IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0171 PRPC
	)	
Respondent,	)	DEPARTMENT A
	)	
v.	)	Navajo County
	)	Superior Court
MICHAEL RAY FUQUA,	)	No. CR2005-0540
	)	
Petitioner.	)	**D E C I S I O N**
	)	**O R D E R**
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The State petitions this court for review from the trial court's order granting relief to Michael Ray Fuqua on the basis of ineffective assistance of counsel (IAC). Presiding Judge Patricia A. Orozco, and Judges Peter B. Swann and Daniel A. Barker, have considered this petition for review. As explained below, Fuqua failed to establish the prejudice prong of IAC. Therefore, we grant review of the petition and grant relief.

Factual and Procedural Background

Fuqua was tried on three counts of sale of a dangerous drug, each a class two felony; eight counts of misconduct involving weapons, each a class four felony; possession of dangerous drugs for sale, a class two felony; and possession of dangerous drugs, a class four felony. The State alleged Fuqua had three prior felony convictions and that he was on probation when he committed the charged offenses. The jury convicted

Fuqua on all counts, and the trial court sentenced Fuqua to aggravated concurrent terms of imprisonment, the longest of which is 19.75 years for possession of dangerous drugs for sale. Fuqua appealed, and this court affirmed the convictions and sentences. *State v. Fuqua*, 1 CA-CR 07-0309, 2008 WL 4152838, at *4, ¶ 18 (Ariz. App. Sept. 4, 2008) (mem. decision). Fuqua then commenced this post-conviction relief proceeding, and in light of the nature and number of claims raised, we set forth the facts in detail.

K.C. testified at Fuqua's trial that in the late summer of 2005, she was working for police in Navajo County as a confidential informant. In that capacity, she participated in three controlled purchases of methamphetamine from Fuqua at his apartment. During these buys, K.C. was provided with cash to purchase drugs. Her person and her vehicle were searched prior to entering Fuqua's apartment to ensure she did not possess any drugs. K.C. was also "wired" so that her conversations with Fuqua were recorded, and she and Fuqua were under police surveillance during each transaction. Fuqua, a prohibited possessor, wore a handgun in his waistband during each of the three transactions, and K.C. noticed he also kept another gun in his apartment.

After these three transactions, on September 14, Fuqua unexpectedly called K.C. at the bar where she worked. He asked to borrow her vehicle to deliver two ounces of methamphetamine he had recently acquired. K.C. acquiesced and asked Fuqua to leave his weapons in her vehicle before entering the bar to get the key because she did not want any weapons in the bar. K.C. then informed police of the situation, and police proceeded to the bar and set up surveillance. About five minutes later, an unidentified pick-up truck arrived at the bar. Officers observed Fuqua exit the truck carrying a duffle bag. Fuqua placed the duffle bag in K.C.'s vehicle and proceeded toward the bar's entrance. At that point, officers arrested Fuqua and searched Fuqua's duffle bag. Officers found two holstered and loaded revolvers, ammunition, and a "tin box" with two plastic bags containing 35.89 grams of methamphetamine.

While being transported to jail, Fuqua asked Officer D. if they could work out a deal and then told the officer he still had something on him. He said "it" was in his sock. When they arrived at the secure entrance area of the jail, Fuqua retrieved a small bag of methamphetamine from inside his sock and tossed it on the floor. The bag contained 1.50 grams of methamphetamine.

During plea negotiations, the prosecutor learned that Fuqua might claim at trial that the duffle bag was not his. Therefore, the prosecutor decided to have the holsters found in the duffle bag tested for DNA evidence. Test results reflected the presence of Fuqua's DNA. Based on the test results and the eye-witness testimony of police at the bar, the prosecutor believed any additional DNA testing of other items found in the duffle bag, including a bloody tissue, would be cumulative and unnecessary. Although the prosecutor had the DNA evidence from the holsters, he chose not to offer it at trial after the trial court indicated it would sever the bar-related counts from the remaining counts if the DNA evidence were introduced at trial. The prosecutor decided "he would rather go [to trial] without [the] DNA and keep those counts together."

