IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEROY MONTOYA,
Petitioner.

No. 2 CA-CR 2015-0176-PR
Filed June 12, 2015

Petition for Review from the Superior Court in Mohave County
No. CR20070058
The Honorable Lee F. Jantzen, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

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

MEMORANDUM DECISION

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

H O W A R D, Judge:

¶1 Petitioner Leroy Montoya seeks review of the trial court's order denying his 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). Montoya has not sustained his burden of establishing the court abused its discretion with respect to the numerous claims it addressed in its order, and we deny relief on those claims. However, because the order does not address one of Montoya's claims of ineffective assistance of counsel, we remand the case for the court to enter factual findings and conclusions of law regarding that claim, in compliance with Rule 32.8(d).

¶2 After a jury trial, Montoya was convicted of contracting without a license, criminal damage, fraudulent schemes and artifices, and participating in a criminal street gang. The trial court sentenced him to concurrent and consecutive terms totaling nineteen years' imprisonment. The convictions and sentences were affirmed on appeal. *State v. Montoya*, No. 1 CA-CR 09-0313 (memorandum decision filed Sept. 15, 2011).

¶3 Montoya initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel in that trial counsel failed to properly prepare for trial; to object to particular jury instructions, improper statements by the prosecutor, and testimony that Montoya was a gang member; or to move for mistrial based on prosecutorial misconduct. He also argued he was entitled to a "[c]orrection of credit for time served." After a hearing, the trial court denied relief on Montoya's claims of

ineffective assistance of counsel, but ordered Montoya to be credited with additional days of credit for time served.

¶4 On review, Montoya repeats his claims made below and contends the trial court abused its discretion in rejecting them. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶5 When a trial court has denied post-conviction relief after a hearing, our review of the court's factual findings "is limited to a determination of whether those findings are clearly erroneous"; we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* And, "[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.; see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶6 Montoya first argues the trial court should not have rejected his claim that trial counsel was ineffective because counsel admitted at trial that he did not feel "fully prepared." Shortly before that statement, counsel noted that he had moved to continue the trial due to Montoya's "depleted mental condition" and suicide attempts. The motion counsel filed noted that witnesses had not been contacted due to Montoya's inability to provide contact information for witnesses while incarcerated and that, in general, defense witnesses had not been adequately interviewed. Likewise, at a

status conference held immediately before trial, counsel requested a continuance because he did "not feel that [Montoya] [wa]s mentally able to proceed to [t]rial."

¶7 At the Rule 32 hearing trial counsel testified that despite his statement, he believed he had been prepared at the time of trial, although he noted "there [are] different degrees of preparedness with a case" and if "the definition of prepared" included having "addressed every single concern that [a defendant] may have, turn over every single rock, taken advantage of every single opportunity[,] to exhaust to its extreme every possible bit of even remotely relevant evidence, then no case would ever probably be truly prepared." He stated he had not had "any concerns about [his] ability to do an effective job" and "had a reasonable preparedness to conduct the trial."

¶8 In ruling on the petition, the court noted its own observations of trial counsel's performance, and accepted counsel's explanation of his comment at trial. Montoya's argument on review amounts to a request that we reweigh the evidence relating to counsel's preparedness; that we will not do. *See Fritz*, 157 Ariz. at 141, 755 P.2d at 446.

¶9 Montoya also argues his counsel was ineffective in failing to request certain jury instructions, specifically an instruction on mere presence and an instruction on Rule 404(b), Ariz. R. Crim. P. The trial court determined it might have given such instructions if asked, but concluded giving them would not have made a difference to the outcome of the case.

