

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

SAMER WAHAB ABDIN,  
*Petitioner.*

No. 2 CA-CR 2016-0103-PR  
Filed May 31, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2010122647001DT  
The Honorable Robert L. Gottsfield, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By Susan L. Luder, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Samer W. Abdin, Buckeye  
*In Propria Persona*

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**MEMORANDUM DECISION**

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

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STARING, Judge:

¶1 Petitioner Samer Abdin seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "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 After a jury trial in 2011, Abdin was convicted of theft of means of transportation and weapons misconduct. The trial court imposed concurrent, mitigated and minimum, eight-year prison terms, with 259 days' presentence incarceration credit. We affirmed Abdin's convictions and sentences on appeal. *State v. Abdin*, No. 1 CA-CR 11-0425 (memorandum decision filed Aug. 9, 2012). Abdin initiated a Rule 32 proceeding in August 2012, and appointed counsel filed a notice of completion of post-conviction review noting he had been unable to find any claims to raise in a petition for post-conviction relief. After the court permitted Abdin to file a pro se petition, he asserted various claims of ineffective assistance of trial counsel and maintained he was entitled to an evidentiary hearing. The court summarily denied relief, and this petition for review followed.

¶3 In its ruling summarily dismissing Abdin's claims, the trial court adopted "[t]he state's analysis of the issues . . . namely, that these are issues of trial strategy which is the domain of trial counsel." <sup>1</sup> On review, Abdin asks that we remand for an

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<sup>1</sup>Although the trial court apparently adopted the state's entire response to the Rule 32 petition below, and despite our finding that the court correctly denied relief, we note that we do not necessarily

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evidentiary hearing, asserting that the state's reasoning in its response to the petition below, as adopted by the court, contains factual and legal errors. Stating a colorable claim of ineffective assistance of counsel requires showing both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004).

¶4 Abdin first argues trial counsel should have moved to sever the theft and prohibited possessor counts because the latter count required proof of a prior conviction, information he contends should not have been presented to the jury in the theft matter. *See generally* Ariz. R. Crim. P. 13.3, 13.4; *see also State v. Henderson*, 116 Ariz. 310, 316, 569 P.2d 252, 258 (App. 1977) ("The joinder and severance rules must be read together."). In the state's response below, which the trial court adopted, it correctly asserted that although the jury was not instructed to consider each offense separately, it nonetheless was instructed the state must prove each separate offense beyond a reasonable doubt and the jury "must not consider a prior conviction as evidence of guilt of a crime for which the defendant is now on trial." *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007) (appellate court reviews instructions in their entirety).

¶5 Assuming, as we must, that the jury followed the instructions provided, which when considered as a whole, correctly stated the law, no "fatal" error occurred. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (we presume jurors follow instructions they are given); *see also State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995) (lack of particular instruction "not fatal" where instructions, read as whole, sufficiently state the law).

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agree with or discuss every argument asserted by the state in its response. *Cf. State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court "will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons").

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Concomitantly, Abdin did not suffer prejudice by counsel's failure to file a motion to sever even if it were error not to do so. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance.").

¶6 Abdin next argues trial counsel failed to object to a violation of his right to a speedy trial. On September 13, 2010, "counsel" advised the court they were not ready to proceed to trial on September 20, 2010, because Abdin had been charged in another matter, and "[u]pon oral motion by counsel for the Defense," the trial date was vacated; counsel indicated Abdin waived "time" and the court set a "new last day" of October 23, 2010. At his initial appearance in the new matter, held on September 20, 2010, Abdin was taken into custody and the court set a status conference for September 23, 2010, which, on Abdin's motion, was continued until September 30, 2010. New defense counsel was substituted on September 30, 2010, and at a hearing on October 21, 2010, the court scheduled a pretrial conference for November 24, 2010, without objection. At the November 24, 2010 hearing, the court set a status conference for December 20, 2010, and directed counsel "to file a calculation [by December 8, 2010] of what they determine the last day [for trial] to be."

