IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SANG DO PHUOC LE,
Petitioner.

No. 2 CA-CR 2014-0343-PR
Filed June 25, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20070403
The Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED IN PART AND GRANTED IN PART AND REMANDED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Steven R. Sonenberg, Interim Pima County Public Defender
By Abigail Jensen, Deputy Public Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Sang Le seeks review of the trial court's order entered after an evidentiary hearing denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review and, for the reasons that follow, grant partial relief.

¶2 After a jury trial, Le was convicted of second-degree burglary and sentenced to an 11.25-year prison term. Le's conviction was based on a burglary in which E. confronted an intruder in his home at approximately 1 p.m. on January 17, 2007. E. stated he had tackled the intruder and hit him in the face before the intruder fled. E. called 9-1-1 at 1:08 or 1:09 p.m. The intruder took three $20 bills from a desk and approximately fifty "crisp" $1 bills from a drawer. E. testified the intruder had been wearing latex gloves, jeans, a black baseball cap, and a dark grey sweater and had been carrying a black Jansport backpack. Based on E.'s description, E.'s brother identified Le. During a search of his home, officers found a black Jansport backpack, latex gloves, and fifty-three "new" $1 bills in the purse of Le's girlfriend, T. And E. identified Le as the intruder in a photographic lineup and at trial.

¶3 As part of his trial defense, Le asserted the following facts. When he was arrested later that day, Le had no visible facial injury. T. testified that she had taken the latex gloves home from cosmetology school. Le told police that he wore latex gloves when he worked on cars, and his mother testified Le had worked on a car earlier that day. T. testified the bills in her purse were from a casino

trip she had taken with Le, were gas money from Le's father, or previously had been taken from a jar in Le's room. Le's mother testified Le had been at home until approximately 1:25 p.m. before he left to pick up T., who testified Le had been waiting for her when she finished work at 1:30. She also asserted Le did not own a hooded sweatshirt and had been "dress[ed] up" in a "polo T-shirt" when he picked her up. The jury did not accept Le's defense and convicted him as indicated.

¶4 After sentencing, Le sought relief pursuant to Rule 24.2(a)(3), Ariz. R. Crim. P., arguing his trial counsel had been ineffective. After several evidentiary hearings, the trial court denied that motion as well as Le's requests for funding for expert witnesses. On appeal, we affirmed Le's conviction and sentence for burglary, determining he was not entitled to raise his claim pursuant to Rule 24.2 and was instead required to raise it in a Rule 32 proceeding. *State v. Le*, 221 Ariz. 580, ¶¶ 5-6, 212 P.3d 918, 919 (App. 2009).

¶5 Le then sought post-conviction relief, arguing trial counsel had inadequately investigated the case, failed to sufficiently investigate and assert at trial an alibi defense or request an alibi instruction, and did not present evidence the burglary had been "staged" in an effort to extort Le. Le additionally asserted that facts not presented at trial supported a claim of actual innocence pursuant to Rule 32.1(h).

¶6 The heart of Le's alibi claim was that a preliminary analysis of a computer in Le's residence showed that someone had used the computer at 12:46 p.m. and again at 1:17 p.m., and that witnesses would have testified that nobody at home during that time would have used the computer except for Le. Le asserted it would have been impossible for him to have left his home, traveled to E.'s residence, and committed the burglary between 12:46 p.m. and the time of E.'s 9-1-1 call, much less returned home by 1:17 and changed clothes before leaving to pick up his girlfriend before 1:30 p.m. Le further claimed that "a cumulative analysis" of counsel's errors required relief.

¶7 After an evidentiary hearing, the trial court denied relief. In rejecting Le's actual-innocence claim, it determined that it was possible for Le to have committed the burglary even assuming he had been home at 12:46 p.m. and 1:17 p.m. The court also observed that the testimony offered to support his alibi was by family members and thus was "not neutral, unbiased testimony." During argument on his claims, Le further relied on new tests that showed no evidence the gloves found in his bedroom had been in contact with wrought-iron bars like the ones he allegedly had removed to enter E.'s residence. The court noted, however, that there was no "independent evidence showing the bars on the windows were the same bars present on the day of the burglary" or that they had not been affected "by the elements or other contaminants over the years." Thus, the court concluded, Le had not demonstrated that it was "highly probable that no reasonable fact finder would convict" him of burglary.

