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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STATE OF ARIZONA, Respondent, v. ROBERT RAY MATHIS, Petitioner.	2 CA-CR 2012-0333-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20091705001

Honorable Jose H. Robles, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Law Offices of Erin E. Duffy, P.L.L.C.
By Erin E. Duffy
Tucson
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, petitioner Robert Mathis was convicted of one count of public sexual indecency to a minor, and the trial court placed him on three years' probation. We affirmed Mathis's conviction and probation term. *State v. Mathis*, No. 2 CA-CR 2010-0172 (memorandum decision filed Apr. 29, 2011). Mathis then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting various

claims of ineffective assistance of trial counsel. He now petitions this court for review of the court's dismissal of that petition. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 On review, Mathis argues the trial court erred in rejecting, without an evidentiary hearing, his claims that trial counsel had been ineffective in failing to: (1) file a written motion to preclude the hearsay testimony of the victim's mother; (2) file a motion to preclude speculation regarding the nature of Mathis's conduct; (3) hold the state to its burden of proving he had been masturbating on the patio of his apartment; and, (4) argue in his motion for judgment of acquittal that the victim had not identified Mathis as the man who had engaged in the described conduct and renew the motion at the close of the defense case. Mathis also argues the court should have granted relief based on trial counsel's cumulative errors, including counsel's failure to utilize witness R. properly; provide notice of intent to call witness S.; request jury instructions on trespassing; argue against admission of evidence of prior police contact; argue that Mathis could have been viewing non-pornographic movies that contained sexual material; and, argue that "a man adjusting himself could have his hand in his groin area," as opposed to masturbating.

¶3 On appeal, we found "the record contain[ed] substantial evidence from which reasonable jurors could find Mathis had engaged in sexual contact," noting the victim had testified that, on a date prior to the date of the subject conduct, "he had seen Mathis masturbating on his porch, describing Mathis's actions as 'moving his hand and arm up and down,' and demonstrating the movement for the jury," and that "on another

occasion he had seen Mathis on his patio and his 'weenie [was] hanging out' with his pants around his ankles." *Mathis*, 2 CA-CR 2010-0172, ¶ 6. We also pointed out that the victim had reported Mathis was "'doing it again on his patio'" on the date in question. *Id.* ¶ 7. Also on appeal, we specifically rejected on the merits claims related to the testimony of R. and S., the same claims Mathis has now raised under the guise of ineffective assistance of counsel. *Id.* ¶¶ 20-26.

¶4 In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate the requisite prejudice, the defendant must show "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. A petitioner's failure to establish either part of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). "[D]isagreements as to trial strategy or errors in trial tactics will not support an [in]effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). A reviewing court should give deference to tactical decisions made by counsel and should refrain from evaluating counsel's performance in the harsh light of hindsight. *Nash*, 143 Ariz. at 398, 694 P.2d at 228.

¶5 The trial court addressed Mathis's claims in a thorough, well-reasoned ruling in which it correctly concluded he had failed to raise a colorable claim for relief.

No purpose would be served by restating the court's ruling in its entirety here. Rather, because Mathis has failed to establish the court abused its discretion in denying the petition, we adopt the court's ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Additionally, because we conclude the trial court properly found Mathis had failed to assert any colorable claims meriting post-conviction relief, we reject his claim that he was entitled to an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (evidentiary hearing required only when petitioner states colorable claim). The decision whether a claim is colorable and therefore warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶6 Therefore, we grant the petition for review but deny relief.

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

CONCURRING:

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

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