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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ARIZONA, Respondent, v. FERNANDO ARNULFO TREJO III, Petitioner.	2 CA-CR 2011-0155-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20061450

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

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E S P I N O S A, Judge.

¶1 After a seven-day jury trial, Fernando Trejo was convicted of sexual conduct with a minor under the age of twelve, a dangerous crime against children, and was sentenced to a mitigated thirteen-year prison term. Trejo now seeks review of the

trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., following an evidentiary hearing on his claims of ineffective assistance of counsel and newly discovered evidence.

¶2 When viewed in the light most favorable to sustaining Trejo's conviction, *see State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003), evidence at trial established that on the morning of March 30, 2006, Trejo's girlfriend, Crysta S., left her two-year-old daughter, N., in Trejo's care at their home. When Crysta returned at lunchtime, N. began to cry, saying "owie, owie, owie." Although Crysta could not see anything wrong with N. initially, when she changed the child's diaper she noticed N.'s vagina was tinged with blood. She took N. to urgent care, where medical staff observed a large amount of fresh blood in her vaginal area. After concluding her injuries were possibly caused by non-accidental trauma or sexual assault, the staff referred her for a sexual assault examination, which revealed "a tear right through [N.'s] hymen . . . that . . . went all the way through the vaginal wall . . . [and] continued all the way almost to the rectum." The examining doctor opined that "these were penetrating vaginal injuries that were non-accidental." Trejo was charged with sexual conduct with a minor under fifteen and molestation of a child.

¶3 Trejo's first and second trials ended in mistrials when the jury was unable to reach a verdict on either of the counts. After a third trial, a jury found Trejo guilty on both charges and found the victim was under the age of twelve at the time of the offense. The trial court dismissed the molestation conviction on double jeopardy grounds and

sentenced Trejo as noted above. We affirmed his conviction and sentence on appeal. *State v. Trejo*, No. 2 CA-CR 2008-0239 (memorandum decision filed June 18, 2009).

¶4 At trial, Trejo argued N. actually may have been injured on or before March 24, while she was in Yuma staying with Crysta's mother Rose W. and Rose's former husband, Robert L., or while playing with a plastic horse on March 29, after her return to Tucson. Idalia M., an employee at a Yuma daycare center, testified she had observed N. with unusual vaginal redness and swelling after Robert had dropped the child off there during the spring of 2006, but the exact date of N.'s visit was disputed at trial. In a June 2006 letter detailing Idalia's observations, Marianna V., the director of the daycare center, stated N. had been at the center on April 20, 2006, apparently based on Idalia's recollection of the event. Marianna could not recall independently whether N. had been at the center in March or April and could find no documentation of the child's visit, but she distinctly remembered the child had been at the center on a Friday.

¶5 In his petition and supplemental petition for post-conviction relief, Trejo alleged his trial counsel twice had been ineffective in failing to challenge this evidence. First, Trejo asserted counsel failed to subpoena Rose's work records, in order to impeach her testimony that N. had visited the day care center in April, rather than in March, 2006.[1] Second, he maintained counsel failed to point out that Idalia's testimony placing N. at the

[1]As expressed in the trial court's ruling, Rose's testimony "seem[ed] to change and shift" with the status of her relationships with various members of her family. In Trejo's second and third trials, Rose linked N.'s placement in daycare with her employer's requirement that, after her extended absence, she return to work or face termination. In Trejo's second trial, Rose testified that date was in March; in his third trial, she stated it was in April, after the March 30 discovery of N.'s injuries.

center on April 20, was inconsistent with Marianna's recollection that N. had been at the center on a Friday.[2]

¶6 Trejo also argued Rose's post-trial affidavit, submitted with his supplemental petition, suggested "Robert L[.] had on a number of occasions engaged in aberrant sexual conduct toward N[.]" and argued this constituted newly discovered evidence entitling him to relief. *See* Ariz. R. Crim. P. 32.1(e) (Rule 32 ground for relief when "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict").

