IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EDUARDO VASQUEZ CELAYA,
Petitioner.

No. 2 CA-CR 2016-0167-PR
Filed August 11, 2016

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Pima County
No. CR20063527
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Steven R. Sonenberg, Pima County Public Defender
By David J. Euchner, Deputy Public Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Judge:

¶1 Eduardo Celaya seeks review of the trial court's order denying, after an evidentiary hearing, his petition for post-conviction relief. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Celaya has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Celaya was convicted of two counts of first-degree murder and sentenced to consecutive life terms, both without the possibility of release for twenty-five years. The victims were found in a city park, each shot once in the head. Celaya's cousin, M., testified that Celaya had reported accidentally firing a .45-caliber pistol into his work truck. Firearms examiners opined that a .45-caliber bullet recovered by police from the floorboard of Celaya's truck and the bullets that had killed the victims had been fired from the same gun. Another firearms examiner called by Celaya opined, however, that none of the three bullets "match[ed]" because the "dissimilarities [of the marks on the bullets] far outweigh the similarities." Celaya's expert also testified that forensic bullet matching was "subjective," because it included the examiner's opinion and that it was not possible, when comparing bullets, to "say that a bullet was fired from a specific gun to the exclusion of all other guns."

¶3 M. further testified Celaya had asked him to kill two men in relation to a drug debt and, when he refused, Celaya stated "Well, I'm going to do it. Watch," and put a .45-caliber pistol in his belt. According to M., Celaya then made a telephone call, the two

victims arrived, and Celaya left with the victims after he told them someone would meet them at a park "with your money." About thirty minutes later, Celaya telephoned M. and asked him to come pick him up; when Celaya got in M.'s car, M. saw blood on a sock Celaya had used to clean sweat off of his face and Celaya said "I told you I was going to do it."

¶4 We affirmed Celaya's convictions and sentences on appeal. *State v. Celaya*, No. 2 CA-CR 2007-0307 (Ariz. App. July 1, 2009) (mem. decision). In 2011, Celaya sought post-conviction relief raising, inter alia, claims of ineffective assistance of counsel and claims of newly discovered evidence, specifically (1) evidence M. had later admitted committing the murders and (2) scientific evidence calling into question the forensic evidence connecting the bullets found in Celaya's truck and those that killed the victims to the same gun. The trial court summarily denied relief, and we denied relief on review. *State v. Celaya*, No. 2 CA-CR 2011-0364-PR (Ariz. App. Mar. 6, 2012) (mem. decision).

¶5 Our supreme court, however, vacated our decision and remanded the case for an evidentiary hearing to address Celaya's claims of newly discovered evidence as well as his various claims of ineffective assistance of trial counsel. The trial court held an evidentiary hearing and denied relief, addressing the claim of newly discovered evidence related to the alleged confession and Celaya's ineffective-assistance claims. We granted partial relief on review, clarifying that the supreme court's order had required the trial court to consider both claims of newly discovered evidence and determining the court, in addressing the first issue, had relied "on at least two incorrect facts" in rejecting the claim. *State v. Celaya*, No. 2 CA-CR 2013-0554-PR, ¶¶ 18, 23-24 (Ariz. App. Aug. 27, 2014). We otherwise denied relief, concluding the court had correctly rejected Celaya's claims of ineffective assistance. *Id.* ¶¶ 14, 24.

¶6 After an additional evidentiary hearing on Celaya's claim of newly discovered scientific evidence, the trial court denied relief on both his Rule 32.1(e) claims. It concluded the witnesses to M.'s purported confessions were not credible and the new scientific evidence "would be cumulative to what [had] already been

presented at trial," would not be "more persuasive," and "would likely not alter the jury's verdict." This petition for review followed.

¶7 On review, Celaya asserts the trial court erred in rejecting his claims of newly discovered evidence. To prevail on a claim pursuant to Rule 32.1(e), Celaya must demonstrate the newly discovered material facts were discovered after the trial, he was diligent in securing them, and they "probably would have changed the verdict." *See State v. Amaral*, 239 Ariz. 217, ¶ 9, 368 P.3d 925, 927 (2016). The facts must not be "merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e).

