IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SONIA DELMY RAMIREZ,
Petitioner.

No. 2 CA-CR 2015-0482-PR
Filed February 18, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2009113981001DT
The Honorable Susanna C. Pineda, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
Counsel for Respondent

Howard Schwartz, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Sonia Ramirez seeks review of the trial court's order summarily dismissing her 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). Ramirez has not met her burden of demonstrating such abuse here.

¶2 After a jury trial, Ramirez was convicted of three counts of kidnapping, five counts of theft by extortion, two counts of aggravated assault, and theft of a means of transportation. The trial court sentenced her to concurrent and consecutive prison terms totaling twenty-one years. We affirmed her convictions and sentences on appeal. *State v. Ramirez*, No. 1 CA-CR 11-0048 (memorandum decision filed Apr. 12, 2012).

¶3 Ramirez then sought post-conviction relief, claiming her trial and appellate counsel had been ineffective. Specifically, she argued trial counsel had been ineffective in failing to call additional witnesses in support of her alibi defense and in failing to seek a pretrial hearing concerning a photographic lineup conducted by the state on the basis it was unduly suggestive. She further asserted both trial and appellate counsel had been ineffective in failing to argue three of the extortion counts were multiplicitous. The trial court summarily dismissed Ramirez's petition, concluding her claims were not colorable. This petition for review followed.

¶4 A claim is colorable, thereby entitling a defendant to an evidentiary hearing, only if the "allegations, if true, would have changed the verdict." *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596,

600 (1995). To present a colorable claim of ineffective assistance of counsel, Ramirez was required to show both that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced her. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

¶5 "Defendants are not guaranteed perfect counsel, only competent counsel." *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 366-67, 890 P.2d 1149, 1151-52 (1995). Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and must make "every effort . . . to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Furthermore, "we must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland*, 466 U.S. at 689. 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).

¶6 Accordingly, a defendant must raise in his or her petition "some factors that demonstrate that the attorney's representation fell below the prevailing objective standards." *State v. Borbon*, 146 Ariz. 392, 399-400, 706 P.2d 718, 725-26 (1985); *see also State v. Santanna*, 153 Ariz. 147, 150, 735 P.2d 757, 760 (1987) ("[p]roof of ineffectiveness must be to a demonstrable reality rather than a matter of speculation"; courts required to give effect to presumption of competence absent contrary evidence in "unsupplemented record"). Thus, to state a colorable claim, "[t]he petitioner must offer some demonstration that the attorney's representation fell below that of the prevailing objective standards . . . . [and] some evidence of a reasonable probability that, but for counsel's unprofessional errors, the outcome of the [proceeding] would have

been different." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999).

¶7 Ramirez first argues the trial court "did not properly consider" the affidavits she had submitted in support of her claim that counsel should have called additional alibi witnesses. She asserts that, despite inconsistencies in their proposed testimony, she was nonetheless entitled to an evidentiary hearing so the court could "resolve the conflict" and that the court instead prematurely evaluated their credibility in violation of Rule 32.6(c).

¶8 We need not address this argument, however, because Ramirez has not presented a colorable claim that counsel fell below prevailing professional norms by declining to call the alibi witnesses. The decision whether to call certain witnesses is plainly tactical. *See generally State v. Moreno*, 153 Ariz. 67, 69-70, 734 P.2d 609, 611-12 (App. 1986) (discussing tactical decisions by counsel involving objections and witnesses). Ramirez has identified no authority or evidence suggesting that counsel had no reasoned basis for declining to call these alibi witnesses, particularly given their testimony would have been inconsistent not only with each other, but with Ramirez's testimony and the time of her arrest. Absent evidence or authority demonstrating counsel fell below prevailing professional norms, Ramirez's claim fails and the court did not err in summarily rejecting it.

¶9 We also conclude the trial court did not err in rejecting Ramirez's claim that counsel was ineffective in failing to move pretrial to suppress a witness's identification of her in a photographic lineup as well as his in-court identification. Again, Ramirez has cited no evidence that competent counsel would have sought suppression pretrial. And, even if we accept that counsel should have done so, Ramirez is still not entitled to relief because she has not shown resulting prejudice. Although she repeatedly asserted in her petition below that the pretrial identification was unduly suggestive, she did not develop any argument supporting that claim and, thus, did not demonstrate that such a motion likely would have been granted. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10

P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶10 Last, Ramirez reasserts her claim that trial counsel was ineffective in failing to argue three of the theft by extortion charges were multiplicitous. A charge is multiplicitous if it charges a single offense in multiple counts; such a charge is improper because it "raise[s] the potential that a defendant may be subjected to double punishment." *Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004). Offenses are not multiplicitous "if each requires proof of a fact that the other does not." *Id.*; *see also Blockburger v. United States*, 284 U.S. 299, 304 (1932).

¶11 Ramirez was charged with theft by extortion pursuant to A.R.S. § 13-1804(A)(1). The five counts listed in the indictment alleged Ramirez and her codefendants sought to extort property or services from two people by threatening three people. To convict Ramirez of these offenses, the state was required to prove Ramirez or her accomplices "knowingly obtain[ed] or s[ought] to obtain property or services by" threatening to, in the future, "[c]ause physical injury to anyone by means of a deadly weapon or dangerous instrument or cause death or serious physical injury to anyone." § 13-1804(A)(1). In support of her underlying claim that a portion of the charges were multiplicitous, Ramirez argues that, because the property she sought to obtain was the same for each count and the target of the extortion was the same for three of the counts, those charges are multiplicitous "[n]o matter who the hostage is." She reasons that, because the legislature chose to use the term "anyone" instead of "another person," the threatened individuals are, in her words, "fungible."

¶12 We need not resolve this issue. No Arizona authority is dispositive and deciding the issue would—as Ramirez acknowledges—require not only divination whether the legislature intended a meaningful difference between the term "anyone" and "another person," but also analysis of "roots of the offense of extortion." And, as the trial court pointed out, any evaluation must be done in light of society's interest in punishing separately crimes committed against separate individuals. *See State v. Gunter*, 132

Ariz. 64, 70, 643 P.2d 1034, 1040 (App. 1982). In short, even if were we to agree with Ramirez's legal position in regards to multiplicity, she has not made a colorable claim that trial counsel falls below prevailing professional norms by failing to raise a complex issue of first impression. *Cf. State v. Febles*, 210 Ariz. 589, ¶ 24, 115 P.3d 629, 637 (App. 2005) (counsel not ineffective for failing to anticipate future changes in the law).

¶13 Although we grant review, we deny relief.