

SUPREME COURT OF ARKANSAS

No. CR 11-1016

MICHAEL DESHAUN JACKSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered January 24, 2013

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT AND
APPELLANT'S PRO SE MOTION TO
FILE SUPPLEMENTAL BRIEF
[PULASKI COUNTY CIRCUIT COURT,
60CR 08-474, HON. HERBERT
WRIGHT, JUDGE]ORDER AFFIRMED; MOTION
DENIED.**PER CURIAM**

In 2009, appellant Michael Deshaun Jackson was found guilty by a jury of capital murder, criminal attempt to commit capital murder, and aggravated robbery, with a firearm enhancement. He was sentenced to an aggregate sentence of life imprisonment without parole. We affirmed. *Jackson v. State*, 2011 Ark. 9, ___ S.W.3d ___.

In 2011, appellant filed in the trial court a timely, verified pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011). The petition was denied, and appellant brings this appeal.

This court has held that it will reverse the circuit court's decision granting or denying postconviction relief only when that decision is clearly erroneous. *Charland v. State*, 2012 Ark. 246; *Springs v. State*, 2012 Ark. 87, ___ S.W.3d ___; *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007); *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006). We have said, "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.” *Williams*, 369 Ark. at 107, 251 S.W.3d at 292 (quoting *Howard*, 367 Ark. at 26, 238 S.W.3d at 31).

In his brief on appeal, appellant first argues that the trial court erred in not holding a hearing on his Rule 37.1 petition. He does not explain why a hearing was needed for a ruling on any specific issue. Arkansas Rule of Criminal Procedure 37.3(c) provides that an evidentiary hearing should be held in a postconviction proceeding unless the files and record of the case conclusively show that the prisoner is entitled to no relief. *Charland*, 2012 Ark. 246. A court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. Ark. R. Crim. P. 37.3(a); *Hayes v. State*, 2011 Ark. 327, ___ S.W.3d ___ (per curiam); see also *Smith v. State*, 290 Ark. 90, 717 S.W.2d 193 (1986). Here, the court issued an order that relied extensively on the record to address appellant’s allegations. As appellant has not pointed out any particular claim that required a hearing, he has not met his burden of demonstrating that the court was obligated to hold a hearing. Without some showing of prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984), the petition was conclusive on its face that no relief was warranted, and the circuit court did not err in not holding an evidentiary hearing. See *Charland*, 2012 Ark. 246 (citing *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918).

Appellant next contends that it was a violation of the provisions against double jeopardy contained in the United States Constitution and the Arkansas Constitution for him to be convicted of both capital murder and aggravated robbery because the aggravated-robbery charge

was the underlying offense to the charge of capital murder. The claim is one that may be raised under Rule 37.1. Collateral attacks on a judgment are cognizable in a postconviction challenge to determine whether a judgment was void because it violated fundamental constitutional rights. *See Tornavacca v. State*, 2012 Ark. 224, ___ S.W.3d ___ (citing *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002)); *see also Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001) (holding that Rule 37.1 does not permit a petitioner to raise an issue that might have been raised at trial or on the record on direct appeal, unless the issue is so fundamental as to render the judgment void and, thus, open to collateral attack). In *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000), this court held that double-jeopardy claims, if proven, are sufficient to render a judgment void.

As the trial court found in its order, there is no merit to appellant's argument that he was subjected to double jeopardy. Separate convictions and sentences are authorized for capital murder and the felony underlying the capital-murder charge, pursuant to Arkansas Code Annotated section 5-10-110(d)(1)(A) (Supp. 2009). Circuit courts have specific authority to sentence a defendant for the underlying felony of the capital murder, as well as the murder itself. *See Clark v. State*, 373 Ark. 161, 282 S.W.3d 801 (2008) (citing *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003)).