¶7 After an evidentiary hearing, the trial court denied relief in a detailed ruling, concluding Trejo had failed to demonstrate a reasonable probability that the result of the trial would have been different but for the challenged omissions by trial counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (defendant must establish both deficient performance and resulting prejudice to prevail on ineffective assistance claim; prejudice requires showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). As for Trejo's claim of newly discovered evidence, based on Rose's recent allegations that Robert had engaged in inappropriate conduct with N., the court concluded "unequivocally that her testimony had virtually no likelihood of affecting the jury['s] verdict." This petition for review followed.

¶8 On review, Trejo argues, "The [trial] court's finding that counsel's deficient performance was not prejudicial was an abuse of discretion because it ignored evidence,

[2]April 20, 2006, was a Thursday.

misdescribed other evidence, and relied on conclusions regarding other evidence that constituted an abuse of discretion." Similarly, Trejo challenges some of the court's characterizations of Rose's new allegations about Robert, arguing, "Included in the court's analysis are statements that make no sense unless the court misunderstood the evidence."

¶9 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

Ineffective Assistance

¶10 To support his claim of ineffective assistance, Trejo subpoenaed employment records from Super Value, the parent company of a store where Rose had been employed during March and April 2006. The records showed she had been hired on March 24, 2006, and her first day on the job was March 27. At the evidentiary hearing, Super Value's representative noted some discrepancies in one set of records and rectified three erroneous entries through her testimony, but she expressed confidence in the other data, including Rose's date of hire and her first day at work.

¶11 The trial court found there was no reasonable probability Trejo would have been acquitted even if his attorney had obtained these records and had pointed out to Marianna that April 20, 2006, was not a Friday. The court based its ruling on "the overwhelmingly consistent evidence that the victim was present in Tucson as of 3/24/06";

Rose's testimony at trial that she had placed N. in daycare because she had been "'returning' to work" after an absence, not starting a new job; the failure of any of N.'s regular caregivers to observe "the probable signs and symptoms of distress and trauma that the child would have manifested" had she been injured before March 30; and "the testimony of the daycare workers who believed that the child was placed with them on one occasion in April during which one of them observed the genital trauma."

¶12 Trejo argues the trial court failed to consider the "substantial errors in [Rose's work] records and reason to doubt their accuracy for [her] initial work dates." But the court noted Trejo's argument "that it was *possible* that [Rose] actually started earlier," finding there was "no credible evidence to support this position." We see no error in the court's finding; indeed, Trejo's argument is based on speculation that an error may have occurred in record conversion or as a result of "human error." But Super Value's representative explained to the court that, in producing records, she had cross-checked attendance sheets with payroll records and had informed the court of the only errors she had identified through that process, which were not relevant to Rose's start date.

¶13 Trejo also maintains the trial court overlooked the evidentiary hearing testimony of Charles, N.'s maternal grandfather, that on March 21 or 22, 2006, Rose had telephoned to tell him she would be unable to return N. to Tucson until the evening of March 24, because she had a job offer and "she had to go in for like an orientation." He stated she also told him she had already taken N. to a day care center for a day because the "job offer had come up so . . . unexpectedly." But, although this was not inconsistent

with Charles's trial testimony that Rose had brought N. to Tucson on March 24 after she had finished working, the court noted that it was inconsistent with Rose's testimony, at Trejo's second and third trials, that the daycare center visit was required because Rose had been called back to work, after some period of absence, under the threat of termination.

¶14 And, even at the evidentiary hearing, although Rose testified repeatedly that N. had been taken to the daycare center on March 20 or 21, she was equally emphatic when stating that the daycare visit had not occurred until after she had spoken with a Tucson police detective on April 3. Most important, the court below was in the best position to assess the credibility of the witnesses, *see State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004), and it may have found Charles's credibility impaired by the passage of nearly five years since the telephone conversation in question and the fact that the call did not appear to have been brought to light in previous court hearings or trials.

