IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

STEPHEN JAMES BRUNI, *Petitioner*.

No. 1 CA-CR 15-0261 PRPC
FILED 7-20-2017

Petition for Review from the Superior Court in Coconino County
No. S0300CR20080953
No. S0300CR20120242
The Honorable Mark R. Moran, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Coconino County Attorney's Office, Flagstaff
By Bryan F. Shea
Counsel for Respondent

David Goldberg Attorney at Law, Fort Collins, CO
By David Goldberg
Counsel for Petitioner

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Paul J. McMurdie joined.

T H O M P S O N, Judge:

¶1 Petitioner Stephen James Bruni petitions this court for review from the summary dismissal of his petition for post-conviction relief. For the reasons stated, we grant review and deny relief.

I. Background

¶2 In 2008, the state indicted Bruni for two counts of sexual conduct with a minor and two counts of child molestation. Bruni allegedly committed the offenses against his eight-year-old nephew. The first trial ended in a mistrial when the trial court realized mid-trial that it had ruled erroneously on a disclosure issue. The second trial ended in a mistrial when the jury was unable to reach a verdict. Approximately four months later, the trial court granted the state's motion to dismiss without prejudice.

¶3 The state re-indicted Bruni several months later. While the state based the second indictment on the same incident(s), the indictment alleged four counts of sexual conduct with a minor over a broader period. A jury found Bruni guilty of count 1 but acquitted him of the remaining counts. The trial court sentenced Bruni to the mandatory sentence of life imprisonment with a possibility of parole after thirty-five years. Ariz. Rev. Stat. (A.R.S.) § 13-604.01(A) (2008). This court affirmed Bruni's conviction and sentence on direct appeal. The same superior court that presided over Bruni's trials later considered and summarily dismissed Bruni's petition for post-conviction relief. Bruni now seeks review.

II. Discussion

¶4 Bruni presents a number of claims in which he argues the superior court erred by rejecting his claim that his first trial counsel and second trial counsel were ineffective.[1] To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's

[1] "First trial counsel" represented Bruni in the first two trials. "Second trial counsel" represented Bruni in the third trial.

performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Ineffective assistance must be a demonstrable reality rather than a matter of speculation. *State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983).

¶5 Bruni also argues his appellate counsel was ineffective. Ineffective assistance of appellate counsel is a cognizable claim. *State v. Herrera*, 183 Ariz. 642, 645, 905 P.2d 1377, 1380 (App. 1995). "A colorable claim of ineffective assistance of appellate counsel is a claim which, if true, might have changed the outcome." *State v. Febles*, 210 Ariz. 589, 595, ¶ 18, 115 P.3d 629, 635 (App. 2005). "[T]he petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different." *Id*.

A. The Failure to Call Witnesses at the Suppression Hearing

¶6 Bruni argues his first trial counsel was ineffective when he failed to call "Bruni, Jr." and "Partis" to testify at a hearing on Bruni's motion to suppress inculpatory statements Bruni made to his brother, who was the victim's stepfather. Bruni made the statements to his brother during two separate events - a physical confrontation between Bruni and his brother and during a recorded "confrontation call" between the two several weeks later. The trial court granted the motion in part and held the brother coerced Bruni's admissions in the first incident through violence. The court found Bruni's statements during the confrontation call were not coerced and denied that portion of the motion. Bruni argues Bruni, Jr. and Partis would have testified that Bruni still feared his brother even at the time of the confrontation call, and that this would have shown Bruni's fear of his brother coerced him to admit he engaged in oral sexual contact with an eight-year-old boy.[2]

[2] Bruni argues the statements he made during the confrontation call were "tacit," "vague" and "nebulous at best[.]" During the call, Bruni's brother told Bruni the victim said "that you were touching his penis and you were sucking on him with your mouth[.]" When Bruni said he did not want to talk about it, his brother said the victim's church counselor needed to know

¶7 We deny relief because "the decision as to what witnesses to call is a tactical, strategic decision" that rests solely with counsel. *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). "[C]ounsel's determinations of trial strategy, even if later proven unsuccessful, are not ineffective assistance of counsel." *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). Further, counsel's failure to call two witnesses to offer their speculation regarding what Bruni was thinking when he participated in a telephone call they did not participate in, overhear or otherwise witness, did not fall below objectively reasonable standards. Finally, we have listened to the recording of the confrontation call and there is nothing to suggest Bruni's statements were the result of coercion or otherwise involuntary. Accordingly, the superior court did not abuse its discretion by rejecting this claim.

