

SUPREME COURT OF ARKANSAS

No. CR 10-800

TERRY DON MATTHEWS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 29, 2011

PRO SE APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT, CR 2007-
768, HON. JOE E. GRIFFIN, JUDGE;
PRO SE MOTION TO SUPPLEMENT
ISSUE RAISED ON DIRECT APPEAL
OF JUDGMENT OF CONVICTIONAFFIRMED; MOTION DISMISSED.**PER CURIAM**

In 2008, a jury in Miller County Circuit Court found appellant Terry Don Matthews guilty of aggravated robbery and sentenced him as a habitual offender to a term of thirty years in prison. We affirmed. *Matthews v. State*, 2009 Ark. 321, 319 S.W.3d 266.

Appellant subsequently filed in the circuit court a timely pro se petition seeking postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2008). The circuit court denied the petition without a hearing. Appellant brings this appeal, arguing that the circuit court erred in finding that he did not receive ineffective assistance of counsel at trial. We affirm.

The record on direct appeal in this matter reflects that appellant demanded money or, alternatively, the vehicle of Jarvis Young, a pizza delivery person, while representing that he was armed with a gun. The confrontation took place outside the home of Craig Boyd, who struck appellant in the head with a baton.

Appellant raises a number of issues in this appeal claiming that he received ineffective assistance of counsel. This court assesses the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wallace v. State*, 2010 Ark. 485 (per curiam). Under the *Strickland* standard, 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. *Id.* (citing *Joiner v. State*, 2010 Ark. 309 (per curiam)). In addition, the petitioner must show that counsel’s deficient performance so prejudiced petitioner’s defense that he was deprived of a fair trial. *Id.* A defendant who would prevail on 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. *Hampton v. State*, 2010 Ark. 330 (per curiam).

This court does not reverse a denial of postconviction relief unless the trial court’s findings are clearly erroneous. *Shipman v. State*, 2010 Ark. 499 (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. *Hawthorne v. State*, 2010 Ark. 343 (per curiam).

Appellant first argues that his counsel was ineffective for failing to resist multiple continuances requested by the prosecution. Appellant contends that, as a result, he was tried beyond the nine-month period required by Arkansas Rule of Criminal Procedure 28.1(a) and was, thus, denied the right to a speedy trial. The record does not bear out appellant’s assertions.

Our review reflects that the prosecution sought and obtained one continuance, whereas the circuit court granted appellant's motions for two continuances. Even with the delay resulting from the continuances, appellant was tried on July 14, 2008, which was within nine months of his arrest on October 24, 2007. Therefore, appellant was not denied the right to a speedy trial. Counsel is not ineffective for failing to raise a speedy-trial argument that is without merit. *See Johnson v. State*, 2009 Ark. 552 (per curiam).

Appellant next argues that he was deprived of effective assistance of counsel because his counsel did not object to the introduction of his "pen pack" that listed his prior convictions and "his movements within the prison system." Contrary to his assertion, appellant's pen pack was not introduced into evidence. Rather, the State introduced certified copies of his previous convictions. Appellant's argument is otherwise unavailing because evidence of appellant's prior convictions was admissible during the sentencing phase of trial as proof of the allegation that appellant was a habitual offender. *See* Ark. Code Ann. § 16-97-103(2) (Repl. 2006). The circuit court did not clearly err in finding that counsel was not ineffective on this basis.

As a third issue, appellant contends that counsel failed to effectively assist him by not objecting to testimony regarding appellant's history of drug and alcohol abuse. The record reveals, however, that the testimony on this subject was offered by Kay Jones, appellant's mother, who was called as a defense witness during the sentencing phase of trial. This issue raises a question of trial tactics and strategy. Where a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then counsel's decision is not a basis for relief under Rule 37.1. *Croy v. State*, 2011 Ark. 284, ____