¶15 Many of Trejo's other challenges pertain to the trial court's comment that there was "a very compelling likelihood that the child was placed in day care on April 24, 2006." However, although this statement may have reflected the court's own assessment of the evidence, it was not essential to its ruling that Trejo had failed to show a reasonable probability that he would not have been convicted had counsel obtained Rose's work records. Counsel spent considerable time attempting to impeach Rose's trial testimony with her earlier statement, under oath, that N. had been placed in day care on

March 21, 2006; we find no error in the court's conclusion that the work records would have done little to bolster counsel's argument.

¶16 The trial court's reliance on the "substantial" and "consistent trial testimony of [N.'s] medical providers" seems to be at the heart of its determination that there was no reasonable probability the outcome at trial would have been different but for counsel's errors. The state called five medical professionals at trial. Doctors who had examined N. on March 30 or March 31 testified that N.'s injuries were not only severe but "acute," opining that they had occurred within hours of N.'s first examination. These opinions were based both on the absence of any evidence of healing and caretakers' reports that they had not seen any injury in the days before March 30, and N. had not appeared to be in any pain before that date.

¶17 Trejo suggests the trial court abused its discretion because it failed to consider the effect of counsel's errors in the context of the trial testimony of Dr. Kathryn Bowen, who had opined that any genital redness and irritation, if observed by daycare workers sometime between April 20 and April 24, probably was not related to the same injuries doctors had identified on March 30. According to Trejo, a finding that the day care visit was in April would require the jury "to reject Dr. Bowen's testimony." But the jury was aware of the opinion Bowen offered at trial, as well as Trejo's argument that N. had visited the day care center in March, not in April. And Dr. Michael Aldous, another medical expert, had offered a different opinion when he testified that observations of redness and irritation three weeks after March 30 would have been consistent with the injuries identified that day. Trejo fails to explain how the introduction of Rose's work

records or the impeachment of Marianna's testimony in the manner he suggests would create a reasonable probability that the jury would have resolved conflicts in expert testimony differently.[3]

Newly Discovered Evidence

¶18 We next turn to Trejo's implicit claim that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict," Ariz. R. Crim. P. 32.1(e), based on Rose's new allegations that she had observed Robert acting inappropriately with N.. In rejecting this claim the trial court wrote:

> The Court has had the opportunity to assess the veracity of [Rose]'s recantation. Based on her inability to recount even simple events in a straight forward and consistent manner, her demeanor while testifying, and her inconsistent prior testimony, the Court states unequivocally that her testimony had virtually no likelihood of affecting the jury verdict.

Again, although Trejo challenges the court's characterization of Rose's testimony at the evidentiary hearing, he fails to address the substance of the court's ruling.[4] The court's assessment of the probability that Rose's new allegations would have changed the result

[3]With respect to the trial court's ruling that Trejo failed to show he was prejudiced by counsel's failure to impeach Marianna's testimony by showing her a calendar, Trejo raises only one challenge: that in referring to "day care workers who believed that the child was placed with them on one occasion in April," the court failed to distinguish Marianna's equivocation with respect to her personal recollection. We disagree that the court's more general statement of the evidence amounts to an abuse of discretion and, in any event, find no error in the court's determination that "[t]his aspect of the testimony . . . is inconsequential when viewed in light of the evidence presented at trial."

[4]Trejo argues the trial court mischaracterized Rose's recent allegations against Robert as a "recantation," because he "knows of no earlier statement" in which Rose had "denie[d] the observations she disclosed" at the evidentiary hearing. But Rose testified at trial that she had never been suspicious that Robert had "done something" to N.

at trial is well supported by the evidence, and the court did not abuse its discretion in denying relief on this ground.

Disposition

¶19 For the foregoing reasons, although review is granted, relief is denied.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

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

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