B. The Failure to Call Witnesses at Trial

¶8 Bruni argues his second trial counsel was ineffective when he failed to call Bruni, Jr. and Partis to testify at trial. Bruni argues they would have provided exculpatory testimony regarding a variety of subjects, including Bruni's good character, his normal adult sexual interest, how he would not have engaged in the charged activity, how they never saw him act inappropriately with a child, how the victim and other witnesses lied about various subjects, and that prior acts the court admitted pursuant to Arizona Rule of Evidence 404(c) never happened. We deny relief because, again, the decision as to what witnesses to call is a matter of trial strategy. Thus, the superior court did not abuse its discretion by rejecting this claim.

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and asked, "is that all that happened?" Bruni answered, "Yeah." When his brother asked if it was just that one time, Bruni answered, "Yeah." He then told his brother to tell the victim he was "really sorry and it will never happen again." When his brother asked why this conduct started on a camping trip, Bruni answered "I don't know. It was – it just happened, I don't know." When Bruni explained the victim did not contact Bruni during the incident, his brother asked, "It was just you contacting him, right?" to which Bruni answered, "Right" and then claimed that the victim seemed to enjoy it. Bruni later said he wanted to make sure he would "never think or do anything like that to another child ever." At the end of the conference call, Bruni's brother asked Bruni if the conduct involved the victim's hands and penis and Bruni's mouth. Bruni answered, "That was it."

C. The Failure to Object to the Dismissal of the Original Indictment or Move to Dismiss the Second Indictment

¶9 Bruni next argues his second trial counsel was ineffective when he failed to object to the dismissal of the first indictment or move to dismiss the second indictment.[3] Bruni argues the dismissal and reindictment were the result of prosecutorial misconduct and/or vindictiveness.

¶10 "A criminal defendant's constitutional right to due process protects him from prosecutorial decisions that are 'motivated by a desire to punish him for doing something that the law plainly allowed him to do.'" *State v. Mieg*, 225 Ariz. 445, 447, ¶ 10, 239 P.3d 1258, 1260 (App. 2010) (quoting United *States v. Goodwin*, 457 U.S. 368, 384 (1982)). Due process prevents a prosecutor from punishing a defendant who exercises protected rights by subsequently subjecting that defendant to more severe charges. *Mieg*, 225 Ariz. at 447, ¶ 10, 239 P.3d at 1260.

¶11 There are two ways a defendant can establish prosecutorial vindictiveness. First, a defendant can show actual vindictiveness with objective evidence that a prosecutor acted to punish the defendant for exercising his legal rights. *Mieg* at ¶ 11. Second, "a defendant may rely on a presumption of vindictiveness if the circumstances establish a 'realistic likelihood of vindictiveness.'" *Id*. (quoting *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)). We consider all relevant circumstances in our determination of whether to apply a presumption of vindictiveness. *Mieg*, 225 Ariz. at 448, ¶ 15, 239 P.3d at 1261. In doing so, we bear in mind that the pretrial decisions of prosecutors are entitled to "especially deferential" judicial evaluation. *Town of Newton v. Rumery*, 480 U.S. 386, 397, n. 7 (1987). If a defendant makes a prima facie showing that the decision to charge the defendant was more likely than not attributable to prosecutorial vindictiveness, the burden shifts to the state to overcome the presumption by presenting objective evidence that justified the prosecutor's action. *Mieg*, 225 Ariz. at 448, ¶ 12, 239 P.3d at 1261. "[T]he acceptable 'vindictive' desire to punish a defendant for any criminal acts" does not constitute "vindictiveness" that violates due process. *Id*.

[3] Bruni's first trial counsel withdrew five weeks after the second mistrial and nearly three months before the state moved to dismiss the first indictment. His second trial counsel made his first appearance shortly after first counsel withdrew.

¶12 We deny relief. First, the trial court found good cause to dismiss the first indictment without prejudice. A court may dismiss a prosecution upon the state's motion for good cause at any time so long as the purpose of the dismissal was not to avoid the time provisions of Arizona Rule of Criminal Procedure 8. Ariz. R. Crim. P. 16.6(a). There has been no suggestion that the state sought the dismissal to avoid violating Rule 8. Second, Bruni's first trial had ended in a mistrial based on a disclosure issue and the second trial ended in a hung jury. In short, Bruni's counsel had litigated the matter such that the state eventually felt the need to dismiss it. Bruni's counsel need not have assumed that months after the court dismissed the first indictment the state would indict Bruni a second time and attempt to try him a third time. For these reasons, the failure to object to the dismissal of the first indictment did not fall below objectively reasonable standards.

¶13 Second, there is no evidence of actual vindictiveness nor any circumstances that support a presumption of vindictiveness. The state is entitled to respond to changes in the procedural posture of a case by reevaluating its case and changing strategy. So long as the state does not violate due process, this includes bringing new charges after a mistrial. *Mieg*, 225 Ariz. at 449, ¶ 19, 239 P.3d at 1262. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. [T]he initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *Goodwin*, 457 U.S. at 382. Further, over the course of a case, "the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that the information possessed by the state has a broader significance." *Id*. at 381. Finally, it is expected that a defendant will invoke procedural rights before trial and that the invocation of those rights will place a "burden" on the prosecutor. *Id*. It is "unrealistic" to assume a prosecutor will respond to ordinary pretrial motions or the routine invocation of rights by taking actions to "penalize and deter" the defendant. *Id*. "The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates." *Id*.

