

ARKANSAS SUPREME COURT

No. CR 06-405

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered October 26, 2006

MARK ANTHONY TURBYFILL
Appellant

APPEAL FROM THE CIRCUIT
COURT OF SALINE COUNTY, CR
2003-142, HON. GARY M. ARNOLD,
JUDGE

v.

STATE OF ARKANSAS
Appellee

AFFIRMED

PER CURIAM

Mark Anthony Turbyfill was convicted by a jury of rape of an eight-month-old girl and was sentenced to sixty years' imprisonment. The Arkansas Court of Appeals affirmed. *Turbyfill v. State*, 92 Ark. App. 145, ___ S.W.3d ___ (2005). Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. After appellant filed an amended *pro se* petition, the trial court denied the petition and amended petition without a hearing. Appellant, now represented by counsel, has lodged this appeal of the order denying the petitions.

On appeal, appellant maintains that the trial court erred in denying his petition without a hearing, that the trial counsel provided ineffective assistance and that he should not have been charged as a habitual offender. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was 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. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

As to appellant's first point on appeal, this court has recognized that a trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). 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. *Sanders, supra*. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or on the face of the petition itself, that the allegations have no merit. *Id.*

Here, the trial court stated in its order denying the petition that it reviewed the petition and amended petition, as well as the State's response to the petition, in order to reach its decision. From this examination, the trial court found that appellant's claims either required review on direct appeal and not through postconviction relief, or failed to overcome the presumption of trial counsel's competency. We cannot say that the trial court erred in ruling on appellant's petition without holding a hearing, and appellant has provided no valid basis to support this argument.

Next, appellant alleges that the trial court erred in denying his seven allegations of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent counsel's errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of

the trial. *Id.*

The charges against appellant resulted from a referral by doctors at Arkansas Children's Hospital after treatment of the eight-month-old victim. Appellant and Michelle Raney, his girlfriend and the victim's mother, brought the victim to the hospital's emergency room. The victim was bleeding vaginally and was in shock from having lost at least 25% of her blood. Information obtained by the doctors indicated that several bloody diapers were changed before the victim was brought to the emergency room around 5:00 p.m. Surgery was performed immediately to repair a third-degree vaginal tear. The treating doctors testified that the baby's injury was similar to a tear that a woman may suffer during childbirth and was consistent with a body part or an object being inserted inside the victim's vagina.

During questioning by the Arkansas State Police and by the Benton Police Department, appellant, who did not testify at trial, stated that he arrived at Michelle's home at approximately 10:00 a.m. the morning of the incident. Around noon, Michelle left the house to go shopping. Appellant estimated that she was gone about fifteen minutes. According to appellant, during this time, he went into the baby's room to change her diaper when he noticed she was bleeding.¹

In his first allegation of ineffective assistance of counsel, appellant maintains that counsel failed to present evidence of a time line establishing when he was with the victim on the day of the rape. He argues that a statement obtained by police from Michelle, as well as her phone records,

¹Appellant told the officers during questioning that he accidentally harmed the victim either by scratching or pinching her while changing her diaper. During the trial, witnesses were questioned as to whether this type of injury could have occurred by other circumstances, such as dropping the baby on railing around the crib or on a finial at the corner of the railing, or by the insertion of an object, such as a marble, into the baby's diaper. However, both doctors testified that none of these alternate theories, including pinching and scratching, could explain such a serious injury.

indicated that appellant arrived at her house much later in the day, and that he was alone in the house with the victim for only fifteen minutes.

The record reveals that Michelle was not able to be located prior to trial and a warrant for her arrest was issued. As a result, a motion in *limine* sought by the State was granted which precluded statements made by Michelle from being introduced into evidence, except for those given to the doctors for treatment of the victim. Her phone records also would have been precluded from being introduced at trial. While appellant does not specifically complain about the motion in *limine*, appellant has not shown a basis under which trial counsel could have successfully introduced into evidence either Michelle's statement to police or her phone records. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra; Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001).

Next, appellant complains that counsel did not call other witnesses to testify as to the victim's condition earlier in the day or on the way to the hospital. Appellant lists Michelle and the victim's maternal grandmother as potential witnesses to provide this testimony.

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*). An attorney's decision not to call a particular witness is largely a matter of professional judgment, and even 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. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

Here, Michelle was unavailable for trial as discussed above. As to the victim's grandmother,

appellant fails to specify the nature of her testimony, how it would have been advantageous to appellant's case or how the jury's decision would have been different if she had testified. This court does not grant postconviction relief for ineffective assistance of counsel where the petitioner fails to show what the omitted testimony or other evidence was and how it would have changed the outcome of the trial. *Camargo, supra*. Appellant also failed to show actual prejudice as a result of counsel's actions.

