NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LAWRENCE TASHQUINTH, Petitioner.	2 CA-CR 2011-0404-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064189

Honorable Jan E. Kearney, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena
Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Lawrence Tashquinth was charged with first-degree murder of his girlfriend. Although Tashquinth's first trial resulted in a mistrial when the jury could not reach a verdict, he was convicted of second-degree murder after a second jury found him guilty of that offense. This court affirmed his conviction on appeal. *State v. Tashquinth*, No. 2 CA-CR 2008-0172 (memorandum decision filed Sept. 18, 2009). In this petition for review, Tashquinth challenges the trial court's denial of his petition for post-conviction relief in which he had claimed trial counsel had been ineffective, arguing the court erred when it rejected his claim that his waiver of his right to testify had not been knowing, voluntary and intelligent. We will not disturb the court's ruling unless the court abused its discretion in determining post-conviction relief was not warranted. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., Tashquinth maintained trial counsel had been ineffective in failing to request a jury instruction on third-party culpability and inadequately advising Tashquinth with respect to his decision not to testify at the second trial.[1] At an evidentiary hearing on the petition, at which Tashquinth testified, he stated, inter alia, that he and trial counsel had a

[1]Although in his Rule 32 petition Tashquinth asserted the claim as part of a broader claim of ineffective assistance of counsel, Rule 32 counsel argued at the end of the evidentiary hearing that the trial court could grant relief based on, essentially, the independent claim that Tashquinth had not knowingly, voluntarily and intelligently waived his right to testify at trial. The prosecutor argued Tashquinth had not presented the validity of the waiver of his right to testify as an independent claim in the petition and Tashquinth therefore was precluded from presenting the claim independently because it could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). The court appeared to reject the prosecutor's argument.

brief discussion about whether he should testify at the second trial while they were sitting in the courtroom, just before the decision had to be made. Tashquinth stated that counsel had told him the jury would have the transcripts from his testimony at his first trial. And when Rule 32 counsel asked him whether he would have testified had he known the jury would not be given the transcript from the first trial and would not be told he had testified at that trial, Tashquinth responded, "Yes, I would have." He conceded on cross-examination that his trial testimony at the first trial and his statements to police, which were presented to the jury in both trials, were consistent in that Tashquinth had maintained he and his girlfriend had been attacked during a home invasion. The only inconsistency between his trial testimony and his statements to police had been where his girlfriend's body had been when he had found her, and Tasquinth agreed with the prosecutor that the prosecutor had cross-examined Tashquinth thoroughly on that inconsistency.

¶3 Trial counsel also testified at the Rule 32 hearing. He stated he did not specifically recall his conversation with Tasquinth about testifying. But he testified about his normal practice in such cases based on his thirty-three years' experience as a lawyer. Based on that practice, counsel presumed he would have discussed the issue with Tashquinth at both trials based on what the evidence had shown at the close of the state's case. Counsel acknowledged the inconsistencies between Tashquinth's trial testimony and Tashquinth's statements to police about the location of the victim's body, noting the prosecutor had cross-examined Tashquinth on this point. Counsel testified further that he did not believe it would have been beneficial for Tashquinth to testify at the second trial,

although he could not recall whether he had told Tashquinth this was his opinion. But he would have told Tashquinth the jury already had Tashquinth's statements, meaning his statements to police, not the testimony at trial; counsel explained no mention would have been made or could have been made to the jury about there having been an initial trial. Counsel also testified that a number of strategic factors relevant to whether Tashquinth should testify at the second trial including that his statements to police had already been introduced and, in counsel's view, Tashquinth's demeanor while testifying at the first trial had been flat, something a juror had commented about after the mistrial had been declared.

¶4 With respect to counsel's failure to request a third-party culpability instruction, he agreed that, in hindsight, he probably should have asked for the instruction. Counsel explained, however, that he had believed the issue had been covered adequately by instructions on mere presence and the state's burden of proof. He testified the defense was that another person had committed the offense, and that he had tried to support that defense through witnesses' testimony and argument.

¶5 The trial court denied the Rule 32 petition. In its thorough minute entry, the court reviewed the history of this case and identified the claims of ineffective assistance of counsel, correctly evaluating them under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and other relevant authorities. The court also addressed independently whether Tashquinth's waiver of his right to testify had been valid.

¶6 Although no purpose would be served by restating the court's ruling in its entirety here, *see State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993), we note the salient portions of that ruling as relevant to arguments Tashquinth is raising on review. First, the court found that even had counsel performed deficiently by not requesting a third-party-culpability instruction, Tashquinth was not prejudiced because other instructions, including instructions on the burden of proof and mere presence, had informed the jury of essentially the same principle. The court concluded the outcome of the trial could have been no different had counsel requested the instruction, therefore, Tashquinth had not been prejudiced by counsel's purportedly deficient performance.

¶7 Second, the trial court concluded counsel's performance had been neither deficient nor prejudicial with respect to Tashquinth's decision not to testify at trial. The court noted trial counsel's testimony that he could not recall independently what he had advised Tashquinth about testifying but that he presumed he would have explained the ramifications of testifying, given counsel's ordinary practice. The court also noted counsel's testimony that counsel did not feel it would have been beneficial to Tashquinth to testify. The court, either expressly or by inference, rejected Tashquinth's testimony to the extent Tashquinth had maintained he did not understand information relevant to his decision whether to testify at trial. The court concluded counsel had not performed deficiently and, in any event, Tashquinth had not been prejudiced because the outcome of the case would have been no different had he done so. The court also concluded that "the information imparted to [Tashquinth] was appropriate and sufficient to permit him to make an informed decision at the second trial" about whether to testify.

¶8 On review Tashquinth argues the trial court erred when it concluded he had failed to sustain the "low evidentiary burden of proving by an evidentiary preponderance that he did not knowingly waive his right to testify because he had been misinformed about the evidence." *See* Ariz. R. Crim. P. 32.8(c) (providing defendant must prove factual allegations in petition by preponderance of evidence). He concedes the evidence established he was aware he had a right to testify, but he claims he did not understand the jury would not have transcripts of his testimony from his first trial. He argues he was prejudiced by counsel's alleged deficient performance because the lack of that information made his decision "unknowing and unintelligent," a decision he "should not be held to." He also contends the court erred when it rejected his claim that counsel's deficient performance with respect to the third-party-culpability instruction had not been prejudicial.

¶9 The record supports the trial court's ruling in all respects and we adopt it. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360. To the extent the ruling was based on its resolution of conflicts in the evidence presented at the hearing, its evaluation of the witnesses' credibility, and its determination of how much weight to give the witnesses' testimony, we have no basis for interfering. It is for that court, not this court, to determine the credibility of witnesses, resolve any conflicts in the evidence, and weigh the evidence accordingly. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). As the trier of fact, the court was "'in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance'" the evidence that was presented at the evidentiary hearing. *State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997,

1019 (2000), *quoting State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). We do not determine the credibility of witnesses, *see State v. Ossana*, 199 Ariz. 459, ¶ 7, 18 P.3d 1258, 1260 (App. 2001), nor will we reweigh the evidence, *see State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003).

¶10 For the reasons stated, we grant the petition for review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge