

SUPREME COURT OF ARKANSAS

No. CR 09-892

ROBERT LAVORN BURTON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 15, 2011

PRO SE APPEAL FROM THE
GARLAND COUNTY CIRCUIT COURT,
[CR 2007-144] HON. JOHN H. WRIGHT,
JUDGEAFFIRMED.**PER CURIAM**

Appellant Robert Lavern Burton appeals from the circuit court's order denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). Burton was convicted of aggravated robbery and residential burglary following a jury trial and was sentenced to 360 months' imprisonment. The Arkansas Court of Appeals affirmed. *Burton v. State*, CACR 08-1019 (Ark. App. Apr. 29, 2009) (unpublished).

Appellant asserts three points on appeal, arguing that the circuit court erred in failing to find that his counsel was ineffective for (1) failing to adequately conduct voir dire; (2) failing to move to suppress a pretrial and in-court identification; (3) failing to object to the prosecution's reference to him as a drug dealer. We find no error and affirm the circuit court's order.

This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *See Reed v. State*, 2011 Ark. 115 (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.

See id.

We assess the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Shipman v. State*, 2010 Ark. 499 (per curiam). Under the *Strickland* test, a petitioner raising a claim of ineffective assistance must show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the petitioner by the Sixth Amendment to the United States Constitution. *See id.* In addition, the petitioner must show that counsel’s deficient performance so prejudiced petitioner’s defense that he was deprived of a fair trial. *See id.* A defendant making an ineffective-assistance-of-counsel claim must show that his counsel’s performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense.

See id.

For his first point on appeal, Burton argues that his counsel was ineffective for failing to effectively voir dire two potential jurors, both of whom said that they were victims of crime, to determine any bias or prejudice. He contends that his counsel’s failure to do so tainted the jury pool. In denying relief, the circuit court found that Burton failed to provide “even a suggestion of how the outcome of the trial might have been changed if his counsel had conducted voir dire differently relative to a potential juror being the victim of a crime.”

Jurors are presumed unbiased and qualified to serve. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). To prevail on an allegation of ineffective assistance of counsel with regard to jury selection, a petitioner first has the heavy burden of overcoming the presumption that jurors are unbiased. *See id.* To accomplish this, a petitioner must demonstrate actual bias, and the actual bias must have been sufficient to prejudice the petitioner to the degree that he was

denied a fair trial. *See id.* Bare allegations of prejudice by counsel's conduct during voir dire that are unsupported by any showing of actual prejudice do not establish ineffective assistance of counsel. *See id.*

Here, Burton has failed to demonstrate any actual bias; instead, he simply states that the jury was tainted without pointing to any factual basis in support thereof. We have repeatedly held that conclusory claims are insufficient to sustain a claim of ineffective assistance of counsel. *See Ewells v. State*, 2010 Ark. 407 (per curiam). Moreover, an allegation of ineffective assistance of counsel not supported by facts is insufficient to demonstrate prejudice. *See id.* We therefore affirm the circuit court's finding.

For his next point on appeal, Burton claims that his counsel was ineffective for failing to seek suppression of the pretrial and in-court identification of him by one of the victims, Ms. Cummings. Claiming that the pretrial and in-court identification procedures were suggestive, Burton asserts that his counsel was ineffective for failing to object and raise the issues on appeal. The circuit court concluded that Burton was "unable to assert a legal basis for the pre-trial suppression of the identification . . . or make a reasonable argument that a motion to suppress pre-trial identification would have been granted, and the cross examination of the identifying witness is thorough." Again, we cannot say that the circuit court's finding was clearly erroneous.

While Burton asserts that both identifications of him were suggestive, he fails to explain how they were so. He further fails to provide any basis on which the circuit court would have granted a suppression motion had one been made, nor does he provide any basis on which appellate relief would have been afforded. A claim that prejudice was suffered without any factual explanation about what form the prejudice took or how serious it was is not enough to

prove ineffective assistance of counsel. *See Spivey v. State*, 299 Ark. 412, 773 S.W.2d 446 (1989) (per curiam).

For his final point, Burton asserts that his counsel was ineffective in failing to object to the admission of his prior felony convictions. Specifically, Burton references what he claims was an unsubstantiated allegation that he was a drug dealer made by the prosecutor during sentencing, contending that such a statement was improper under Arkansas Rule of Evidence 404(b) and that his counsel was ineffective for failing to object to the prejudicial statement. The circuit court, in its order, found that the State was entitled to make such a reference about Burton where he testified to such during the sentencing phase of his trial.

The circuit court did not clearly err. A review of the trial record reveals that Burton testified on his own behalf during sentencing, wherein he acknowledged his prior convictions and, specifically, that he had previously sold drugs out of his home. Having so acknowledged, Burton cannot demonstrate any prejudice as a result of the prosecutor's statement. In addition, the record reveals that the State sought an extended sentence for Burton based on his status as a habitual offender; therefore, his prior convictions were admissible pursuant to Ark. Code Ann. § 5-4-502 (Repl. 2006). For this reason, there was no error and no basis for an objection by counsel. Accordingly, his claims of ineffective assistance of counsel within this point must fail.

For all of the foregoing reasons, we affirm the circuit court's order denying Burton's petition for postconviction relief.

Affirmed.