FILED BY CLERK
SEP 24 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. FERMIN ANTONIO DE LA ROSA, JR., Petitioner.	2 CA-CR 2012-0294-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007109517001DT

Honorable John R. Ditsworth, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin — Phoenix
Attorneys for Respondent

Fermin Antonio De La Rosa, Jr. — Tucson
In Propria Persona

B R A M M E R, Judge.*

¶1 After a jury trial, petitioner Fermin Antonio De La Rosa, Jr., was convicted of second-degree murder, aggravated assault, drive-by shooting, and discharge of a firearm at a structure, all dangerous offenses. This court affirmed the convictions and the sentences imposed on appeal. *See State v. De La Rosa, Jr.*, No. 1 CA-CR 2008-0911

(memorandum decision filed July 15, 2010). De La Rosa then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., waiving his right to be represented by counsel. The trial court dismissed the petition and this petition for review followed. We will not disturb the court's ruling absent a clear abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 In his pro se petition for post-conviction relief, De La Rosa argued in relevant part[1] that trial counsel had rendered ineffective assistance by not objecting to the jury instruction on second-degree murder, a lesser-included offense of the charged offense of first-degree murder, thereby permitting him to be "tried on a charge different and distinct from first degree murder"; permitting the violation of his right to have a jury determine aggravating circumstances for purposes of sentencing on the second-degree murder and aggravated assault convictions; De La Rosa also argued his conviction was based solely on the victim's girlfriend's hearsay statement that De La Rosa had been the shooter, claiming this violated his right to a fair trial, as illustrated by "the litany of questions posed by the jurors." De La Rosa asserted he was entitled to relief under Rule 32.1(h) based on his "actual innocence."

¶3 In order to establish a colorable claim of ineffective assistance of counsel, De La Rosa was required to show his attorneys' performances had been deficient, based on prevailing professional norms, and that these deficiencies had been prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (addressing what constitutes colorable claim generally and colorable claim of ineffective assistance of counsel). To demonstrate the requisite prejudice, he

[1]Although De La Rosa argued trial and appellate counsel had been ineffective in a variety of respects, we address only those claims he even arguably has reasserted in his petition for review.

had the burden of showing there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*. 466 U.S. at 694. Thus, with respect to the alleged ineffectiveness of trial counsel De La Rosa was required to show the outcome of trial would have been different. *Id*. Similarly, to establish a claim of ineffective assistance of appellate counsel, he was required to show counsel's performance on appeal had been deficient and there is "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different." *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). A colorable claim warranting an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). And like all other claims, including his claim that he was entitled to relief based on actual innocence, *see* Ariz. R. Crim. P. 32.1(h), De La Rosa's claims were subject to summary dismissal if he failed to establish a "material issue of fact or law which would entitle [him] to relief." Ariz. R. Crim. P. 32.6(c). De La Rosa essentially challenged the sufficiency of the evidence.

¶4 The state argued in its response to De La Rosa's Rule 32 petition that the claims essentially challenging the sufficiency of the evidence or the admission of the victim's statements were precluded because they were or could have been raised on direct appeal. The state further responded that De La Rosa had not raised a colorable claim of ineffective assistance of trial or appellate counsel, specifying that the decision whether to object to a lesser-included instruction is a matter of trial strategy, and that claims based on strategic decisions rarely support a claim of ineffective assistance of trial counsel. The state made the same argument with respect to appellate counsel's performance,

noting it is for the appellate attorney to decide, based on his or her experience and expertise, which issues to raise on appeal.

¶5 The trial court summarily dismissed De La Rosa's petition[2] "[f]or the reasons contained in the State's Response." In his petition for review, De La Rosa again contends trial counsel was ineffective for failing to object to the instruction on the lesser-included offenses; he argues counsel's performance was particularly deficient because throughout the trial the state's theory on the murder charge had been that De La Rosa had acted with premeditation and counsel had allowed him to be "tried and convicted on a theory different and distinct from [that upon] which defendant was indicted and different and distinct from that which the state used at trial." In a wholly conclusory fashion, De La Rosa also asserts that "[b]oth trial and appellate counsel were ineffective in not raising these issues." In a similarly abbreviated manner, he seems to suggest that because the jurors had "substantial questions" about hearsay statements, there was insufficient evidence warranting a conviction and he was entitled to relief under Rule 32.1(h).

¶6 De La Rosa has not persuaded us on review the trial court abused its discretion in adopting the state's arguments contained in its response to the petition for post-conviction relief. Specifically, a general challenge to the sufficiency of the evidence or a challenge to the propriety of the court's admission of certain evidence, including hearsay statements, do not, without more, constitute a viable claim under Rule 32.1(h). A defendant is not entitled to relief under this subsection unless he can establish, "by clear and convincing evidence that . . . no reasonable fact-finder would have found defendant

[2]Although the trial court stated in its minute entry that it was dismissing the Notice of Post-Conviction Relief, the court clearly intended to dismiss the petition, having stated it had reviewed De La Rosa's pro se petition and the state's response.

guilty of the underlying offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h). The court correctly denied De La Rosa relief under this subsection of the rule.

¶7 The state, and therefore the trial court, also was correct that De La Rosa's claims of ineffective assistance of trial and appellate counsel based on the lesser-included-offense instruction were not colorable claims for relief. From the lack of an objection, we can presume trial counsel chose not to pursue a defense strategy that would have permitted the jury to have only one option on the murder-related charge: a guilty verdict on the charge of first-degree murder or nothing at all. Given the record before us and the evidence against De La Rosa, the decision to permit the court to instruct the jury on the lesser offenses was a reasonable tactical decision. *See State v. Espinosa–Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) ("Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel."); *see also State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) (defendant must overcome strong presumption counsel's tactical decisions reasonable under circumstances existing when decisions made). And without an objection to the instruction, appellate counsel had little, if any, basis for challenging the legally correct instruction on appeal, given that second-degree murder is a lesser-included offense of first-degree murder. *See State v. Kamai*, 184 Ariz. 620, 623, 911 P.2d 626, 629 (App. 1995) (second-degree murder homicide "without premeditation" and lesser-included offense of first-degree murder); *see also* Ariz. R. Crim. P. 13.2(c) cmt. (noting Rule 13.2(c) "clarifies the prosecutor's right to request instructions as to necessarily included offenses"); Ariz. R. Crim. P. 23.3 cmt. ("Rules 13.2(c) and 23.3 make clear that the prosecutor . . . is entitled to an instruction on any offense for which there is evidentiary support and for which a verdict form is submitted to the jury.").

¶8 For the reasons stated, we grant De La Rosa's petition for review but we deny relief.

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

CONCURRING:

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

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

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.