FILED BY CLERK
OCT 10 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JORGE JESUS CORTEZ, Petitioner.	2 CA-CR 2012-0167-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084834

Honorable Terry L. Chandler, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Richard Luff, PLLC
By Richard Luff
Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Jorge Cortez seeks review of the trial court's order, entered after an evidentiary hearing, denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Cortez has not met his burden of establishing such abuse here.

¶2 Cortez was convicted after a jury trial of aggravated assault with a deadly weapon and drive by shooting. The trial court sentenced him to concurrent, mitigated prison terms, the longer of which was seven years. We affirmed Cortez's convictions and sentences on appeal. *State v. Cortez*, No. 2 CA-CR 2009-0318 (memorandum decision filed Sept. 30, 2010).

¶3 Cortez filed a notice and petition for post-conviction relief, claiming his trial counsel had been ineffective in failing to: (1) have his clothing tested for "gunshot residue," which might have been exculpatory had no residue been found; (2) prepare him to testify at trial, prompting him to decide not to testify; (3) adequately present his defense that he was merely present and that a third party had been the shooter; (4) seek to admit into evidence clothing he was wearing at the time of the incident and a booking photograph purportedly showing Cortez did not match the description of the shooter; (5) request a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969); and (6) strike and/or seek the preclusion of testimony by a witness that purportedly had violated Rule 9.3(a), Ariz. R. Crim. P., by speaking with the alleged victim about the trial, or to move for a mistrial on that basis. Cortez additionally raised a claim of newly discovered evidence, asserting his mother "had a chance contact" with the "real shooter"

in 2010 during which that individual admitted being "the shooter in this matter." After an evidentiary hearing, the trial court rejected Cortez's claims and denied his petition.

¶4 On review, Cortez first argues he presented "sufficient evidence . . . that newly discovered facts probably exist concerning the identity of the real shooter that likely would have changed the verdict." He contends the trial court erred in concluding his mother's testimony about the alleged shooter's confession was not credible and, in any event, would have been inadmissible. We need not reach these issues because Cortez has not identified any newly discovered material facts as defined by Rule 32.1(e). Such facts are those that existed at the time of trial but were not discovered until after trial. *State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989). Cortez testified at the evidentiary hearing that he had seen a third party shoot the victim. However, "'[e]vidence known to the defendant is not newly discovered, even if it is not known to his counsel.'" *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000), *quoting Commonwealth v. Osorno*, 568 N.E.2d 627, 631 (Mass. App. Ct. 1991). Thus, the purported fact the shooter was a third party is not newly discovered. And, to the extent Cortez suggests the confession allegedly witnessed by his mother is newly discovered, that confession did not exist at the time of trial and therefore is not newly discovered evidence. *See Bilke*, 162 Ariz. at 52, 781 P.2d at 29. Thus, the court did not err in rejecting this claim.

¶5 Cortez next asserts the trial court erred in rejecting several of his claims of ineffective assistance of counsel.[1] To prevail on a claim of ineffective assistance, Cortez must demonstrate by a preponderance of the evidence, *see* Ariz. R. Crim. P. 32.8(c), that counsel's conduct fell below prevailing professional norms and that counsel's deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, 688 (1984). When, as here, the trial court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). In our review, we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *Id.* And we will affirm if "the trial court's ruling is based on substantial evidence." *Id.* "Evidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*

¶6 Cortez repeats on review his claim that his trial counsel did not adequately prepare him to testify and that he chose not to do so because of that failure. But the trial court found incredible his testimony that counsel had told him she was not prepared for him to testify. Although Cortez claims his testimony was, in fact, credible and there was other evidence counsel was unprepared to properly present his mere presence or third-party culpability defenses, we will not reweigh the evidence on review. *See id.*; *see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter

[1]Cortez does not reassert his claims that counsel should have sought a *Dessureault* hearing or his claims based on a purported violation of Rule 9.3(a), Ariz. R. Crim. P.

of witness credibility in post-conviction proceeding). Nor does Cortez identify any evidence in the record supporting a claim that counsel's advice to him to forgo testifying fell below prevailing professional norms. *See Strickland*, 466 U.S. at 687. Thus, the court did not err in rejecting this claim.

¶7 We also reject Cortez's claims regarding his counsel's decisions not to test for gunpowder residue the shirt he was wearing at the time of the shooting and not to present as evidence Cortez's booking photograph purportedly showing he did not match the description of the shooter given by witnesses. The trial court concluded both decisions were appropriate strategic decisions given that gunpowder residue testing is unreliable due to the high rate of false positives[2] and that the booking photograph was recognizable as such and might have prejudiced Cortez. We presume "counsel's conduct falls within the wide range of reasonable professional assistance" that "'might be considered sound trial strategy.'" *Strickland*, 466 U.S at 689, *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955). To overcome this presumption, Cortez must show counsel's decisions were not tactical in nature, but were instead the result of "ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Thus, disagreements about trial strategy will not support an ineffective

[2]Although Cortez argues the detective who testified at trial about the reliability of gunpowder residue testing "is not and did not hold himself out as an expert" in such testing, he does not adequately develop this argument on review, nor does he support it with citation to the record or authority. Accordingly, we do not address it further. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must contain "reasons why the petition should be granted" and include "specific references to the record"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

assistance claim if "the challenged conduct has some reasoned basis," *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985), even if the tactics counsel adopts are unsuccessful, *see State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975). Although another attorney testified at the evidentiary hearing that he might have conducted Cortez's defense differently,[3] the court identified reasoned bases for trial counsel's decisions. Thus, Cortez's claims fail.

¶8 For these reasons, although review is granted, relief is denied.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[3]Cortez also suggests counsel should have sought to admit the long-sleeved shirt he had been wearing to address witness testimony that the shooter had bare arms. But, although he elicited evidence relevant to this claim at the evidentiary hearing, he did not raise it in his petition below nor in his closing argument following the evidentiary hearing. Accordingly, we do not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not adequately raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").