Fuqua testified at trial. He denied selling any drugs to K.C. He stated he was working for a construction company during the time the drug sales occurred. He claimed the voice on the tape that was played to the jury was not his. Fuqua testified that on the night he was arrested, K.C. called him and asked him if he would fix the radio in her vehicle. He said he went to the bar to fix the radio and denied carrying a duffle bag. He claimed he did not bring any tools with him because he had left his screwdriver set in K.C.'s vehicle. He said that after he

exited the vehicle to go into the bar, he was arrested. He denied handing over any drugs to Officer D. after he was transported to jail. The jury rejected Fuqua's testimony and, as noted, returned guilty verdicts on all counts.[1]

Post-Conviction Relief Proceedings

Fuqua timely commenced post-conviction relief proceedings and raised several issues. His pro se petition was supplemented by appointed counsel. Later, newly appointed counsel filed an amended supplemental petition. Together these pleadings presented numerous claims, including claims of IAC. The State filed a response and argued, in part that based on the evidence of Fuqua's guilt, counsel's alleged errors could not have affected the jury's verdicts.

The trial court found colorable claims and set an evidentiary hearing. Several witnesses testified at the hearing, including trial counsel and Fuqua. After the evidentiary hearing, the trial court granted relief. The State then filed a motion for rehearing, which was subsequently denied. The State now seeks review of the order granting relief.

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[1] Fuqua is currently serving a life sentence for his conviction for conspiring to have K.C. murdered. Fuqua filed a direct appeal; however, this court affirmed his conviction and sentence. *State v. Fuqua*, 1 CA-CR 12-0027, 2013 WL 593467, at *5, ¶ 19 (Ariz. App. Feb. 14, 2013) (mem. decision).

The trial court only granted relief on the IAC claims identified below, and Fuqua did not cross-petition for review. Therefore, we only discuss those claims on which the trial court granted relief, which are as follows:

a. Counsel failed to obtain jail video of the secured entrance area where Fuqua surrendered the methamphetamine, and this video "may [have] contain[ed] exculpatory evidence";

b. Counsel failed to adequately pursue the fact that police found no incriminating evidence during the search of Fuqua's apartment, conducted after Fuqua was incarcerated and in light of evidence that K.C. had a key to the apartment;

c. Counsel failed to interview the driver of the pick-up truck, Eddie Greer (Greer), who took Fuqua to the bar the night he was arrested and failed to timely interview Officer F., the detention officer who was working the night Fuqua was booked into jail, "in order to adequately decide whether [they] would provide exculpatory evidence to aid the defense";

d. Counsel failed to discover a color photograph that showed the bloody tissue in the duffle bag. Had counsel done so, counsel would have discovered the tissue and could have had it tested for DNA evidence;

e. Counsel failed to challenge the DNA testing done on the holsters and to have the bloody tissue tested, which

deprived Fuqua of a possible *Willits* instruction that "may have aided [Fuqua] with severance of trial on some counts";

f. Counsel failed to investigate an AutoZone rewards card Fuqua possessed when he was arrested to determine what specifically had been purchased, which may have corroborated Fuqua's testimony that he had gone to the bar that night to fix K.C.'s radio;

g. Counsel failed to discover "the nature of [Fuqua's] testimony which would have affected other areas of discovery and preparation for trial and [enabled counsel] to adequately advise him on whether he should testify";

h. Counsel failed to present diagrams of the bar and parking lot "in order to examine witness(es) about the events there, including cross-examination of the witnesses regarding [Fuqua's] possession of the black [duffle] bag";

i. Counsel failed to call Fuqua's mother as a witness to testify that she did not believe the voice on the tape was her son's voice; and

j. Counsel failed to have transcripts of the tapes made and did not retain a voice identification expert.

While the trial court made these specific findings of deficient performance, it made only a general finding of prejudice. The trial court found the evidence of guilt was not

overwhelming and "that there is a reasonable probability that the result of the jury trial would have been different . . . were it not for the [IAC]."

Discussion

To state a colorable claim of IAC, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To establish the prejudice prong, a defendant must show there is a reasonable probability, which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Proof of IAC must be that of a demonstrable reality, not mere speculation. *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23, 987 P.2d 226, 230 (App. 1999) (holding that to establish a claim of IAC, the burden is on the petitioner and the petitioner's showing must be more than "mere speculation"); *State v. Santanna*, 153 Ariz. 147, 150, 735 P.2d 757, 760 (1987).

When the trial court holds an evidentiary hearing, a reviewing court will affirm the trial court's ruling if it is based on substantial evidence. *State v. Sasak*, 178 Ariz. 182,

186, 871 P.2d 729, 733 (App. 1993). In this case, the record does not support a finding of prejudice. As discussed below, Fuqua failed to present sufficient evidence to establish prejudice. Therefore, we need not determine whether his counsel's performance was deficient. *State v. Salazar*, 146 Ariz. 540, 541-43, 707 P.2d 944, 945-47 (1985) (noting that if a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied).

a. Failure to obtain jail video

Other than Fuqua's testimony that was presented to, and rejected by, the jury, there is no evidence that this video contained exculpatory evidence. In fact, Fuqua's claim that the video would have exculpated him is undercut by Officer F.'s testimony at sentencing and at the evidentiary hearing that he did not observe Fuqua and the officer when they first arrived at the jail and that he overheard part of a discussion about the drugs being found.

