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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OF ARIZONA, Respondent, v. JASON LAWRENCE SHARP, Petitioner.	2 CA-CR 2012-0221-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20061544

Honorable Ralph M. Hess, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Jason Sharp seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an evidentiary hearing on his claim of ineffective assistance of trial counsel. For the following reasons, we grant review but deny relief.

¶2 After a jury trial, Sharp was convicted of sexual assault and attempted sexual assault and sentenced to concurrent terms of imprisonment, the longer of which was seven years. This court affirmed his convictions and sentences on appeal. *State v. Sharp*, No. 1 CA-CR 07-0458 (memorandum decision filed Nov. 4, 2008). Sharp then filed a timely notice of post-conviction relief and, in the petition that followed, alleged trial counsel had been ineffective in failing to call as witnesses several children who, Sharp claims, may have been in the room with him and the victim when the assault and attempted assault reportedly had occurred and had not noticed any interaction between the two of them.[1]

¶3 After an evidentiary hearing, the trial court denied relief, finding that counsel had not rendered ineffective assistance but had made a reasoned tactical decision and that Sharp had failed to establish prejudice. On review, Sharp argues the court abused its discretion in failing to find counsel ineffective for his decision not "to call exculpatory witnesses who were available and willing to testify."

[1]At trial, L.P. testified that she and Sharp were alone in a room with her brother, who was occupied at a computer, when Sharp pulled her over to him and, against her will, put his hand inside her pants, forced his finger into her vagina, and attempted to put his finger in her anus.

¶4 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the 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," and when "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* "Evidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶5 Sharp points to his trial counsel's statements at the evidentiary hearing that he "couldn't tell you exactly why" and "couldn't tell you now or articulate the reasons" he decided not to call the children, who were all related to Sharp. But counsel also testified that he "didn't think they were good witnesses" and "thought the kids didn't come across well." He also stated, "I don't believe today they should have testified . . . because I don't think they were believable. I thought they were somewhat disingenuous in their approach, and it was primarily adults getting them there; not them." He added, "Maybe I'm wrong, but I didn't think they should be called then and I don't now. And you may be able to convince me otherwise, but I think that's kind of a decision that we come to at trial. And if I'm wrong about it, I'm wrong about it." Although Sharp argues that, "[w]ithout exception," each of the children testified at the evidentiary hearing that

he or she "was in the room at the time of the alleged event [and] . . . saw nothing and . . . heard nothing," the court observed that "the children . . . were understandably led to agree with whichever counsel was questioning them." Thus, notwithstanding Sharp's assertion that the children would have provided "critical exculpatory testimony," the court concluded, "At trial four years earlier, [trial counsel] could very well have accurately assessed that their testimony could appear to have been influenced by family members to assist their father and uncle and undermine the defense theory of consent."[2] We will not reweigh the evidence presented, as Sharp seems to suggest on review. *Cf. State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (reviewing court does not reweigh trial evidence).

¶6 In its ruling, the trial court clearly identified and thoroughly addressed each aspect of Sharp's claim and resolved the issues in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Ample evidence supported the court's findings, and no purpose would be served by repeating the court's full analysis here. *See id.* Based on the record before us, the applicable law, and the court's assessment of the testimony presented at the evidentiary hearing, the court did not abuse its discretion in denying relief on Sharp's claim of ineffective assistance of counsel.

[2]Sharp maintains there was insufficient evidence to support the trial court's conclusion that the testimony would have undermined Sharp's defense, because Sharp's defense was that he had digitally penetrated L.P., with her consent, in a different room earlier that day. We read the court's comment as somewhat more nuanced; if a jury had the impression that a defendant had influenced his child relatives to testify falsely on his behalf, it would likely undermine any defense theory he proposed.

¶7 Accordingly, although we grant review, we deny relief.

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

CONCURRING:

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

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