¶8 We first address Celaya's argument that the trial court was required to evaluate whether the scientific evidence would alter the verdict "in the context of all the new evidence available," including alibi evidence related to his rejected claim of ineffective assistance of counsel. He cites our memorandum decision *State v. Krause*, No. 2 CA-CR 2015-0326-PR (Ariz. App. Nov. 19, 2015) (mem. decision),[1] but *Krause* does not support Celaya's argument. There, in evaluating a claim of newly discovered scientific evidence, we considered additional evidence not presented at trial only because the state "would not have attempted to present" critical forensic evidence in light of the newly discovered evidence, and thus the new evidence would have "dramatically altered the presentation of evidence at trial by both parties had they been aware of it." *Id.* ¶¶ 4, 9. Here, in contrast, the newly identified forensic evidence on which Celaya relies merely contradicts the forensic evidence presented at trial, and Celaya has not identified any tactical decision made as a

[1]Rule 111(c), Ariz. R. Sup. Ct., provides that a memorandum decision has no precedential value but may be cited, inter alia, "for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion."

result of the strength of that trial evidence. We therefore reject the notion that the court was required to consider Celaya's unrelated alibi defense in determining whether the additional scientific testimony would have changed the verdict.

¶9 We have evaluated the new scientific evidence in light of the record before us and can find no basis to disturb the trial court's discretionary determination that the evidence would not have altered the jury's verdict.[2] *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948. Rather, we conclude the court correctly addressed Celaya's claim in a thorough and well-reasoned ruling, which we accordingly adopt. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶10 We write further, however, to point out that Celaya's claim the newly discovered scientific evidence would have altered

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[2]Insofar as Celaya suggests the supreme court's remand for an evidentiary hearing somehow limited the trial court's discretion in this regard based on the "law of the case," we disagree. The supreme court's summary order provided no reason for the remand. Law of the case applies when a court "refus[es] to reopen questions previously decided in the *same* case by the same court or a higher appellate court." *State v. Whelan*, 208 Ariz. 168, ¶ 8, 91 P.3d 1011, 1014 (App. 2004) (emphasis added in *Whelan*), *quoting Davis v. Davis*, 195 Ariz. 158, ¶ 13, 985 P.2d 643, 647 (App. 1999). Our supreme court has instructed that, when doubt exists whether a petition raises a colorable claim, "a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988), *quoting State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Thus, the supreme court's remand for an evidentiary hearing did not finally resolve any substantive issue in this case.

the verdict overemphasizes the importance of the forensic evidence at trial. To convict Celaya, the jury necessarily must have believed M.'s testimony that Celaya had committed the murders. Nothing about the new scientific evidence calls M.'s credibility into question. And, even if a jury were to accept entirely Celaya's contention that the forensic examiners cannot establish the same gun fired the three bullets,[3] the remaining physical evidence still corroborates M.'s testimony—a .45-caliber bullet was recovered from Celaya's truck, and a .45-caliber weapon was used to murder the victims.

¶11 Celaya further argues the trial court erred in finding incredible the testimony of two witnesses who claimed to have heard M. confess to the murders. But the determination of the credibility of witnesses at an evidentiary hearing in a post-conviction relief proceeding rests solely with the trial court. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988); *see also State v. Hess*, 231 Ariz. 80, ¶ 11, 290 P.3d 473, 476 (App. 2012). Celaya has identified no factual error by the trial court and, thus, no basis for us to disturb its determination of credibility.

¶12 For all of the foregoing reasons, we grant review but deny relief.

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[3] The evidence offered by Celaya varies on this point—he identifies a 2013 letter from the United States Department of Justice containing a statement by the Federal Bureau of Investigation (FBI) that the "science regarding firearms examinations does not permit examiner testimony that a specific gun fired a specific bullet to the exclusion of all other guns in the world" but does permit testimony that a specific gun fired a specific bullet "to a reasonable degree of scientific certainty." But one of the experts called by Celaya at the evidentiary hearing went considerably further than the FBI, testifying the "strongest scientifically defensible opinion . . . would be that a specific firearm could not be eliminated as the . . . firing platform for particular bullets or cartridge cases."