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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOSEPH DOUGLAS WHALEY, *Petitioner*.

No. 1 CA-CR 16-0504 PRPC
FILED 9-14-2017

Petition for Review from the Superior Court in Mohave County
No. S8015CR20080797
The Honorable Rick A. Williams, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By Matthew J. Smith
Counsel for Respondent

Erika A. Arlington Esq. PC, Flagstaff
By Erika A. Arlington
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Jon W. Thompson joined.

M c M U R D I E, Judge:

¶1 Joseph Douglas Whaley petitions this court for review from the dismissal of his petition for post-conviction relief. For the reasons stated, we grant review but deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 Whaley initially went to trial in 2009, and was convicted of sexual molestation of a child. He was acquitted of kidnapping and sexual conduct with a minor. On appeal, his conviction was overturned. *State v. Whaley*, 1 CA-CR 09-0558, 2011 WL 92990 (Ariz. App. Jan. 6, 2011) (mem. decision). Whaley was re-tried in 2012, and again convicted of sexual molestation of a child. He was sentenced to the presumptive term of 17 years. His step-daughter A.M., and his wife Tiffany Platt, testified in both trials about the sexual act.

¶3 Whaley again appealed his conviction. On his direct appeal, Whaley raised three issues: double jeopardy, prosecutorial vindictiveness, and evidentiary errors. This court affirmed the conviction. *State v. Whaley*, 1 CA-CR 12-0142, 2013 WL 3387667 (Ariz. App. July 2, 2013) (mem. decision).

¶4 After several extensions of time to file, Whaley's appointed attorney filed a petition for post-conviction relief on September 15, 2015, raising three issues all related to ineffective assistance of counsel. Whaley alleged that trial counsel was ineffective for failing to properly object and raise an evidentiary issue related to a poster called "Cradle of Filth," failing to review the actual audio recording of jail house phone calls prior to their admission at trial, failing to object when evidence of other acts were heard in the audio recordings during the trial, and failing to investigate Platt's alleged sexual conduct with a minor to use as impeachment and to demonstrate a motive to lie on the part of the witness. The State filed a response, and Whaley replied.

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¶5 On May 5, 2016, the superior court denied the petition, finding that counsel had not been ineffective and, even if objections should have been raised differently about the “Cradle of Filth” poster or the audio of jail house phone calls reviewed prior to its introduction at trial, no prejudice resulted from any failure on the part of trial counsel. Regarding the issue that counsel was ineffective for failing to investigate the alleged sexual conduct with a minor by Platt, the superior court found that the decision of trial counsel not to pursue the allegation was “legally and strategically sound.”

¶6 On July 29, 2016, Whaley petitioned for review raising only one claim: Trial counsel was ineffective for failing to investigate a key witness’s alleged sexual misconduct with a minor and to use that evidence to impeach the witness during trial by showing that the witness had a motive to lie about Whaley’s sexual interaction with the victim.

DISCUSSION

¶7 Whether counsel was ineffective is a mixed question of fact and law. This court defers to the superior court’s factual finding but reviews the court’s legal conclusions and constitutional issues *de novo*. *State v. Denz*, 232 Ariz. 441, 444, ¶ 6 (App. 2013); *see also State v. Newell*, 212 Ariz. 389, 397, ¶ 27 (2006).

¶8 To state a colorable claim of ineffective assistance of counsel, 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 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). To show prejudice, a defendant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶9 To meet the *Strickland* test, a defendant must show that counsel’s performance fell outside the acceptable “range of competence” and failed to meet “an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687–88. “In short, reviewing courts must be very cautious in deeming trial counsel’s assistance ineffective when counsel’s challenged acts or omissions might have a reasonable explanation.” *State v. Pandeli*, 242 Ariz. 175, 181, ¶ 7 (2017).

¶10 Counsel for Whaley asserts that had trial counsel investigated the allegation that Platt had sexual contact with a 14-year-old girl, and then

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used this information to impeach Platt by linking it to a motive for Platt to lie about the sexual molestation of her daughter, there is a reasonable probability that the outcome of the trial would have been different. This court does not reach that conclusion.

¶11 Whaley asserts, by way of affidavit, he requested his attorney investigate Platt's alleged sexual contact with a minor before both trials. There is nothing in the record that corroborates he told defense counsel to do this. He also claims he told his attorney he was going to report Platt's sexual encounter with the 14-year-old girl just prior to the incident for which he was charged. There is no evidence of this beyond his own statements. In the transcript of the jail house calls, made by Whaley to Platt, there is mention of this alleged sexual contact. Platt does not deny that some sexual contact occurred but does insist she did not know that the minor in question was only 14 years old. Whaley, however, is very clear that he knew the girl was only 14 years old and that is why he did not do anything. He was present, however, and was clearly aware that Platt was engaging in sexual conduct with a minor and did nothing to intervene. In the excerpts provided in the petition, there is no mention of the date of this occurrence or exactly what the behavior was.

¶12 The superior court found, even assuming there is evidence Platt engaged in sexual conduct with a minor, such evidence would have little to no relevance and constitute improper impeachment of a witness. The nexus between Platt's alleged sexual interaction with a minor and her motive to lie about a sexual event between her husband and daughter is tenuous at best. Whaley admitted to being present when his wife had sexual contact with a 14-year-old girl, and he did not object or intervene. It appears to be a sound strategic decision on the part of trial counsel not to attempt any line of questioning regarding this incident because even if there was some minor tangential impeachment value, the jury might have inferred Whaley was involved or bore some responsibility. Trial counsel did attempt to impeach Platt through inconsistent statements and through Whaley's testimony that Platt wanted to get rid of him.

¶13 "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. If a petitioner fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the defendant satisfied the other prong. *State v. Salazar*, 146 Ariz. 540, 541 (1985). Whaley has failed to show that his trial attorney's actions

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fell outside the range of reasonable professional assistance or were anything other than sound trial strategy. The superior court did not abuse its discretion in denying Whaley's petition for post-conviction relief.

CONCLUSION

¶14 We grant review but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA