

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

GERARDO ROBERTO ZEPEDA,  
*Petitioner.*

No. 2 CA-CR 2014-0398-PR  
Filed March 10, 2015

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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NOT FOR PUBLICATION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.*

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Petition for Review from the Superior Court in Pima County

No. CR20063374

The Honorable D. Douglas Metcalf, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

John William Lovell, Tucson  
*Counsel for Petitioner*

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MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

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VÁSQUEZ, Judge:

¶1 Gerardo Zepeda seeks review of the trial court's order denying, after an evidentiary hearing, his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Zepeda has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Zepeda was convicted of second-degree murder and unlawful imprisonment and was sentenced to concurrent prison terms, the longer of which is twenty-two years. His convictions arose from an incident in which Zepeda knocked the victim unconscious, and the victim was later found dead, facedown under a mattress with his hands and feet bound. The medical examiner testified that, in his opinion, the victim had died of asphyxiation, possibly caused by being left unconscious and facedown into the carpeting.

¶3 Zepeda sought post-conviction relief raising a claim of newly discovered evidence, which the trial court rejected. On appeal, we affirmed his convictions and sentences; we additionally granted review of his petition for review of the trial court's denial of his post-conviction claim, but we denied relief. *State v. Zepeda*, Nos. 2 CA-CR 2007-0351, 2 CA-CR 2008-0266-PR (consolidated) (memorandum decision filed Apr. 23, 2009).

¶4 Zepeda then filed a timely, successive petition for post-conviction relief arguing appellate counsel had been ineffective in failing to argue on appeal that there was insufficient evidence

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Zepeda had caused the victim's death. The trial court set an evidentiary hearing and permitted Zepeda to amend his petition to include an affidavit from a medical doctor regarding the cause of the victim's death. At the hearing, Zepeda additionally argued trial counsel had been ineffective in failing to retain an independent medical expert to testify that the cause of the victim's death could not be determined "to a reasonable medical probability."<sup>1</sup> An attorney testified at the evidentiary hearing that counsel had been ineffective in failing to retain an independent expert and in failing to raise the sufficiency of the evidence on appeal. The medical doctor also testified at the hearing, as did the medical examiner who had testified at trial.

¶5 The trial court denied relief. It noted that the medical examiner had told trial counsel's investigator during an interview that he could not adequately determine the cause of the victim's death, and that counsel had effectively cross-examined the medical examiner at trial. Thus, the court concluded, counsel had made a reasonable, tactical decision to not retain an independent expert. The court noted further that, on appeal, counsel had argued that Zepeda was entitled to a superseding-cause instruction. In rejecting that argument, the court reasoned that because this court rejected that argument on appeal, we necessarily found sufficient evidence of causation. This petition for review followed.

¶6 On review, Zepeda first argues the trial court erred in rejecting his claim of ineffective assistance of trial counsel. "To prevail on this claim, [Zepeda] 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 (App. 2013), citing *Strickland v. Washington*, 466 U.S. 668,

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<sup>1</sup>Preclusion does not apply to Zepeda's claims because he was represented by the same counsel at trial, during his first Rule 32 proceeding, and on appeal. Thus, this proceeding is his first opportunity to raise claims of ineffective assistance of trial and appellate counsel. See Ariz. R. Crim. P. 32.2(a)(3); *State v. Bennett*, 213 Ariz. 562, ¶¶ 13-16, 146 P.3d 63, 66-67 (2006).

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687-88 (1984). We presume, however, that “‘counsel’s conduct falls within the wide range of reasonable professional assistance’ that ‘might be considered sound trial strategy.’” *Id.* ¶ 7, quoting *Strickland*, 466 U.S. at 689. “To overcome this presumption, [Zepeda] was required to show counsel’s decisions were not tactical in nature, but were instead the result of ‘ineptitude, inexperience or lack of preparation.’” *Id.*, quoting *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). “Thus, disagreements about trial strategy will not support an ineffective assistance claim if ‘the challenged conduct has some reasoned basis,’ even if the tactics counsel adopts are unsuccessful.” *Id.*, quoting *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

¶7 Zepeda argues there was no testimony to support the trial court’s determination that it was reasonable for counsel to forgo hiring an independent expert. But, although an attorney testified at the evidentiary hearing that trial counsel fell below prevailing professional norms by failing to discuss the case with an expert, the court was free to reject that testimony in light of the evidence presented. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007) (fact finder judges credibility of witnesses).

¶8 The decision whether to hire an expert or call a particular witness is a strategic decision to be made by counsel. *Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102. The medical examiner testified that he could not determine what had caused the victim to asphyxiate and that the victim could have died from ingestion of alcohol and drugs. In light of the qualified nature of the medical examiner’s testimony, we cannot say the trial court abused its discretion in finding it reasonable for counsel to forgo consulting an independent expert in these circumstances. *See id.* (reasonable for counsel to forgo expert consultation “based on his or her reasoned conclusion that it would not yield useful information”). Moreover, nothing in the record suggests counsel lacked an understanding of the medical testimony or did not have sufficient experience in defending homicide cases. *See id.* ¶ 13. In any event, even if counsel should have consulted with an independent medical expert before trial, it still would have been well within his strategic discretion to not call that expert at trial given the similarities between the expert’s

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proposed testimony and the testimony of the medical examiner. *See id.* ¶ 11.

¶9 Those similarities also compel the conclusion that there is no reasonable possibility the testimony of the independent expert would have altered the verdict. *See id.* ¶¶ 6, 20. Beyond minor differences in their respective opinions whether death from alcohol and drugs would qualify as asphyxia, the medical testimony of the independent expert was similar to that of the medical examiner—that it was not possible to determine the precise cause of the victim’s death. And, although the independent expert testified that drugs and alcohol most likely caused the victim’s death, he agreed external factors could contribute to a drug-caused death. Additionally, the independent expert did not review photographs of the crime scene; the medical examiner relied on his observations from the crime scene in developing his opinion about the manner of the victim’s death. For these reasons, we find no error in the trial court’s rejection of Zepeda’s claim of ineffective assistance of trial counsel.

¶10 Zepeda further argues the trial court erred in rejecting his claim that appellate counsel had been ineffective in failing to raise the sufficiency of the evidence of causation.<sup>2</sup> We agree with the court’s conclusion that we necessarily rejected on appeal the argument that there was insufficient evidence of causation by concluding Zepeda was not entitled to an instruction on superseding cause. Contrary to Zepeda’s argument, our discussion was not limited to whether the victim’s consumption of drugs and alcohol caused his death; we instead determined Zepeda’s conduct—leaving an unconscious, bound victim facedown on a carpet underneath a mattress—contributed to the risk of death by asphyxia caused or partially caused by the victim’s consumption of drugs and alcohol. In doing so, we necessarily concluded there was sufficient evidence for a jury to conclude Zepeda’s conduct was a cause or partial cause of the victim’s death. *See State v. Pesqueira*, 235

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<sup>2</sup>To the extent Zepeda separately asserts there was insufficient evidence of causation, that claim is precluded. *See Ariz. R. Crim. P.* 32.2(a)(2).

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Ariz. 470, ¶ 23, 333 P.3d 797, 803 (App. 2014) (“A defendant’s actions need not be the sole cause of the death for the defendant to be held criminally liable.”).

¶11 We grant review but deny relief.