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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OF ARIZONA, Respondent, v. PEDRO ROLANDO LOZANO, Petitioner.	2 CA-CR 2011-0191-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20090217002

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

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K E L L Y, Judge.

¶1 Pedro Lozano petitions this court for review of the trial court's denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will

not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pedro Lozano was convicted after a jury trial of first-degree burglary, aggravated robbery, kidnapping, armed robbery, and two counts of aggravated assault with a deadly weapon stemming from his participation in a home invasion in January 2009. The trial court sentenced him to concurrent, slightly mitigated, and presumptive prison terms, the longest of which was nine years. We affirmed his convictions and sentences on appeal. *State v. Lozano*, No. 2 CA-CR 2009-0343, ¶ 7 (memorandum decision filed Jun. 7, 2010).

¶3 Lozano then filed a notice and petition for post-conviction relief, asserting his trial counsel had been ineffective for failing to call a defense witness who allegedly could have corroborated Lozano's trial testimony. He additionally argued his counsel had been ineffective during closing argument. Before Lozano testified, the trial court had precluded evidence of Lozano's previous felony conviction pursuant to Rule 609, Ariz. R. Evid. His counsel asserted during closing argument that the state had provided no evidence Lozano had any previous convictions. The court interrupted and noted at a bench conference that the jury had asked several questions about Lozano's criminal record which the court had declined to answer. The court admonished Lozano for referring to "questions that weren't asked" and suggesting an incorrect answer to those questions. The parties ultimately agreed that Lozano's counsel should inform the jury that he had "misspok[en]" and that the jury should not assume "one way or the other" whether Lozano had previous convictions. Lozano's counsel then told the jury:

> We were just having a discussion about something that I had spoken to you about, which is that you have seen no evidence that Mr. Lorenzo [sic] has a criminal history or criminal record. All right? That doesn't mean to say that that's true or not true. You've just not seen it.

In his petition for post-conviction relief, Lozano asserted counsel's conduct resulted in him being "required to correct himself" in front of the jury and therefore constituted ineffective assistance of counsel. After an evidentiary hearing limited to Lozano's first claim of ineffective assistance of counsel, the trial court denied relief.

¶4 On review, Lozano argues the trial court erred in summarily denying relief on his second claim of ineffective assistance of counsel.[1] In rejecting that claim, the court determined Lozano's trial counsel had made a "mistake," but that it did not fall below "objectively reasonable standards." And, the court concluded, Lozano had not demonstrated prejudice because there was other evidence substantially undermining his credibility and his own testimony suggested to the jury that he previously had been arrested.

¶5 Lozano repeats the argument he made below, characterizing his counsel's conduct as a "major blunder" and asserting the evidence noted by the trial court in rejecting his claim "did not harm [Lozano's] credibility at all." In order to prevail on his claim of ineffective assistance of trial counsel, Lozano must demonstrate his counsel's conduct fell below prevailing professional norms and that the conduct prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To show prejudice, Lozano

[1]Lozano does not challenge the trial court's ruling on his claim that his trial counsel had been ineffective for failing to call a defense witness who allegedly could have corroborated Lozano's trial testimony.

must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶6 Lozano did not provide the trial court with an affidavit or other evidence suggesting his trial counsel's conduct fell below prevailing professional norms. And he cites no authority on review, nor did he below, concluding comparable conduct constituted ineffective assistance of counsel. His conclusory, unsupported assertion that counsel had made an error is insufficient to meet his burden of demonstrating the first *Strickland* requirement. *See 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").

¶7 Moreover, counsel's conduct appears grounded in strategy; had his tactic been successful, it could have benefitted Lozano. "Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). And Lozano must "overcome a 'strong' presumption that the challenged action was sound trial strategy under the circumstances." *Id.*, *quoting State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). It is possible that counsel took a reasoned strategic risk during closing argument that, by asserting the lack of evidence of his client's criminal history, he might open the door to evidence of a previous conviction should an objection be raised. *See People v. Gomez*, 860 N.Y.S.2d 522, 523 (N.Y. App. Div. 2008) (reasonable strategy to risk that summation might permit state to introduce precluded evidence because court might not "perceive his summation . . . as sufficient to permit the [state] to introduce the

precluded evidence"); *State v. Hildreth*, 884 P.2d 771, 777 (Mont. 1994) (counsel not ineffective by "opening the door to evidence of [defendant's] prior bad acts" when "actions were taken for strategic reasons"; court "will not test trial counsel's adequacy by the greater sophistication of appellate counsel, nor by that counsel's unrivaled opportunity to study the record at leisure"); *but see Garcia v. State*, 308 S.W.3d 62, 67-68 (Tex. App. 2009) (counsel ineffective by eliciting testimony on multiple occasions that opened door to prior act evidence). Notably, the state did not object to counsel's comments. Additionally, counsel apparently did not believe Lozano's previous felony conviction, which occurred over fifteen years before trial, would greatly harm Lozano's credibility—he offered to admit its existence during closing argument, but the trial court declined. Because counsel's conduct had some reasoned strategic basis, Lozano's claim fails.

¶8 Even assuming counsel's conduct fell below prevailing professional norms, Lozano has not demonstrated the trial court erred in finding he had not been prejudiced. First, he does not question the court's conclusion that, irrespective of his counsel's closing argument, the jury was aware due to Lozano's own testimony that he likely had been arrested before. Second, he ignores that the jury was instructed properly that the lawyers' statements were not evidence and that it must decide the case based on the evidence presented. Even if we were to speculate that the jury concluded from counsel's comments that Lozano previously had been convicted of a felony, we would also have to assume that it ignored the court's instructions. But we instead must presume the jury followed the court's instructions, *see State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833,

847 (2006), and Lozano has provided no basis for us to depart from that usual practice here. Thus, he has not demonstrated any prejudice resulting from counsel's conduct.

¶9 For the reasons stated, although we grant review, we deny relief.

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

CONCURRING:

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

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