Cite as 2023 Ark. App. 555

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-22-558

TOYA BOSTON	APPELLANT	Opinion Delivered December 6, 2023 APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. 18CR-16-664]
V.		
STATE OF ARKANSAS	APPELLEE	HONORABLE RANDY F. PHILHOURS, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

Toya Boston appeals the Crittenden County Circuit Court's denial of her petition for postconviction relief filed pursuant to Arkansas Rule of Criminal Procedure 37.1 (2016). On appeal, Boston argues that the circuit court erred by finding that her trial counsel was not ineffective for (1) being unprepared for the jury trial, (2) not objecting to the prosecutor's statement concerning a sentencing enhancement, and (3) not objecting to hearsay statements. We affirm.

On October 17, 2017, the State filed an amended criminal information charging Boston with aggravated residential burglary and two counts of first-degree battery. The charges related to Boston's July 8, 2016 attack on Patrick Bufford and his minor child (MC). The State later amended the charges to include a child sentencing enhancement.

The court held a jury trial on July 23, 2019. At trial, the testimony showed that Boston poured a liquid cleaning substance on Bufford and MC that resulted in severe burns to their bodies. Bufford testified that Boston entered his home without his knowledge and poured the substances on him and MC while they were sleeping. He also testified that he had an intimate relationship with Boston, but their relationship was not "serious."

Boston testified on her own behalf that Bufford invited her into his house and that she threw the substance in self-defense after Bufford and MC physically assaulted her. Boston stated that she obtained the substance in Bufford's bathroom.

At the conclusion of the trial, the jury convicted Boston of two counts of first-degree battery and applied the sentencing enhancement, but it acquitted her of aggravated residential burglary. She was sentenced to forty years in the Arkansas Department of Correction.

Boston appealed her convictions to this court and argued that the circuit court erred by denying her motion for a directed verdict and her motion to set aside the verdict. On December 9, 2020, we affirmed Boston's convictions. *Boston v. State*, 2020 Ark. App. 551, 613 S.W.3d 764. As to the appeal of the directed-verdict motion, we held that Boston's appellate argument was not preserved for review because in moving for a directed verdict at trial, she did not specify how the State failed to negate her justification defense. *Id.* On February 18, 2021, the supreme court declined review of Boston's appeal. The mandate issued that day.

On April 19, 2021, Boston petitioned for postconviction relief pursuant to Rule 37 in the Crittenden County Circuit Court asserting, in part, that her trial counsel was ineffective for (1) being unprepared for her trial, (2) not objecting to a prosecutor's statement concerning a sentencing enhancement, and (3) not objecting to hearsay statements.

On March 28, 2022, the court held a hearing on the petition. Boston's trial counsel, Keith Clements, was the only witness. At the conclusion of the hearing, the court took the matter under advisement. On June 1, the court entered an amended order denying Boston's petition. Boston timely appealed the denial to this court.

We will not reverse the circuit court's ruling on a petition for postconviction relief under Rule 37.1 unless it is clearly erroneous. *Sirkaneo v. State*, 2022 Ark. 124, 644 S.W.3d 392. 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 made. *Williams v. State*, 2019 Ark. 129, 571 S.W.3d 921.

Our standard for ineffective-assistance-of-counsel claims is the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Reynolds v. State*, 2020 Ark. 174, 599 S.W.3d 120. Under the *Strickland* standard, to prevail on a claim of ineffective assistance of counsel, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced her defense. *Id.* Unless a petitioner makes both showings, the allegations do not meet the benchmark on review for granting relief on a claim of ineffective assistance. *Id.* To demonstrate prejudice, 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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

On appeal, Boston first argues that her trial counsel was ineffective by being unprepared for trial. She specifically claims that her trial counsel was unprepared because he did not obtain Bufford's and MC's medical records, did not timely obtain Bufford's home-security records, and did not properly move for a directed-verdict motion. We address these allegations separately.

As to Boston's argument concerning the medical records, she did not obtain a ruling on the argument, and consequently, it is not preserved for our review. *Lowery v. State*, 2021 Ark. 97, 621 S.W.3d 140.

As to the home-security records, Boston argues that her trial counsel should have timely obtained the records and introduced them at trial. Boston acknowledges that she was acquitted of aggravated residential burglary; thus, any argument concerning that charge is moot. She instead claims that the home-security records establish that Bufford invited her into his home and negates Bufford's testimony that he and MC were suddenly attacked while sleeping. In other words, Boston argues that she was prejudiced because trial counsel could have used the records to impeach Bufford's credibility.

We disagree and hold that Boston cannot establish prejudice. Bufford testified that he activated his home-security system between 10:00 and 10:30 p.m. on July 7 and that the attack occurred between 1:10 and 1:15 a.m. on July 8. Boston testified that she arrived at Bufford's home between 12:30 and 12:40 a.m. on July 8 and that Bufford activated the alarm

after she had entered the home. The proffered home-security records show that the alarm system was disarmed at 8:37 p.m. (CST) on July 7 and that the system was activated at 12:43 a.m. (CST) on July 8.