D. Jury Coercion

¶14 Bruni next argues his second trial counsel was ineffective when he failed to move for a mistrial when the jury reached an impasse and when he failed to object to the way the trial court addressed the impasse.

Bruni argues the trial court's actions coerced the jury into reaching a verdict.

¶15 "[F]undamental error is present 'whenever a judge improperly influences or coerces a verdict.'" *State v. McAnulty*, 184 Ariz. 399, 404, 909 P.2d 466, 471 (App. 1995), quoting *State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994). "The test of coerciveness is whether the trial court's actions or remarks, viewed in the totality of circumstances, displaced the independent judgment of the jurors." *State v. McCrimmon*, 187 Ariz. 169, 172, 927 P.2d 1298, 1301 (1996), quoting *State v. McCutcheon*, 150 Ariz. 317, 320, 723 P.2d 666, 669 (1986).

¶16 We deny relief. There was no hint of coercion and, therefore, the failure to move for a mistrial or object to the way the trial court addressed the impasse did not fall below objectively reasonable standards. The jury informed the court that they were deadlocked eleven to one. With the agreement of counsel, the court brought in the jury and asked if anyone disagreed that the jury was at an impasse. Nobody disagreed. The court then read an instruction to the jury that tracked the language of the impasse instruction found in Revised Arizona Jury Instructions ("RAJI") Standard Criminal Instruction 42 as well as the language in the suggested impasse instruction found in the comment to Arizona Rule of Criminal Procedure 22.4. RAJI (Criminal) Stand. Crim. 42; Ariz. R. Crim. P. 22.4, cmt. The court then asked the jury to return to the jury room and determine if additional deliberation would help. The court expressly told the jury that whether to proceed further or not was up to them.

¶17 The jury returned to the jury room. Approximately one hour later, the foreperson sent out a question from the "holdout" regarding the confrontation call. The trial court interpreted the question to mean that the jury was still at an impasse. The court stated that it would bring the jury in and if they were still at an impasse, the court would declare a mistrial and discharge the jury. The jury returned and informed the court it was still at an impasse. The court asked the jurors if any of them thought further deliberations would assist them in reaching a verdict. Ten jurors raised their hands. The individual jurors who raised their hands are not identified in the record and we will not speculate that the "holdout" was not one of those ten jurors who thought further deliberation would help. The court held it would not discharge the jury and gave the jurors the option to continue their deliberations that day or wait to resume until the following Monday. The jury decided to continue their deliberations and returned their verdicts later that day. Nothing about this process remotely suggests the trial court improperly influenced or coerced the jury's verdicts.

E. Ineffective Assistance of Appellate Counsel

¶18 As the final issue on review, Bruni argues his appellate counsel was ineffective when counsel failed to raise two claims of fundamental error on appeal. Bruni argues appellate counsel should have argued the trial court coerced the jury into reaching a verdict and that there was insufficient evidence to support his conviction.

¶19 We deny relief. First, appellate counsel is not required to "raise every possible or even meritorious issue on appeal." *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382. The "strategic decision to 'winnow out weaker arguments on appeal and focus on' those more likely to prevail is an acceptable exercise of professional judgment." *Febles*, 210 Ariz. at 596, ¶ 20, 115 P.3d at 636 (internal citation omitted).

¶20 Second, there is no reasonable probability the outcome of the appeal would have been different if appellate counsel had raised these issues. Regarding jury coercion, for the reasons stated above, the trial court did not coerce the jury. Regarding the sufficiency of the evidence, the evidence was more than sufficient to support Bruni's conviction and any claim to the contrary on appeal would have been frivolous. As charged and instructed in this case, a person commits sexual conduct with a minor if the person knowingly or intentionally engages in oral sexual contact with any person under eighteen. A.R.S. § 13-1405(A) (2008). "Oral sexual contact" includes oral contact with the penis. A.R.S. § 13-1401(1) (2008). The victim testified that Bruni made oral sexual contact with the victim's penis during a camping trip within the relevant time frame when the victim was eight years old. The victim's credibility was a matter for the jury. *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). "Because a jury is free to credit or discredit testimony, we cannot guess what they believed, nor can we determine what a reasonable jury should have believed." *State v. Bronson*, 204 Ariz. 321, 328, ¶ 34, 63 P.3d 1058, 1065 (App. 2003) (citation omitted). Neither can Bruni.

¶21 We grant review but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA