsel was not diligent in efforts to locate the witnesses so that they could have been subpoenaed for the trial. But, appellant did not produce Ms. Franklin and Mr. Brazwell or demonstrate that, had counsel acted with such diligence, these witnesses would have provided testimony that was sufficient to undermine confidence in the outcome of the trial.

Counsel did make efforts to locate these witnesses, but appellant asserts that he failed to do so with sufficient haste. One of the investigating officers testified that the witnesses were uncooperative, and that one had a lengthy felony history and the other had left the state soon after giving her statement. Appellant did not provide evidence that, had counsel acted with greater diligence to locate the witnesses, those witnesses would have then been available at trial and provided testimony sufficient to raise a reasonable probability that the fact-finder's decision would have been different. His statements to that effect are conclusory. Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). A petitioner must provide factual substantiation for his allegations in order to overcome the presumption against ineffectiveness. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

Appellant next alleges trial counsel was ineffective for failure to call appellant's father to refute testimony of Chandra Baskin that she had been to appellant's house and had met his father. The trial court's ruling was based upon the same reasoning as its previous ruling on the decision not to call appellant's father. For the same reasons as noted above, we affirm that ruling as to this witness, as well.

Next, appellant alleges trial counsel was ineffective because he failed to introduce a police

report and cross-examine a detective concerning the report. Appellant contends that the report would have refuted Ms. Baskin's testimony that she and appellant's codefendant, George Larue Hall, had spent the night in a motel in Conway two weeks after the murders. The report stated that the manager had told investigating detectives that he had no record of the stay.

The trial court found that the detective testified in the hearing on the Rule 37.1 petition that the manager of the motel was uncooperative. The court ruled that appellant had not shown how the alleged error resulted in prejudice. We would agree that, because the detective would have testified that the motel manger was not cooperative, appellant's claim failed to demonstrate that, had trial counsel introduced the report or cross-examined the detective concerning it, there would have been a reasonable probability that the fact-finder's decision would have been different.

Appellant alleges error in that the trial court found trial counsel was not ineffective for failing to make an objection to the in-court identification of appellant by Mr. McKeller and preserve the issue for appeal. In order to succeed on this sub-point, appellant must demonstrate prejudice in that the argument, if preserved, would have been successful on appeal. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Counsel is not ineffective for failing to make an argument that is meritless.

Appellant had filed a motion in limine to suppress Mr. McKeller's in-court identification of appellant based upon an improper pretrial identification from a photo line-up. The motion was unsuccessful and the issue was raised again on direct appeal, but not addressed because counsel did not object at the time the identification was made during trial. The trial court found that a contemporaneous objection would have been overruled and that an appeal of that objection would not have been successful. The court indicated Mr. McKeller identified appellant in the hearing on

the motion and had testified that his identification was from his own memory of having seen the appellant and was not based on the photo line-up.

A challenge to the admission of Mr. McKeller's identification of appellant would likely have received a ruling consistent with that given on the motion and would not have been successful on appeal. The standard of review concerning a trial court's ruling on the admissibility of an in-court identification requires a determination that the ruling is clearly erroneous under the totality of the circumstances. *Mezquita v. State*, 354 Ark. 433, 125 S.W.3d 161 (2003). Reliability is the linchpin in determining the admissibility of identification testimony. *Id.* This court considers six factors in determining reliability, as follows: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; (6) the lapse of time between the alleged act and the pretrial identification procedure. *Id.* Even when the identification procedure is impermissibly suggestive, the trial court may determine that under the totality of the circumstances the identification was sufficiently reliable for the matter to be submitted to the factfinder. *Id.*

The trial court's admission of the identification here would have been based upon sufficient indicia of reliability to support the ruling considering the totality of the circumstances. Mr. McKeller's testimony at trial indicated that he had a good opportunity to observe the person he identified as appellant. The record does not reflect that Mr. McKeller ever identified anyone other than appellant as the person making the statements he attributed to appellant. As the trial court noted, Mr. McKeller demonstrated a high level of certainty and indicated he made his identifications

from his own memory. The amount of time passing was not excessive for the circumstances. Admission of the identification would have been affirmed on appeal.

Finally, appellant alleges trial counsel was ineffective for failure to object to introduction of a recording of a conversation between appellant and his father on the basis that the recording was so unintelligible as to render the recording untrustworthy. Before trial, counsel had filed a motion to suppress the recording, and, after a pretrial hearing, the trial court found that the recording was admissible, but agreed that the transcript prepared by the prosecution would not be admitted. Appellant had argued that a portion of one of his responses was difficult to understand and that the transcript interpreted a few words of one sentence in that response incorrectly. The defense was permitted to argue its interpretation to the jury. The trial court found that an objection to the introduction of the tape at trial would have been overruled, that appellant was not prejudiced by the failure to object to the admission of the tape, and that the lack of clarity of the tape would go to the weight that should be accorded to it by the fact finder, not its admissibility.

Whether the recording should be played in whole or in part for the jury is discretionary with the trial court. *See Suggs v. State*, 317 Ark. 541, 879 S.W.2d 428 (1994). The general rule is that a recording such as this is admissible unless the inaudible portions are so substantial as to render the recording as a whole untrustworthy. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990). In *Loy v. State*, 310 Ark. 33, 832 S.W.2d 499 (1992), we upheld the introduction of a tape recording where the trial court had denied the admission of a transcript because the tape was inaudible in a number of places. The circumstances are similar here and it does not appear clear that the trial court abused its discretion to allow the tape to speak for itself. Appellant did not meet his burden to show that an objection would have had merit.

The trial court was not clearly erroneous in finding that trial counsel was not ineffective. Accordingly we affirm the denial of postconviction relief.

Affirmed.