As his second ground for reversal of the order, appellant asserts that he was denied due process of law when the prosecutor knowingly used the false testimony of Tina Jefferson to obtain his conviction. He alleges that Jefferson was threatened with revocation of her probation if she did not testify that she had heard appellant talk about his involvement in the crime. Appellant contends that Jefferson recanted her testimony after he was convicted, and, in the

motion to supplement his brief in this appeal, appellant asks that he be permitted to add Jefferson's affidavit to the brief in which she attests that she was coerced into testifying.

At trial, Jefferson was questioned vigorously by counsel for appellant. The circumstances surrounding her reluctance to testify, including her fear that her probation would be revoked if she declined to testify and her attempts to avoid testifying, were brought out both in direct and cross-examination. As raised by appellant, the allegation of Jefferson's recanted testimony amounted to an attempt to refute whatever evidence was adduced at trial by means of Jefferson's testimony. Rule 37.1 is not a means to challenge evidence. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987); *see also Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

With respect to appellant's desire to add Jefferson's affidavit to the addendum to his brief, this court does not consider any item that was not before the trial court when it entered its order on the petition for postconviction relief. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). Accordingly, the motion is denied.

The remainder of appellant's points for reversal of the order are concerned with the effectiveness of his attorney. We first note that appellant urged the trial court to consider that counsel's errors, taken as a whole, amounted to ineffective assistance of counsel. We have repeatedly held, however, that the concept of cumulative error is not recognized in Rule 37.1 proceedings when assessing whether a petitioner was afforded effective assistance of counsel. *Williams*, 369 Ark. 104, 251 S.W.3d 290; *Howard*, 367 Ark. 18, 238 S.W.3d 24; *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005); *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); *see also State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002) (holding that it was reversible error for

the trial court to consider cumulative error in assessing claims of effective assistance of counsel).

When considering an appeal from a circuit court's denial of a Rule 37.1 petition on allegations of ineffective assistance of counsel, the sole question presented is whether, based on a totality of the evidence under the standard set forth by the United States Supreme Court in *Strickland* the circuit court clearly erred in holding that counsel's performance was not ineffective. *Anderson v. State*, 2011 Ark. 488, ___ S.W.3d ___; *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Howard*, 367 Ark. 18, 238 S.W.3d 24.

The benchmark for judging a claim of ineffective assistance of counsel must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Pursuant to *Strickland*, we assess the effectiveness of counsel under a two-prong standard. First, 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. *Williams*, 369 Ark. 104, 251 S.W.3d 290. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

Second, the petitioner must show that counsel's deficient performance so prejudiced petitioner's defense that he was deprived of a fair trial. *Id.* A petitioner making an ineffective-assistance-of-counsel claim must show that his counsel's performance fell below an objective standard of reasonableness. *Abernathy v. State*, 2012 Ark. 59, ___ S.W.3d ___ (per curiam).

Petitioner must identify specific acts and omissions that, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Isom v. State*, 2010 Ark. 495, 370 S.W.3d 491. Conclusory statements that counsel was ineffective cannot be the basis of postconviction relief. *Anderson*, 2011 Ark. 488, ___ S.W.3d _____. 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, i.e., the decision reached would have been different absent the errors. *Howard*, 367 Ark. 18, 238 S.W.3d 24. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* The language "the outcome of the trial" refers not only to the finding of guilt or innocence, but also to possible prejudice in sentencing. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* "[T]here is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

To understand the allegations raised, a brief summary of the events giving rise to the charges against appellant is needed. In 2007, three men—appellant, Sammie Madden, and Cherick Coleman—entered the home of David Rogers in North Little Rock. Rogers operated a candy and snack store from his home. Rogers's stepson, Shawn Bisbee, also lived in the home. Rogers testified that the three men demanded money, forced him to lie face down on the floor of the dining room, and took Bisbee back to a bedroom. Rogers emptied the cash register and one lockbox hidden in the home. Rogers also told the men about a gun he kept hidden under

the cash register. Coleman testified at trial that only appellant and Madden were armed with guns when they entered, but appellant handed him the gun taken from under the cash register.

