IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN JOSEPH MARTINEZ,
Petitioner.

No. 2 CA-CR 2023-0174-PR
Filed April 22, 2024

Petition for Review from the Superior Court in Pinal County
No. S1100CR201503988
The Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Grand Canyon Law Group, Mesa
By Angela C. Poliquin
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Gard concurred.

E P P I C H, Presiding Judge:

¶1 Petitioner John Martinez seeks review of the trial court's rulings dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Martinez has not met his burden of establishing such abuse here.

¶2 After a jury trial, Martinez was convicted of kidnapping, aggravated assault, influencing a witness, and two counts of threatening or intimidating a witness. The trial court sentenced him to concurrent and consecutive, enhanced prison terms totaling twenty-six years. This court affirmed his convictions and sentences on appeal. *State v. Martinez*, No. 2 CA-CR 2017-0120 (Ariz. App. Feb. 21, 2019) (mem. decision).

¶3 Thereafter, Martinez initiated a proceeding for post-conviction relief. In his petition, Martinez raised several claims of ineffective assistance of trial counsel, including that he had failed to inform Martinez of a favorable plea offer, that he had fallen asleep during trial, that he had failed to call a gang expert, and that he had failed to object to "repeated acts" of prosecutorial misconduct. Martinez argued that the cumulative impact of these errors resulted in a "fundamentally unfair" trial. As a standalone claim, he asserted that the prosecutor had committed misconduct by "presenting improper bolstering hearsay and other improper evidence." Martinez also raised a claim under Rule 32.1(g), arguing that *State v. Hood*, 251 Ariz. 57 (App. 2021), constituted a significant change in the law that applied to his case. According to Martinez, *Hood* established that "reversible error and unfair prejudice" occurs when officers testify as both experts and fact witnesses, as occurred here, confusing the jury as to their "dual capacity role."

¶4 After the state filed its response, Martinez obtained new counsel. In his reply, Martinez asserted a new claim of ineffective assistance of appellate counsel for failing to challenge the purported prosecutorial misconduct. Because his first Rule 32 counsel had also been appellate

counsel, Martinez reasoned that she could not argue her own ineffectiveness and asked the trial court to allow supplemental briefing on the matter. The court granted that request. In his supplemental reply, Martinez argued that his "prosecutorial error claims are also couched under new law—*State v. Hood*."

¶5 The trial court issued a ruling in December 2022. First, the court concluded that *Hood* "did not establish a change in the law that would support granting a new trial in this case." The court explained that *Hood* "merely noted that some courts have expressed concerns when a case agent testifies at trial both as an expert and a fact witness" but "did not, by any means, categorically prohibit dual-capacity witness testimony." The court rejected Martinez's claim of prosecutorial misconduct, explaining, in part, that it was precluded under Rule 32.2(a)(3). The court also rejected Martinez's claims of ineffective assistance of trial and appellate counsel based on the failure to challenge the purported misconduct.

¶6 Next, the trial court rejected Martinez's claims of ineffective assistance for trial counsel's failure to advise Martinez of a plea offer and to call a gang expert. As to the latter claim, the court observed that Martinez had failed to "identify what expert [counsel] should have called" or "what an expert could have testified to that would have made any difference in the outcome of the trial." In addition, the court noted that Martinez had sought to show that he had "ended his gang involvement" but such evidence could "be presented effectively to lay jurors without the assistance of an expert witness on gangs." However, as to Martinez's claim of ineffective assistance due to trial counsel "falling asleep during trial," the court concluded he had established a colorable claim warranting an evidentiary hearing. Lastly, the court rejected Martinez's claim of cumulative error, pointing out that "the general rule is that several non-errors and harmless errors do not add up to one reversible error."

¶7 At the evidentiary hearing several months later, trial counsel testified, as did Martinez, his brother, and his father. Shortly thereafter, in May 2023, the trial court issued its ruling denying Martinez's petition. The court determined that Martinez had "not shown by the preponderance of the evidence that counsel fell asleep during the trial" and therefore had not established that counsel's conduct was deficient. In addition, the court concluded that Martinez had failed to establish prejudice. This petition for review followed.

¶8 "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below

objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* Under the first prong of *Strickland*, "we must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). And under the second prong, a defendant cannot meet his burden by "mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

¶9 Martinez first argues that the trial court erred by not addressing whether appellate counsel had been ineffective in failing to raise the issue with dual-capacity witness testimony and instead addressed only whether *Hood* was a significant change in the law.[1] But Martinez did not clearly raise a claim of ineffective assistance of appellate counsel with regard to this issue, perhaps explaining why the court addressed his claim under Rule 32.1(g). Martinez's claim of ineffective assistance of appellate counsel seemed to be couched in terms of the failure to raise prosecutorial misconduct arguments on appeal. Martinez also failed to file a motion for rehearing or to otherwise request that the court address his claim as to appellate counsel's failure to challenge the dual-capacity witness testimony. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (appellate court reviews issues trial court decided). In any event, Martinez failed to establish a colorable claim because he did not argue—let alone establish—that the result of the appeal might have been different had appellate counsel raised this issue. *See Bennett*, 213 Ariz. 562, ¶ 21; *see also State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015) ("We will affirm the trial court's decision if it is legally correct for any reason.").

¶10 Martinez next contends that he "was entitled to an evidentiary hearing to determine whether trial counsel's failure to consult or call his own gang expert" constituted ineffective assistance. He argues that there was "no excuse" for trial counsel not to have called an expert. But Martinez does not address the trial court's determination that he failed to "identify what expert [counsel] should have called" or "what an expert

[1]In his petition for review, Martinez also argues that trial counsel was ineffective in failing to object to the dual-capacity witness testimony. However, this claim was not raised below, and we do not consider it now. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review).

could have testified to that would have made any difference in the outcome of the trial." *See* Ariz. R. Crim. P. 32.16(c)(2)(D) (petition must include reasons why court should grant relief and citations to supporting legal authority, if known); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). We thus cannot say the court erred in summarily dismissing this claim. *See Bennett*, 213 Ariz. 562, ¶ 21.

¶11 Martinez further contends that the trial court abused its discretion by prohibiting Rule 32 counsel from exploring at the evidentiary hearing "trial counsel's explanation that the pain in his neck caused him to look like he was asleep." But Martinez mischaracterizes what happened at the hearing. During Rule 32 counsel's cross-examination of trial counsel, the court did not limit the questioning. The prosecutor objected once—to a question concerning counsel's use of opioids for his pain—and the court overruled the objection, letting the answer stand. Because the court did not prohibit this line of questioning, it could not have abused its discretion in that regard.

¶12 Lastly, Martinez maintains that "the cumulative failures of counsel deprived [him] of a fair trial." Our supreme court has not recognized application of the cumulative-error doctrine to claims of ineffective assistance. *See State v. Pandeli*, 242 Ariz. 175, ¶ 69 (2017). Even assuming the doctrine applies, however, we reject Martinez's argument. He has failed to establish any concrete instances of ineffective assistance of counsel that we could consider cumulatively.

¶13 Accordingly, we grant review but deny relief.