¶10 On review, Montoya argues the lack of a mere presence instruction was damaging, "especially . . . with the criminal damage count."[1] In our decision on appeal, this court noted Montoya's

[1]In his petition for post-conviction relief Montoya also claimed the mere presence instruction "applied to the participation in the criminal street gang charge [and] the fraudulent schemes charge" as well as to the criminal damage charge. But he did not meaningfully develop such an argument below and makes no argument on those

failure to request a mere presence instruction, but also ruled that such an instruction was inappropriate in response to a jury question as to whether Montoya could be found guilty if he "'did have knowledge and did not inform [the property owner] of the damage.'" *Montoya*, No. 1 CA-CR 09-0313, ¶¶ 18-19. As we determined on appeal, "the [s]tate did not argue Montoya's accomplice liability regarding the damage . . . was based on his presence there; rather, the [s]tate argued Montoya was guilty because he provided the means and opportunity . . . to cause the damage." *Id.* ¶ 19. Because a mere presence instruction was therefore inappropriate, we cannot say the trial court abused its discretion in determining counsel was not ineffective in failing to request it. *Cf. State v. Perez,* 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm if result was legally correct for any reason).

¶11 We also reject as waived Montoya's claim that the trial court should have granted relief on his claim of ineffective assistance based on counsel's failure to request a limiting instruction for evidence admitted pursuant to Rule 404(b). He does not specify what evidence of other acts was admitted to warrant such an instruction; he only asserts that "[n]umerous other highly prejudicial acts, not contained within the [i]ndictment, were introduced . . . during . . . trial." Nor does he discuss whether any such acts were in fact "other acts" or were merely direct evidence of his participation in a criminal street gang. *See* A.R.S. § 13-2321. Because he has failed to provide meaningful argument on these complex questions, we deem them waived. *See* Ariz. R. Crim. P. 32.9(c)(1); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

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points on review. We therefore do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "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); *cf. 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.").

¶12 Montoya next contends counsel should have objected to the "improper statements" made by the prosecutor in the state's opening statement, should have requested a limiting instruction on "inflammatory questions" asked by the prosecutor, and should have moved for a mistrial "based on cumulative prosecutorial misconduct." The trial court noted that it had "admonish[ed]" the prosecutor on a few occasions, but rejected Montoya's claims that counsel had been ineffective in relation to prosecutorial misconduct, noting that it would not have granted a motion for mistrial based on cumulative misconduct even had it been made. We cannot say the court abused its discretion in rejecting these claims.

¶13 First, in view of the trial court's ruling that it would not have granted a motion for mistrial grounded on the cumulative effect of prosecutorial misconduct, Montoya has not established prejudice as to that claim. Further, on appeal, although in part reviewing only for fundamental error, this court determined the prosecutor's actions either were not misconduct or were cured by other instructions. *Montoya*, No. 1 CA-CR 09-0313, ¶¶ 41-51. Montoya has not explained how counsel's conduct, even if it were found deficient, could have been prejudicial. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant fails to make sufficient showing on either element of *Strickland* test, court need not determine whether other element satisfied).

¶14 Montoya also argues counsel was ineffective in "fail[ing] to object to testimony that [he] was a documented gang member." The trial court did not address this claim in its oral ruling or in its minute entry. Pursuant to Rule 32.8(d), in making its ruling after an evidentiary hearing, a trial court must "make specific findings of fact, and state expressly its conclusions of law relating to each issue presented." Thus, we remand this case to the trial court for it to enter an order including factual findings and conclusions of law, in compliance with Rule 32.8(d), as to this claim. *See State v. Tankersley*, 211 Ariz. 323, 324-25, 121 P.3d 829, 830-31 (2005).

¶15 Finally, on review Montoya refers us to "Exhibit D," which includes what appears to be a copy of a pro se filing in the trial court for "additional claims seeking relief." This procedure is not permitted, both because Montoya attempts to obtain hybrid representation and because Exhibit D is not an appendix in support of the arguments presented in the petition, but rather is an attempt to present separate arguments by providing this court with copies of documents filed below in which those arguments were made to the trial court. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must contain "reasons why the petition should be granted" and either appendix or "specific references to the record," but "shall not incorporate any document by reference, except the appendices"), (f) (appellate review under Rule 32.9 discretionary); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838 (insufficient argument waives claim on review); *State v. Cook*, 170 Ariz. 40, 48, 821 P.2d 731, 739 (1991) (no right to hybrid representation).

¶16 For these reasons, we grant review and relief in part, remanding the matter to the trial court for further proceedings consistent with this decision.