Appellant next alleges that trial counsel was ineffective for failing to call as witnesses other people who came into contact with the victim, the victim's mother and appellant on the day of the rape. Appellant maintains that appliance delivery men were at the victim's home around noon and could have testified that appellant was not at the home at that time. He also alleges that his mother could have testified that Michelle called her later in the day looking for appellant. Last, he complains that trial counsel should have investigated appellant's activities on the day in question and could have called witnesses to testify as to those activities.

Appellant did not explain how the testimony of these witnesses would have been beneficial to appellant's case or how the jury's decision would have been different if any or all of them had testified. At best, the testimony of these witnesses only would have been able to call in question the time frame appellant gave to police as to when he was at the victim's home. However, this testimony could not address whether appellant was at the victim's home that day at any time or alone with the victim at any point.

In determining a claim of ineffective assistance of counsel, the totality of the evidence before the factfinder must be considered. *Greene, supra*. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent

evidence. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002). Appellant has failed to show how he suffered actual prejudice by counsel's actions, or how the assertions of these witnesses would have changed the outcome of the trial even if their testimony were to be believed by the jury.

Appellant's fourth basis for reversal as a result of ineffective assistance alleges that trial counsel failed to call witnesses who would have testified about appellant's interaction with their children. In the instant matter, during an in-chambers discussion, trial counsel informed the court that he had witnesses on hand who were prepared to testify as to this very point. The trial court, in response to a direct question by counsel, determined that the witnesses would have been subject to cross-examination by the State about appellant's prior felonies. The defense subsequently rested its case without calling these character witnesses.

Trial counsel's decision not to call these witnesses was a matter of trial strategy. *See Camargo, supra*. Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for finding of ineffective assistance of counsel. *Noel, supra*. Counsel's actions did not satisfy either prong of *Strickland* and did not rise to the level of ineffective assistance of counsel.

Next, appellant argues that trial counsel failed to raise the issue of the judge and a prosecutor's being involved in the victim's adoption matter. In a similar vein, appellant also claims that trial counsel failed to call the victim's uncle to testify about the reason for the adoption of the victim and her sister.

With regard to a potential conflict by the trial court and prosecutor in handling both the adoption and appellant's criminal trial, appellant fails to set out to this court how raising this issue would have aided the defense or would have changed the outcome of the jury's decision. *Camargo,*

supra. As to the victim's uncle, appellant fails to explain how the uncle's testimony would have been beneficial to appellant's case or how the jury's decision would have been different if he had testified. *Id.* Appellant failed to show that prejudice to his case resulted from counsel's actions.

Appellant's last ineffective assistance allegation contends that trial counsel failed to call any witnesses to testify on behalf of appellant. On appeal, appellant argues that a private physician was consulted prior to the victim's being transported to Children's Hospital. He also contends that Barbara Webb, the former Saline County prosecutor, would have testified that her office previously did not bring charges against appellant on this case due to a lack of concrete evidence. He further maintains that the victim's grandmother and the workers at the daycare attended by the victim and her sister would testify as to the relationship between appellant and both the victim and her sister.

As to the private doctor consulted prior to the victim's being taken to Children's Hospital, appellant failed to state the subject matter of doctor's testimony and the testimony at trial to have been rebutted, how the testimony would have helped the defense, or how it would affect the outcome of the trial. *Camargo, supra*. As to the testimony of Ms. Webb, the victim's grandmother and the daycare workers, appellant did not explain the benefit of their testimony to the defense or on what basis the jury would have concluded that appellant was not guilty of the charges. *Id.* Also, appellant did not set forth the prejudice he suffered due to ineffective assistance of counsel.

In each claim of ineffective assistance of counsel, appellant failed to show that counsel's representation fell below an objective standard of reasonableness, that the deficiency prejudiced the defense and that, but for counsel's errors, the result of the trial would have been different. *Strickland, supra; Andrews, supra*. We cannot say that appellant made a showing that counsel did not provide reasonable professional assistance.

Appellant's final argument is that he was improperly charged as a habitual offender based upon his prior felony charges. He maintains that because he continues to faithfully make restitution to the payors, these charges are irrelevant and should not have been presented to the jury during the penalty phase of the trial. However, postconviction proceedings under Ark. R. Crim. P. 37.1 do not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Appellant did not raise this issue at trial or on appeal, and failed to state a valid ground for postconviction relief.

The trial court found that appellant failed to overcome the presumption of trial counsel's competency and failed to show prejudice that denied him a fair trial. The trial court further found that appellant presented claims that should have been raised in the trial court or on appeal. We find no error and affirm.

Affirmed.