While Rogers was in the dining room, at least one of the three intruders was searching the bedroom where Bisbee was also forced to lie face down on the floor. There was a second lockbox hidden under Rogers's bed, but Rogers could not find a key to unlock it. At this point, Rogers testified that he was taken to the bedroom and was forced to lie face down on the floor where both he and Bisbee were struck in the back of the head with a pistol. When Rogers could not open the second lockbox, Bisbee was stabbed in the back by appellant four times, and his throat was cut by appellant.¹ Appellant then shot Bisbee and Rogers each in the back of the head before all three assailants fled the home. Coleman testified that he dropped the gun that he was given by appellant in the front yard. Rogers survived the attack, but Bisbee died as a result of his injuries.

Appellant first alleged in his petition that his attorney was ineffective, in that counsel failed to elicit information from Coleman on a prior firearm-possession charge against Coleman and failed to cross-examine Coleman on whether a deal had been made with the prosecution in exchange for his testimony. Appellant provides no substantiation for the claim that there was a prior firearm-possession charge that had some effect on Coleman's testimony. Conclusory statements cannot be the basis of postconviction relief. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000). Coleman agreed to testify as part of the negotiated plea of guilty, and appellant's attorney questioned Coleman at length concerning the plea agreement. Appellant did not offer

¹Rogers was unable to identify any of the three men. Coleman testified at trial about Jackson's conduct in the course of the robbery.

factual substantiation to establish that counsel failed to adequately question Coleman and failed to overcome the presumption that counsel was effective.

Next, appellant asserted that counsel should have followed up on the progress of Tina Jefferson's criminal case so that a posttrial motion could have been filed and a hearing held on the matter. The claim was not supported by any facts to show that counsel had any obligation to file a posttrial motion and did not demonstrate that counsel erred. The burden was entirely on appellant to provide facts in this petition to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam); see also *Jones v. State*, 2012 Ark. 215 (per curiam).

Petitioner also alleged that there were a number of instances where counsel could have questioned witnesses in such a way that doubt would have been cast on whether appellant was involved in the attack on the victims. He argues that there were inconsistencies in victim David Rogers's statements that could have been used to establish that appellant did not commit the acts that Rogers and Coleman attributed to him. Appellant particularly focused on proof that counsel could have presented to the jury to show that he is left-handed and shorter than the other assailants, and, thus, could not have committed the acts as described. In the same vein, he contended that the forensic evidence, including that obtained from the medical examiner's autopsy of victim Shawn Bisbee, could have been presented by counsel so as to show the jury that he did not inflict certain injuries. He further contends that counsel could have elicited important evidence if counsel had argued that fingerprint analysis should have been done on the gun found in the yard of the victims' residence.

The trial court addressed each of the claims in its order and concluded that none had merit. Appellant does not advance any arguments on appeal to challenge the court's findings and conclusions. Instead, he reiterates the Rule 37.1 petition. As the court found none of the claims to be meritorious, and appellant offers no argument on appeal to challenge the rulings, appellant has failed to meet his burden of showing that the trial court committed reversible error by denying the Rule 37.1 petition. He fell short in his petition, and has fallen short in this appeal, of demonstrating that there is a reasonable probability that, but for any specific error on counsel's part, the fact-finder would have had a reasonable doubt respecting guilt; that is, that the decision reached would have been different absent the error. As a result, his allegations of ineffective assistance of counsel did not rise to the level necessary to establish that he was not afforded effective assistance of counsel. *See Howard*, 367 Ark. 18, 238 S.W.3d 24. After reviewing the entire evidence, this court is not left with the definite and firm conviction that a mistake has been committed. Accordingly, we cannot say that the trial court's decision to deny the relief sought was clearly erroneous. *See Williams*, 369 Ark. at 104, 251 S.W.3d at 290.

Order affirmed; motion to supplement brief denied.

Michael Deshaun Jackson, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.