

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

TERRY ALLEN MC PHERSON, *Petitioner*.

No. 1 CA-CR 19-0418 PRPC
FILED 2-27-2020

Appeal from the Superior Court in Maricopa County
No. CR2016-107139-001
The Honorable Richard L. Nothwehr, Judge *Pro Tempore*

REVIEW GRANTED AND RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Daniel Strange
Counsel for Respondent

Stephen M. Johnson PC, Phoenix
By Stephen M. Johnson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which
Presiding Judge Samuel A. Thumma and Judge Diane M. Johnsen joined.

STATE v. MC PHERSON
Decision of the Court

HOWE, Judge:

¶1 Terry McPherson seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is McPherson's first petition.

¶2 Following a jury trial, McPherson was convicted of aggravated assault, unlawful imprisonment, unlawful discharge of a firearm, and possession or use of dangerous drugs. During the aggravation phase, the jury found the aggravated assault, unlawful imprisonment, and unlawful discharge of a weapon counts were dangerous offenses. McPherson was sentenced to life imprisonment without the possibility of release for 25 years for aggravated assault, 10 years' imprisonment for possession or use of dangerous drugs, 6 years' imprisonment for unlawful imprisonment and 6 years' imprisonment for unlawful discharge of a firearm with 385 days' presentence incarceration credit. This Court affirmed his convictions and sentences in *State v. McPherson*, No. 1 CA-CR 17-0173, 2017 WL 6567970 (Ariz. Ct. App. Dec. 26, 2017).

¶3 McPherson petitioned for post-conviction relief. He argued that trial counsel was ineffective because he failed to adequately investigate the case by failing to obtain text messages between the victim and himself that would have damaged the victim's credibility. McPherson also argued that trial counsel failed to request a voluntariness hearing and the cumulative effect of trial counsel's ineffective assistance prejudiced him.

¶4 The trial court held an evidentiary hearing and heard testimony from McPherson and his mother. Following the evidentiary hearing, the trial court denied McPherson's petition, finding that the trial presented overwhelming evidence of McPherson's guilt on all charges. McPherson timely petitioned this Court for review of a single issue—whether trial counsel's failure to investigate the text messages between himself and the victim constituted ineffective assistance of counsel because the text messages could have been used to impeach the victim's testimony.

¶5 McPherson argues that if the jury had learned that the victim had lied several times the outcome might have been different. He further argues that the bulk of the trial court's ruling relied on the victim's testimony and the victim lied throughout the trial.¹ Absent an abuse of

¹ While the trial court referenced the victim's testimony several times in its ruling, it also considered the 911 call, the testimony of police, and the testimony of an independent witness.

STATE v. MC PHERSON
Decision of the Court

discretion or error of law, this court will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). McPherson bears the burden to show that the trial court abused its discretion by denying the petition for post-conviction relief. See *State v. Poblete*, 227 Ariz. 537, 538 ¶ 1 (App. 2011) (petitioner has burden of establishing abuse of discretion on review). A claim for post-conviction relief based on ineffective assistance of counsel "must be that of a provable reality, not mere speculation." *State v. Rosario*, 195 Ariz. 264, 268 ¶ 23 (App. 1999).

¶6 McPherson did not meet his burden and relies on mere speculation to prove his ineffective assistance of counsel claim. McPherson identified only one text message in his petition that he could have used to impeach the victim. At trial, the victim was asked "Was there ever a text exchange about money for the date?" The victim replied, "No." The text exchange between McPherson and the victim shows that statement was not true. This text exchange happened before the two met, however, and is unrelated to the facts supporting McPherson's convictions.

¶7 McPherson did not identify any other text messages that could have been used to impeach the victim's credibility, nor did McPherson point to any other trial testimony that could have been impeached. Rather, McPherson relies on conclusory statements that the victim is a liar and lied several times, and that if a jury heard evidence undermining the victim's credibility, his trial could have led to a "possible different outcome." A claim for ineffective assistance of counsel, however, must consist of more than conclusory assertions. *State v. Donald*, 198 Ariz. 406, 414 ¶ 21 (App. 2000).

¶8 Additionally, McPherson failed to establish that if trial counsel had impeached the victim's testimony with her text messages that the outcome would have been different. Overwhelming evidence supported McPherson's aggravated assault conviction. The victim testified that McPherson took her gun out of her purse, that he pointed the gun at her, and that, throughout the incident, he fired the gun multiple times. The victim also testified that she was scared for her life. Her testimony was supported by additional evidence, including her 911 call, photos of several bullet holes in the wall and baseboard of the living room, an independent witness's video deposition that he heard gunshots, the police officer's testimony that he found McPherson with the gun in his hand, and McPherson's statements to police that he got the gun from the victim's purse and shot at the walls multiple times. As a result, the trial court did not abuse its discretion when it found that the impeachment value of the

STATE v. MC PHERSON
Decision of the Court

text messages was minimal and that the trial still would have resulted in McPherson's conviction.

¶9 We have reviewed the record in this matter, the trial court's order denying the petition for post-conviction relief, the petition for review, and the State's response. We find that McPherson has not established an abuse of discretion.

¶10 For the foregoing reasons, we grant review and deny relief.



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