In any event, mere speculation that the video "may [have] contain[ed] exculpatory evidence" is not a sufficient showing of prejudice; we find that Fuqua's claim does not amount to "a probability sufficient to undermine confidence in the outcome" of his trial. *Strickland*, 466 U.S. at 694; *see, e.g.*, *State v.*

Berryman, 178 Ariz. 617, 621, 875 P.2d 850, 854 (App. 1994) (finding that counsel's failure to investigate whether a firearm was operable, without evidence that the firearm was inoperable, was too speculative to support an IAC claim).

b. Failure to pursue absence of incriminating evidence after search of Fuqua's apartment

The trial court found counsel had failed to use "[p]roof of the absence of incriminating evidence" found during the search of Fuqua's apartment. However, the record reflects that counsel brought out on cross-examination the fact that police did not find any incriminating evidence in Fuqua's apartment during the search conducted shortly after his incarceration. Fuqua's counsel also argued this point in closing.

In any event, Fuqua did not present any evidence of what counsel could have presented to the jury to aid Fuqua's defense if counsel had further investigated or pursued this "[p]roof of the absence of incriminating evidence" in his apartment. Thus, he failed to establish any prejudice.

c. Failure to call Officer F. and to interview Greer

The failure to call Officer F. as a trial witness could not have prejudiced Fuqua because Officer F. was not in a position to observe Fuqua and Officer D. when they arrived in the secured entrance area of the jail. Furthermore, the record reflects

trial counsel had her investigator interview Officer F. before trial and the investigator "did [not] come up with any indication or any evidence that would contradict Officer D.'s testimony."

As to counsel's failure to interview Greer, the driver who brought Fuqua to the bar, an alleged failure to investigate does not meet the prejudice prong when, as here, Fuqua does not explain what evidence would have been discovered through additional investigation and how it might have changed the outcome of his trial. *See Gallego v. McDaniel*, 124 F.3d 1065, 1077 (9th Cir. 1997). Fuqua did not present an affidavit or any evidence regarding what Greer's testimony would have been and how it might have changed the outcome. This is fatal to his claim. *See State v. Borbon*, 146 Ariz. 392, 399-400, 706 P.2d 718, 725-26 (1985) (finding that defendant's statement that his attorney should have called several witnesses to testify was insufficient to raise a colorable claim because defendant failed to include affidavits containing what testimony those witnesses would have offered).

d. Failure to discover the bloody tissue and to have it tested

Fuqua failed to establish that he was prejudiced by counsel's failure to discover and test the bloody tissue found in the duffle bag. Even if the tissue had been tested and

Fuqua's DNA not found on the tissue, this would not prove the duffle bag was not his. Such evidence would merely establish that someone else had touched the tissue at some point in time. Thus, he would not have been entitled to a *Willits* instruction at trial. *See, e.g.*, *State v. Strong*, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995) (no error in failing to give *Willits* instruction based on failure to preserve possible fingerprints when such evidence would not possess exculpatory value). Furthermore, the lack of Fuqua's DNA on the tissue would not prove or disprove ownership of the duffle bag and, thus, would not have materially aided his defense. *See, e.g.*, *State v. Torres*, 162 Ariz. 70, 75-76, 781 P.2d 47, 52-53 (App. 1989) (absence of defendant's fingerprints on heroin packet would not be exculpatory; therefore, proof of absence of fingerprints would not have materially aided defendant's defense).

Finally, as noted, DNA tests of the holsters found in the duffle bag revealed the presence of Fuqua's DNA, and there was ample trial testimony Fuqua carried this duffle bag and placed it in K.C.'s vehicle. Thus, evidence of the absence of Fuqua's DNA on this tissue would not have affected the outcome of his trial.

e. Failure to challenge the DNA tests of the holsters

Fuqua alleged counsel should have challenged the DNA evidence because, before testing, the holsters had been contaminated by being placed in contact with Fuqua's clothes where his "dead skin cells fell off." However, the DNA evidence was not introduced at trial, and thus Fuqua could not have been prejudiced by the failure to challenge the DNA tests.

f. Failure to investigate "radio defense" and AutoZone card

When Fuqua was arrested, he was in possession of an AutoZone rewards card, and he introduced this card in evidence at the evidentiary hearing. The card contained various numbers, but Fuqua did not present any other evidence about the nature of those numbers or what items they represented. He presented no evidence that numbers on the card evidenced a purchase of a screwdriver or any other tools. Additionally, the defense investigator testified at the evidentiary hearing that Fuqua did not give him any information that would have allowed the investigator to pursue the matter.

While Fuqua faults counsel for failing to investigate this "defense," he did not present any evidence as to what the investigation would have uncovered. A court may not find prejudice based on speculation about what evidence an investigation might have turned up. *Grisby v. Blodgett*, 130

F.3d 365, 373 (9th Cir. 1997); *see Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995) ("Absent an account of what beneficial evidence investigation into any of these issues would have turned up, [the defendant] cannot meet the prejudice prong of the *Strickland* test.").

K.C. testified her radio was not broken and that she never called Fuqua to come to the bar that night to fix it. She testified that when Fuqua called her, she told him to leave his weapons in her car and then to enter the bar to get the key. Fuqua's actions that night were entirely consistent with this testimony. When viewed in the context of the record, and absent the helpful evidence an investigation would have uncovered, it cannot be said that but for counsel's failure to investigate or present this defense, the outcome of the trial likely would have been different.

g. Failure to timely discover the nature of Fuqua's testimony

Trial counsel testified that Fuqua did not inform her of his decision to testify until after the State rested. The trial court found that if counsel had discovered the nature of Fuqua's testimony earlier, it "would have affected other areas of discovery and preparation for trial and [enabled counsel] to adequately advise [Fuqua] on whether he should testify." It is not clear whether this is a reference to the "radio repair

defense" testimony or to something else. The trial court did not specify, and the record does not reflect what other discovery and trial preparation counsel could have done that would have resulted in the discovery or acquisition of evidence material to Fuqua's defense. The record does in fact reflect that counsel advised Fuqua not to testify because: (1) he had prior felony convictions; (2) by testifying the jury would hear Fuqua's voice and be able to compare his actual voice with the voice on the tapes and then confirm that the voice on the tapes was in fact Fuqua's voice; and (3) his defense that someone else sold drugs to the confidential informant during the controlled buys was not plausible.

In terms of this claim, Fuqua did not establish what evidence counsel could have discovered, how counsel could have prepared for trial differently, or how discovery of the nature of his testimony likely would have changed the outcome of the trial. Thus, Fuqua did not establish prejudice. *See Salazar*, 146 Ariz. at 542-43, 707 P.2d at 946-47.

h. Failure to prepare and present diagrams of the bar and parking lot

As with preceding claims, even if counsel should have prepared diagrams or other visual aids of the bar and parking lot for use in cross-examination of witnesses, Fuqua failed to

establish any resultant prejudice. Fuqua did not offer in evidence any diagram or other visual aid that counsel should have used, nor did he demonstrate how such diagram or visual aid would have aided his defense or affected the outcome of his trial. To succeed on this claim, Fuqua had the burden to make an actual showing of prejudice. *See Berryman*, 178 Ariz. at 620, 875 P.2d at 853 (stating that a defendant has the burden of proving claims for post-conviction relief by a preponderance of the evidence).

i. Failure to call Fuqua's mother as a witness

Fuqua's mother testified at the evidentiary hearing that she had listened to the tapes and that her son's voice was not on the tapes. This would have corroborated Fuqua's trial testimony. However, the jury heard Fuqua when he testified and also heard the voice on the tape, and the jury found it was Fuqua's voice on the tape. Thus, there is no reasonable probability, a probability sufficient to undermine confidence in the outcome, that, but for counsel's failure to call Fuqua's mother to testify on his behalf, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694.

j. Failure to transcribe tapes and retain a voice identification expert

Fuqua presented no affidavit, testimony, or other evidence from any voice identification expert that the voice on the tapes could not be reliably identified or that it was not Fuqua's voice on the tapes. He failed to present "an account of what beneficial evidence" would have been acquired for use at trial had counsel transcribed the tapes and retained a voice identification expert, and thus he failed to establish prejudice. *Hendricks*, 70 F.3d at 1042; *see also Borbon*, 146 Ariz. at 399-400, 706 P.2d at 725-26.

Conclusion

Fuqua failed to demonstrate that counsel's deficiencies were prejudicial. He failed to establish that, but for counsel's errors, there is a reasonable probability that the result of his trial would have been different. We vacate the trial court's order granting relief and remand this matter with directions to the trial court to reinstate the convictions and sentences.

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PATRICIA A. OROZCO, Presiding Judge