¶8 In rejecting Le's claim of ineffective assistance, the trial court found trial counsel's performance had not been deficient. It noted that the bulk of Le's complaints were related to matters of trial strategy and that, in any event, Le had not established resulting prejudice. The court also noted that the computer evidence "does not alibi" Le "for the time of the burglary." This petition for review followed the court's denial of Le's motion for rehearing.

¶9 On review, Le first repeats his claim of actual innocence, asserting that he proved his alibi by clear and convincing evidence. To obtain relief under Rule 32.1(h), a defendant must "demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt." He argues the trial court was incorrect in determining that he could have committed the burglary in the time between 12:46 p.m. and the intruder's contact with E. But, even if we assume Le is correct, his Rule 32.1(h) claim nonetheless fails. A jury would be free to disregard the testimony from his family that Le was the only person in the house that would have used the computer and thus would be free to reject his alibi entirely. *See State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974) (trier of fact free

to disregard testimony of interested persons); *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974) ("No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury."). Thus, Le cannot establish that no reasonable jury would convict him of the offense.[1]

¶10 Le also repeats his claim of ineffective assistance of trial counsel. To prevail on this claim, Le "was required to demonstrate that counsel's conduct fell below prevailing professional norms and that he was prejudiced thereby." *State v. Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d 98, 100-01 (App. 2013), *citing Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Whether counsel rendered ineffective assistance is a mixed question of fact and law." *Id.* "'[W]e defer to the trial court's factual findings but review de novo the ultimate legal conclusion.'" *Id.*, *quoting In re MH2010-002637*, 228 Ariz. 74, ¶ 13, 263 P.3d 82, 86 (App. 2011) (alteration in *Denz*).

¶11 Le claims that counsel's pretrial investigation was insufficient and that counsel failed to adequately present his defense at trial. Le generally asserts that counsel's conduct fell below the standard of care, but he fails to cite any evidence supporting that conclusion.[2] Nor does he address the court's conclusion that the

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[1]We need not address Le's additional arguments that the court erred in discounting the window and glove test results or by failing to conduct "a cumulative analysis" of the evidence in evaluating his claim. He does not assert that those arguments, standing alone, entitle him to relief pursuant to Rule 32.1(h). Nor need we address his argument that his claim is subject to de novo review—irrespective of our standard of review, we reach the same result. Further, although Le insists his identification at trial was "completely deconstructed," we disagree. His argument seizes on minor inconsistencies in E.'s description and, although E. acknowledged he had "some doubt" Le was the intruder, that did not require the jury to reject his identification testimony.

[2]Le argues the trial court erred in denying his request for an expert to testify as to the relevant standard of care. Le briefly raised

decision whether to present certain witnesses is a tactical decision that cannot form the basis of an ineffective assistance claim if that decision had some reasoned basis. *See Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101. And, although Le cites some authority discussing inadequate investigation as a ground for a claim of ineffective assistance of counsel, those cases do not aid his argument. For example, in *State v. Tapia*, an expert witness testified that counsel's conduct fell below prevailing professional norms by failing to interview the only two witnesses who could have supported the defendant's alibi. 151 Ariz. 62, 64, 725 P.2d 1096, 1098 (1986). In contrast, here, counsel interviewed relevant alibi witnesses and made an affirmative decision to not call all of them at trial.[3] And, in *State v. Radjenovich*, "trial counsel did not interview any of the prosecution's witnesses prior to trial," and testified he preferred to take the police reports "at face value" to avoid any suggestion of witness tampering. 138 Ariz. 270, 274, 674 P.2d 333, 337 (App. 1983).

