

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 16 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0261-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARY ANN HAAG,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2004015357001DT

Honorable Roger E. Brodman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin

Phoenix
Attorneys for Respondent

The Ferragut Law Firm, P.C.
By Ulises A. Ferragut, Jr.

Phoenix
Attorney for Petitioner

K E L L Y, Presiding Judge.

¶1 Petitioner Mary Ann Haag seeks review of the trial court’s order denying her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Haag has not sustained her burden of establishing such abuse here.

¶2 After a jury trial, Haag was convicted of second-degree murder for shooting her husband. The trial court imposed an enhanced, mitigated sentence of twelve years’ imprisonment. Haag’s conviction and sentence were affirmed on appeal. *State v. Haag*, No. 1 CA-CR 07-0029 (memorandum decision filed Mar. 3, 2009). She thereafter initiated a proceeding for post-conviction relief, asserting various claims of ineffective assistance of trial counsel, including that counsel was ineffective in failing to lay a proper foundation for the admission of certain medical records relating to her having been abused by her husband, to “investigate [other] prior incidents of serious physical abuse,” and to present evidence of her “organic brain damage.” The trial court summarily denied relief.

¶3 On review, Haag reasserts the claims made below,¹ maintains the trial court abused its discretion “by misapplying the applicable standard of review for the claim of

¹In her petition for post-conviction relief, Haag also asserted appellate counsel was ineffective, but did not develop any argument related to that claim, nor does she assert that claim on review. We therefore do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain “[t]he reasons why the petition should be granted” and “specific references to the record”); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

ineffective assistance of counsel” and asserts there was “more than ‘a mere possibility’ of a difference in the outcome of the trial” if trial counsel had acted as Haag now suggests was required. But, in its thorough order denying relief, the court correctly resolved Haag’s claims that trial counsel was ineffective in failing to admit evidence that her husband had abused her. No purpose would be served by restating the court’s ruling, and we adopt that portion of it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶4 Haag’s remaining claim is that counsel was ineffective in failing to present evidence that Haag “may have organic brain damage, arising from the continued physical abuse by her husband.” In its ruling, the trial court stated it could not “determine whether trial counsel’s actions were ‘a reasonable strategic decision’” because it was “presented with conflicting medical reports” about Haag’s condition and had no “information on why trial counsel elected not to call [an expert who examined Haag] as a witness.”

¶5 To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). Furthermore, trial counsel is presumed to have acted properly unless a petitioner can show that counsel’s decisions were not tactical, “but, rather, revealed ineptitude, inexperience or

lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). There is “[a] strong presumption” that counsel “provided effective assistance,” *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel’s conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶6 In this case, Haag provided no affidavits or other evidence in the trial court suggesting counsel’s failure to present evidence of Haag’s possible brain damage fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 (“Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it.”). She cites no authority in her petition for review, nor did she below, showing similar decisions by counsel have been found to constitute ineffectiveness. Her bald assertion that counsel erred is insufficient to sustain her burden of demonstrating the first requirement of the *Strickland* test. *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”). Thus, in the absence of evidence that counsel’s action was the result of ineptitude, the court should have presumed counsel acted properly and concluded Haag failed to state a colorable claim of ineffective assistance of counsel. We therefore cannot say the court abused its discretion in denying Haag relief on this claim. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court is obliged to affirm trial court’s ruling if result was legally correct for any reason).

¶7

Although we grant the petition for review, relief is denied.

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

CONCURRING:

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

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge