IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CATHY LYNN HUFFMAN,
Petitioner.

No. 2 CA-CR 2014-0422-PR
Filed January 23, 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NOT FOR PUBLICATION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 Mohave County
No. CR201000514
The Honorable Lee F. Jantzen, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Matthew J. Smith, Mohave County Attorney
By Gregory A. McPhillips, Deputy County Attorney, Kingman
Counsel for Respondent

The Brewer Law Office, Show Low
By Benjamin M. Brewer
Counsel for Petitioner

MEMORANDUM DECISION

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

K E L L Y, Presiding Judge:

¶1 Cathy Huffman seeks review of the trial court's order denying, after a hearing, her 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). Huffman has not met her burden of demonstrating such abuse here.

¶2 Huffman was convicted after a jury trial of possession of methamphetamine for sale and possession of drug paraphernalia. The trial court sentenced her to concurrent prison terms, the longer of which is seven years. We affirmed her convictions and sentences on appeal. *State v. Huffman*, No. 1 CA-CR 11-0210 (memorandum decision filed June 5, 2012). Huffman then sought post-conviction relief, arguing her trial counsel had been ineffective in failing to call two witnesses who would have testified, inter alia, that the methamphetamine belonged to Huffman's husband.

¶3 The trial court noted that the petition "raise[d] a colorable claim" and set the matter for "oral argument," but instructed the parties to notify it "[i]f either party believes an evidentiary hearing is necessary." Neither party did so. At the scheduled argument, Huffman nonetheless expressed "concern[]" that she could not meet her burden of proof if those witnesses did not testify. The state ultimately agreed, however, that the affidavits signed by those witnesses could be admitted into evidence, and the court did so. It then denied Huffman's petition for post-conviction relief. The court concluded the decision whether to call the witnesses was a tactical decision made by counsel and, in any event, Huffman had not demonstrated prejudice because "the end result

[of trial] would have been the same based on the evidence that was presented at trial." This petition for review followed.

¶4 On review, Huffman asserts that, because she presented a colorable claim and her evidence was accepted without rebuttal, the trial court was required to grant her relief. She reasons that, because an evidentiary hearing is required only when the defendant presents a colorable claim, that is, if the allegations are true, the outcome could have changed, *see State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), and because no evidence was presented except the affidavits submitted with her petition, her claim necessarily prevails.

¶5 We find no authority, however, and Huffman cites none, suggesting a trial court is irrevocably bound by its initial determination that a claim is colorable. *Cf. State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988) (if doubt exists as to whether claim is colorable, hearing should be held). Instead, having presented a claim deemed colorable, a defendant is then required to prove that claim by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(a), (c). To prevail on a claim of ineffective assistance of counsel, Huffman was required to show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In addressing the sufficiency of counsel's performance, 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 demonstrating 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). "To overcome th[e] presumption," a petitioner is "required to show counsel's decisions were not tactical in nature, but were instead the result of 'ineptitude, inexperience or lack of preparation.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

¶6 Moreover, "the decision as to what witnesses to call is a tactical, strategic decision," *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d

153, 158 (1984), and "[d]isagreements as to trial strategy . . . will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis," *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). Even assuming, without deciding, that the affidavits presented by Huffman established prejudice, she has presented no evidence and cited no authority suggesting that counsel's decision to not call those witnesses was not a reasoned tactical decision. Thus, the trial court did not abuse its discretion in rejecting this claim.

¶7 We grant review, but we deny relief.[1]

[1] Although we deny relief, we note the state's response to Huffman's petition for review fails to comply in any meaningful way with Rule 32.9(c) in that it contains no citations to the record and instead appears to incorporate by reference the response filed by the state below. This procedure is not permitted by our rules. *See State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991). And, to the extent the state has marshaled any legal argument in its response, that argument is unsupported by citation to authority. *Cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).