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this claim in his petition for post-conviction relief. However, in his petition for review, he refers only to the court's ruling rejecting the request he had made during his proceeding pursuant to Rule 24.2, Ariz. R. Crim. P., initiated before his appeal, and to requests he made after the court had denied relief in this proceeding. The court's rulings in the Rule 24.2 proceeding are not before us, and Le does not identify any ruling by the trial court on this issue during his Rule 32 proceeding. And, in any event, beyond a passing reference to "due process," Le does not meaningfully develop an argument that the court erred in rejecting his requests. *Cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). We thus do not address this argument further. For the same reason, we do not address Le's companion argument that he is entitled to funding for additional computer forensic investigation.

[3]Le insists that counsel intended to call an additional alibi witness at trial but that the witness was precluded because counsel did not disclose her. The record does not support this assertion—counsel contemplated calling the witness but ultimately determined her testimony was unnecessary. The court never precluded the witness from testifying.

That situation is not present here—Le claims only that counsel failed to interview a police detective that counsel had the opportunity to cross-examine at a probation violation hearing. Counsel's decision to forgo the interview in lieu of cross-examination could have had a tactical basis. And, in any event, Le cites no evidence suggesting competent counsel would have pursued the line of questioning he believes his trial counsel should have undertaken.

¶12 We grant partial relief on Le's claim that counsel was ineffective for failing to request an alibi instruction. Pursuant to Rule 32.8(d), Ariz. R. Crim. P., a trial court is required to "make specific findings of fact, and state expressly its conclusions of law relating to each issue presented," but the trial court did not provide facts or legal conclusions. Arizona law clearly requires such an instruction be given if supported by the evidence, which it was here. *State v. Rodriguez*, 192 Ariz. 58, ¶¶ 16, 21, 961 P.2d 1006, 1009-10 (1998). Counsel admitted he had not declined to request the instruction as a matter of trial strategy, but instead because "it never occurred to [him] to ask for one."

¶13 Counsel also acknowledged that, had Le told him he was using the computer during the time of the burglary, he would have investigated further and sought the assistance of a computer expert to evaluate whether any evidence could be found that would support Le's alibi. Le testified at the evidentiary hearing that he had told counsel he was using the computer during the relevant time. The trial court made no factual findings regarding this apparent discrepancy between Le's statement and counsel's avowal he would have done more had he been told about the computer use. *See* Ariz. R. Crim. P. 32.8(d). And, if the court were to find Le had told counsel about his computer use, counsel's failure to follow up on that information has no apparent reasoned basis based on counsel's own testimony.[4] *See Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101.

[4]To the extent Le asserts that counsel should have asked him about additional support for his alibi claim, such as his alleged computer usage, he identifies no evidence suggesting that counsel fell below prevailing professional norms by failing to do so.

¶14 The trial court may have omitted a discussion of the discrepancy because it rejected Le's computer alibi claim, reasoning it would have been possible for Le to have committed the burglary even assuming he had used the computer at 12:46 p.m. and 1:17 p.m. But Le was not required to show, as the court's ruling suggests, that it would have been impossible for him to have committed the offense in light of the alibi evidence. "[A]libi is not an affirmative defense," but instead "the jury must acquit a defendant if the alibi evidence raises a reasonable doubt about whether the defendant committed the crime." *Rodriguez*, 192 Ariz. 58, ¶¶ 24-25, 961 P.2d at 1011. A jury readily could conclude that it was unlikely that Le had left his home after 12:46 p.m., traveled to E.'s home and completed the burglary before being confronted by E. at approximately 1 p.m., traveled home, used the computer at 1:17 p.m., and picked up his girlfriend before 1:30 p.m. Thus, the jury could conclude the computer alibi evidence raises a reasonable doubt as to Le's guilt. We cannot determine on this record, however, whether Le informed trial counsel about his computer use.

¶15 For the reasons stated, we grant review and partial relief. We remand the case to the trial court to address counsel's failure to request an alibi instruction and to investigate the computer evidence in support of Le's alibi defense. We otherwise deny relief.