

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOE LOUIS CANO,
Petitioner.

No. 2 CA-CR 2015-0439-PR
Filed March 7, 2016

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NOT FOR PUBLICATION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 Gila County
No. S0400CR201300139
The Honorable Timothy M. Wright, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

Bradley D. Beauchamp, Gila County Attorney
By June Ava Florescue, Deputy County Attorney, Globe
Counsel for Respondent

Ramos Law Firm, Scottsdale
By Paul A. Ramos
Counsel for Petitioner

STATE v. CANO
Decision of the Court

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

STARING, Judge:

¶1 Joe Cano seeks review of the trial court’s order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons discussed below, we remand this case to the trial court for the limited purpose of allowing it to determine whether Cano has made a colorable claim of prejudice and, only if so, to conduct an evidentiary hearing.

¶2 After a jury trial, Cano was convicted of continuous sexual abuse of a child and three counts of kidnapping. He was sentenced to consecutive prison terms totaling sixty-two years. We affirmed his convictions and sentences on appeal. *State v. Cano*, No. 2 CA-CR 2014-0036 (memorandum decision filed Oct. 8, 2014). Cano then sought post-conviction relief, arguing his trial counsel had been ineffective for failing to object to leading questions asked by the state of the victim, and in failing to consult with an expert and present that expert’s opinion that the testimony of the victim and his brother may have resulted from suggestive interviewing. He further argued he was entitled to relief due to the “cumulative effect” of counsel’s errors.

¶3 Cano attached to his petition a report by a clinical psychologist who had reviewed the various statements by the victim and his brother, also a minor. The psychologist identified aspects of those statements that, in his opinion, could show the children’s testimony had been distorted by the use of leading questions,

STATE v. CANO
Decision of the Court

repeated questions, possible rehearsal, and reinforcement of particular answers. Cano also attached to his petition an affidavit by a defense attorney. Relevant to Cano's claim that trial counsel should have retained an expert for trial, the attorney avowed "the issues [concerning possible suggestion] noted in the police report, interviews, and forensic interview arose to a sufficient level demanding the consultation with experts," and the issues "should have been sufficient to warrant the retaining of such experts for trial." The attorney further stated he "believe[d] that [trial] counsel's performance was deficient and was not reasonable given the nature of the charges."

¶4 The trial court summarily denied relief, concluding Cano had not shown trial counsel had performed deficiently and rejecting the defense attorney's avowal in his affidavit that counsel had acted unreasonably. The court noted that the bulk of the prosecutor's questions during direct examination of the victim had not been leading and, in any event, "the few questions that were leading were appropriate and therefore any objection by trial counsel would have been overruled." The court also observed that counsel had adequately prepared for trial and had extensively cross-examined witnesses and pointed out inconsistencies in their testimony. This petition for review followed.

¶5 Cano first repeats his claim that his trial counsel was ineffective for failing to retain an expert to testify concerning "numerous problems and issues of suggestibility and distortion" related to the testimony of the victim and his brother. "To state a colorable claim of ineffective assistance of counsel," Cano was required to 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, he was required to demonstrate 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.* In determining whether a claim is colorable and, thus, if a defendant is entitled to an

STATE v. CANO
Decision of the Court

evidentiary hearing, we treat the defendant's factual allegations as true. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶6 As we noted above, Cano included with his petition an affidavit by a defense attorney in which that attorney opined trial counsel had acted unreasonably in failing to consult with and call at trial the clinical psychologist. Although the trial court rejected this avowal, it was not entitled to do so summarily. Instead, it was required to treat that allegation as true. *See D'Ambrosio*, 156 Ariz. at 73, 750 P.2d at 16; *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal permitted only when "no remaining claim presents a material issue of fact or law which would entitle the defendant to relief"). In light of the attorney's avowal, Cano has made a colorable claim that counsel fell below "objectively reasonable standards" of performance. *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶7 That conclusion, however, does not necessarily entitle Cano to an evidentiary hearing on his claim of ineffective assistance. The trial court did not address whether Cano had been prejudiced by counsel not consulting with and presenting the testimony of the psychologist. We decline to decide this issue for the first time on review and therefore remand this case to the trial court for it to address whether Cano has made a colorable claim of prejudice and, only if so, to conduct an evidentiary hearing.

¶8 Cano also repeats his claim that counsel was ineffective for failing to object to leading questions asked by the prosecutor during examination of the child witnesses. We find no error in the trial court's summary rejection of this claim. First, Cano offers no evidence to support his conclusion that "[t]here is no reasonable trial strategy for failing to object" to leading questions. Clearly, an attorney may opt not to object to testimony in order to avoid drawing attention to it. *See State v. Garcia*, 141 Ariz. 97, 103, 685 P.2d 734, 740 (1984). This sort of tactical decision cannot support a claim

STATE v. CANO
Decision of the Court

of ineffective assistance.¹ See *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984); see also *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013) (“[W]e must presume ‘counsel’s conduct falls within the wide range of reasonable professional assistance’ that ‘might be considered sound trial strategy.’”), quoting *Strickland*, 466 U.S. at 689.

¶9 In any event, Cano does not meaningfully address the trial court’s conclusion that many of the prosecutor’s questions were not leading or were otherwise appropriate—particularly given that asking leading questions of child witnesses is permitted in some circumstances. See *State v. Jerousek*, 121 Ariz. 420, 426, 590 P.2d 1366, 1372 (1979). We therefore need not address this issue further. See *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶10 We grant review and relief in part. The case is remanded to the trial court for a determination whether Cano presented a colorable claim that he was prejudiced by his attorney not consulting with a child psychologist and presenting that psychologist’s testimony at trial and, if so, to conduct an evidentiary hearing on this specific claim of ineffective assistance of trial counsel. We otherwise deny relief.

¹Because Cano has not demonstrated counsel as deficient in failing to object, we need not address his claim that he is entitled to relief due to the “cumulative effects” of counsel’s purported errors.