Even though the court excluded the home-security records, Boston's counsel used the contents of the records to cross-examine Bufford. Specifically, during cross-examination, Bufford admitted that he had a security system and that he controlled the system. He also admitted that there should be records pertaining to his security system and that the police did not obtain the records. Trial counsel also questioned Bufford whether he activated the system at 12:43 a.m.[1] Accordingly, Boston impeached Bufford's credibility using the home-security records. Further, the jury acquitted Boston of aggravated burglary, the charge for which Boston's method of entry into the home was also relevant.[2] Given these circumstances, we cannot say that there is a reasonable probability that, but for trial counsel's failure to

[1]Specifically, counsel asked Bufford, "If I read a document to you that says, you put your alarm on stay at 12:43 a.m., would that refresh your memory?" Bufford responded, "No, sir, because I put it on home." Trial counsel then questioned Bufford on the difference between stay and home, and Bufford stated, "When you put it on home, the motion detectors be off so you can walk through the house, but the sensors still be activated."

[2]A person commits aggravated residential burglary if she inflicts or attempts to inflict death or serious physical injury on another person while committing residential burglary as defined in Arkansas Code Annotated section 5-39-201. Ark. Code Ann. § 5-39-204(a)(1) (Repl. 2013). A person commits residential burglary if she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2013).

introduce the home-security records, the fact-finder would have had a reasonable doubt respecting guilt. We therefore find no error by the circuit court on this point.

Boston's final claim is that her trial counsel's failure to properly move for a directed-verdict motion demonstrates his unpreparedness. She points out that her trial counsel vaguely argued that the State failed to negate her justification defense; thus, he forfeited her right to challenge the sufficiency of the evidence on direct appeal.

To prevail on a claim of ineffective assistance of counsel based on counsel's failure to preserve an issue for appeal, a petitioner must show that, had the issue been preserved, the appellate court would have reached a different decision. *Strain v. State*, 2012 Ark. 42, 394 S.W.3d 294 (per curiam). Thus, in this case, Boston must demonstrate that the appellate court would have found the evidence adduced at trial was insufficient and would have overturned her conviction for that reason.

However, on appeal, Boston offers no explanation why the State's evidence was insufficient to show that she did not act in self-defense.[3] Conclusory statements in a brief on appeal are insufficient to overcome the presumption that counsel was effective. *Ellis v. State*, 2014 Ark. 24 (per curiam); *Blackwell v. State*, 2017 Ark. App. 248, 520 S.W.3d 294. We do not research or develop arguments for appellants. *Sims v. State*, 2015 Ark. 363, 472 S.W.3d

[3]When any evidence tending to support a self-defense claim is raised, the State has the burden of negating the defense by proving beyond a reasonable doubt that the defendant did not act in self-defense. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003).

107; *Blackwell*, 2017 Ark. App. 248, 520 S.W.3d 294. Boston has therefore failed to meet her burden.

Accordingly, because none of Boston's points concerning her trial counsel's preparedness for trial establish that he was ineffective, we hold that the circuit court was not clearly erroneous in denying Boston relief on the basis of this claim.

Boston next argues that her trial counsel was ineffective for failing to object to the prosecutor's misstatement regarding her parole eligibility. Specifically, Boston points out that the prosecutor incorrectly stated that she would be required to serve only one-fourth of her sentence, but in actuality, she would be ineligible for parole due to the sentencing enhancement.[4] She acknowledges that her trial counsel addressed the prosecutor's error during his rebuttal, but she argues that he should have immediately objected. She claims that due to trial counsel's inaction, the jury mistakenly believed that she would be eligible for parole.

The supreme court has noted that experienced advocates might differ about when or if objections are called for since, as a matter of trial strategy, further objections from counsel may have succeeded in making the prosecutor's comments seem more significant to the jury. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999); *Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985). Because many lawyers

[4]Boston was charged and convicted of the child sentencing enhancement pursuant to Arkansas Code Annotated section 5-4-702(a)(5) (Supp. 2009). The enhanced sentence must be served consecutively to any other sentence imposed without eligibility for early release on parole or a community correction transfer. Ark. Code Ann. § 5-4-702 (d)-(e).

refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct. *See Howard*, 367 Ark. 18, 238 S.W.3d 24; *Sasser*, 338 Ark. 375, 993 S.W.2d 901. Given this standard and the fact that Boston's trial counsel addressed the misstatement during rebuttal, we cannot say that the circuit court clearly erred by denying Boston's relief on this claim.

Boston finally argues that her trial counsel was ineffective for failing to object to hearsay statements. Specifically, Boston argues that counsel should have objected to the admissibility of the dashcam recordings of Bufford's statements to officers immediately after the incident. She further points out that the recordings show Bufford's injuries and suffering and that they were more prejudicial than probative and thus inadmissible under Arkansas Rule of Evidence 403.

However, at the Rule 37 hearing, trial counsel testified that he stipulated to the recording's admissibility because he wanted the jury to hear the recorded statements concerning Bufford and Boston's relationship. Trial counsel conceded that the recording depicted Bufford's suffering from the burns and that the suffering may have incited the jury, but he claimed that the concern "didn't occur to" him at trial.

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. *Swain v. State*, 2017 Ark. 117, at 3, 515 S.W.3d 580, 583. A matter of reasonable trial strategy does not constitute deficient performance. *Id.* Given trial counsel's testimony

that he made a tactical decision to stipulate admissibility of the dashcam recording, we cannot say the circuit court erred by rejecting Boston's claim on this point.

We therefore affirm the circuit court's denial of Boston's petition for postconviction relief filed pursuant to Rule 37.1.

Affirmed.

WOOD and HIXSON, JJ., agree.

James Law Firm, by: *William O. "Bill" James, Jr.*, and *Drew Curtis*, for appellant.

Tim Griffin, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.