¶7 In its December 21, 2010 ruling, the trial court rejected both parties' last day calculations, denied Abdin's motion to dismiss based on a violation of his right to a speedy trial, and adopted a "Last Day" of March 8, 2011. In that ruling, the court concluded, "The delay between the original September 20 trial date and whatever trial date is ultimately set is delay 'occasioned by or on behalf of the Defendant,' and is therefore excluded time pursuant to Rule 8.4(a)[, Ariz. R. Crim. P.]." The court also noted defense counsel had not objected when the court set the next hearing for November 24, "more than a month beyond the purported Last Day [of October 23, 2010]."

¶8 Based on inter alia, at least two continuances requested by Abdin and his waiver of time, along with his failure to identify any prejudice he suffered as a result of a purported speedy trial violation, the trial court denied his claim of ineffective assistance.

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To the extent Abdin conflates the showing of prejudice required to prevail on a speedy-trial claim and the prejudice he must show to obtain relief for ineffective assistance of counsel, he fails to describe on review any discernible prejudice or detriment stemming either from the minimal delay of his trial, held in February 2011, or from counsel's failure to timely seek dismissal. *See United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (defendant bears burden to show more than possibility of prejudice in order to establish violation of speedy-trial rights). Therefore, even assuming counsel performed deficiently, in light of Abdin's failure to establish how he was prejudiced, the court did not abuse its discretion by denying his claim. Moreover, even if the court had granted Abdin's motion to dismiss, it could have done so without prejudice, thereby permitting the state to refile immediately. *See Ariz. R. Crim. P. 8.6.*

¶9 Abdin next contends trial counsel should have filed a motion in limine to exclude the four weapons officers seized from a camper where Abdin was living. He asserts this evidence, which formed the basis for the prohibited possessor charge, was cumulative and prejudicial. At trial, defense counsel objected to the admission of the four weapons, asserting Abdin had only been charged with possession of one weapon; specifically, Abdin was charged with "misconduct involving weapons" for having "knowingly possessed a knife, a deadly weapon, while being a prohibited possessor." The trial court denied the objection, finding there had been "sufficient disclosure" of all four weapons before trial. Notably, even if counsel had filed a motion in limine, there is no reason to believe the court would have granted it, and even if it had, there was overwhelming evidence that Abdin was guilty of weapons misconduct, particularly in light of his admission to officers that he owned the subject weapons. Absent a showing of prejudice, which Abdin has not made, he has failed to establish a claim of ineffective assistance of counsel. *See Salazar*, 173 Ariz. at 414, 844 P.2d at 581.

¶10 Abdin next challenges counsel's opening statement, in which he told "a joke about Lord Baltimore," rather than discussing the evidence he expected to present at trial. Abdin asserts that no reasoned trial strategy supports counsel's conduct, particularly in

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light of evidence he maintains counsel should have shared with the jury, to wit, that Abdin had “cooperated” with the police to locate the stolen vehicle and had not “intend[ed]” to possess the weapons. The state argued, inter alia, that counsel’s opening statement was based on trial strategy, and that the Lord Baltimore story offered a “moral” –not to “jump to conclusions,” which counsel referred to again in his closing argument.

¶11 “Matters of trial strategy and tactics are committed to defense counsel’s judgment . . . .” *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). “Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel.” *State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984). To the extent the trial court adopted the state’s reasoning that counsel’s opening argument was based on reasonable trial strategy, our review of the record supports this reasoning. Moreover, in his petition below, Abdin himself acknowledged that “defense counsel’s telling a joke instead of making a substantive opening statement in and of itself may not be ineffective.”

¶12 Finally, Abdin argues counsel should not have waived the giving of a lesser-included-offense instruction, asserting without factual or legal support that “it is reasonably probable that the jury would have returned a verdict for a lesser offense based on the evidence and not convicted Petitioner on theft of means.” As the state correctly noted in its response below, Abdin “does not state what [the] lesser-included offense would have been and he fails to explain how the jury would have found such a lesser-included offense.” Unsupported speculation is not sufficient to warrant an evidentiary hearing. *See State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984) (“Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation.”); *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim “must consist of more than conclusory assertions”). Abdin has failed to establish the trial court abused its discretion in summarily dismissing this claim.

¶13 Accordingly, we grant Abdin’s petition for review but deny relief.