S.W.3d ____ (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Anderson v. State*, 2010 Ark. 404, ____ S.W.3d _____. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and a claimant has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel, which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *Kelley v. State*, 2011 Ark. 175 (citing *McCraney v. State*, 2010 Ark. 96, ____ S.W.3d ____ (per curiam)). Counsel is allowed great leeway in making strategic and tactical decisions, such as whether to introduce witness testimony. See *Rankin v. State*, 365 Ark. 255, 258, 227 S.W.3d 924, 927 (2006). Matters of trial tactics and strategy are not grounds for postconviction relief on the basis of ineffective assistance of counsel. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). In this case, appellant has not shown that the decision to elicit the testimony was not the product of reasonable professional judgment. Thus, we cannot say that the circuit court's finding that counsel's performance was not deficient is clearly erroneous.

Appellant also asserts that counsel should have objected during closing argument at the sentencing stage of trial when the prosecutor stated that drug and alcohol use was no defense and that appellant had not taken advantage of any rehabilitation programs during his previous incarcerations. Before appellant can prevail on an allegation that counsel was ineffective for failing to object during closing argument, he must establish that he was denied a fair trial by the failure to object. *Lee*, 343 Ark. 702, 38 S.W.3d 334. Again, counsel's decision not to object is one of trial strategy and outside the purview of Rule 37.1. *Id.* Moreover, the prosecutor's comments were a fair inference from the testimony. Where an attorney's comment during

closing arguments is directly reflecting of, or inferable from, testimony at trial, there is no error. *Hendrix v. State*, 2011 Ark. 122 (quoting *Woodruff v. State*, 313 Ark. 585, 592, 856 S.W.2d 299, 303–04 (1993)).

As his next point, appellant claims that his counsel did not conduct a thorough investigation of the State’s witnesses, Boyd and Young. He asserts that his counsel failed to discover that Boyd was facing criminal liability for striking him with the baton, which he alleges caused Boyd to be biased and to have a conflict of interest. Appellant also contends that he learned after trial that Young had an arrest record. However, other than appellant’s bare assertions, appellant offered no evidence to support his claims that criminal charges had been filed against Boyd or that Young in fact had an arrest record. The burden is entirely on the appellant to provide facts that affirmatively support his claims of prejudice. *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___ (per curiam). Conclusory statements without factual substantiation are insufficient to overcome the presumption that counsel was effective and do not warrant granting postconviction relief. *Moore v. State*, 2011 Ark. 269 (per curiam); *Kelley v. State*, 2011 Ark. 175 (per curiam); *Watkins v. State*, 2010 Ark. 156, ___ S.W.3d ___. Moreover, even if there were arrest records for the two, appellant did not establish that the outcome of the trial would have been different had those records been brought forth at his trial.

As another issue, appellant asserts that his counsel was not fully prepared in that counsel visited him only once, two weeks before trial. Appellant maintains that, had counsel contacted him on a more frequent basis, counsel would have learned “significant information” regarding his case. Appellant does not divulge what this information might be. As with the previous

point, appellant's argument is conclusory and lacking factual support. Therefore, the circuit court did not clearly err by rejecting this contention.

In addition, appellant argues that Young gave inconsistent testimony and that his counsel was ineffective for not raising an objection based on the alleged inconsistencies. Testimony is not subject to exclusion on the ground that it contains inconsistencies. Instead, it is for the jury to weigh the credibility of the witness and to resolve any conflicts or inconsistencies in the evidence. *See Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007).

In his final argument, appellant contends that his counsel failed to raise an objection when a juror disclosed during trial that he knew Young in high school. Because this issue was not advanced in the petition to circuit court, it cannot be addressed for the first time on appeal. *See Shipman v. State*, 2010 Ark. 499 (per curiam); *Johnson v. State*, 2009 Ark. 460 (per curiam).

In the course of this appeal, appellant filed a motion, asking that he be allowed to "supplement" one of the issues raised on direct appeal of the judgment of conviction. The motion is dismissed. There is no provision in the prevailing rules of procedure to permit an appellant in an appeal from an order that denied postconviction relief to reopen the direct appeal of the judgment of conviction.

Affirmed; motion dismissed.