IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRET J. BJERTNESS,
Petitioner.

No. 2 CA-CR 2017-0317-PR
Filed January 11, 2018

Petition for Review from the Superior Court in Apache County
No. S0100CR201200149
The Honorable Michael P. Roca, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Michael B. Whiting, Apache County Attorney
By Garrett Whiting, Deputy County Attorney, St. Johns
Counsel for Respondent

Bret Bjertness, Florence
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Bret Bjertness 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 (App. 2007). Bjertness has not established such abuse here.

¶2 After a jury trial, Bjertness was convicted of armed robbery, first-degree burglary, and two counts of assault. At the state's request, the trial court dismissed one of the assault counts and ordered a sentence of time served on the other. The court imposed presumptive, concurrent, 10.5-year prison terms on the robbery and burglary counts. The convictions and sentences were affirmed on appeal. *State v. Bjertness*, No. 1 CA-CR 14-0194, ¶ 24 (Ariz. App. Mar. 31, 2015) (mem. decision).

¶3 Bjertness thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and "determined that there are no colorable claims that can be raised." In a pro se, supplemental petition, however, Bjertness argued the trial court lacked jurisdiction because he had not been charged in the county where the offense took place and asserted he was actually innocent. He also argued he had received ineffective assistance of counsel, based on counsel's failure to object to trial in Apache County, challenge his being held without bond, secure the presence of alibi witnesses at trial, or move for a mistrial based on "jury members . . . consorting and fraternizing with the prosecution and witnesses during breaks in the trial." He also alleged he had received ineffective assistance "as a cumulative effect of having six different attorneys appointed to defend him." The court summarily denied relief.

¶4 On review, Bjertness reasserts his claims and contends the trial court abused its discretion in denying relief without an evidentiary hearing. The question of venue and the court's jurisdiction could have been raised on appeal, and is therefore precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

And, in any event, testimony at trial established that the victim's home was "within the jurisdiction of Apache County." Bjertness has not shown the home is outside Apache County.

¶5 "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 (2006); *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must establish 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.*

¶6 As noted above, Bjertness has not shown the crime was committed outside Apache County, and we therefore cannot say counsel was deficient in failing to object to venue. Bjertness also contends his having had multiple lawyers amounts to ineffective assistance. He asserts he did not ask for the changes. But the record shows otherwise. At a *Donald*[1] hearing in September 2012 Bjertness apparently objected to his original attorney, and new counsel was appointed. Two attorneys from the new firm represented Bjertness until, in a letter to the court in March 2013, he asked for new counsel. The trial court appointed new counsel, but that counsel had a conflict, and declined to represent Bjertness. The court then appointed another attorney, who moved to withdraw shortly after being appointed, citing a "breakdown in attorney-client relations." She explained that on the first day she met with Bjertness he had sent her a letter "asking her to quit" and that he had sent a similar letter to the court. In June, the court again appointed one of the earlier attorneys, who withdrew in August because he had taken a position that would not allow him to represent Bjertness. The court then appointed the attorney who ultimately represented Bjertness at trial.

¶7 Thus, on the record before us, although Bjertness did not request all of the changes of counsel, the majority were at his request or due to his conduct. And, in any event, Bjertness has cited no authority to support the proposition that a defendant receives ineffective assistance of counsel based solely on being represented by multiple attorneys. *See* Ariz. R. Crim. P. 32.9(c)(4)(B).

---

[1]*State v. Donald*, 198 Ariz. 406 (App. 2000).

¶8 Bjertness also contends counsel was ineffective in failing to challenge the state's assertion that he had committed the crime while released on bond and the subsequent denial of bail. Even were we to accept that counsel was ineffective in regard to the question of bail, however, to state a colorable claim of ineffective assistance, Bjertness must show he was prejudiced, that is, 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. Bjertness has not explained how his having been on release during the trial would have changed the outcome.

¶9 Next, Bjertness argues counsel was ineffective in failing to subpoena certain alibi witnesses. He contends he was "with several people in a location more than 30 miles away" throughout Christmas day.[2] The victim testified at trial that he remembered waking up on Christmas morning and refusing to give Bjertness money, but after that the next thing he remembered was waking up after having been assaulted. The law enforcement officer who first arrived on the scene was dispatched at 5:30 p.m.

¶10 Counsel issued a subpoena for the surviving adult witness in February 2013, ordering him to appear in March, but that trial date was vacated. Counsel also asked for and obtained funds to hire an investigator "to contact and serve" the witness. Counsel further sought funds because the witness "does not drive and will have to be transported to the trial." In a report to the trial court after trial, in January 2014, however, the defense investigator indicated that the witness "was not able to be located for the actual trial." Bjertness has not provided any evidence to suggest that counsel's attempts to secure this witness's attendance at trial fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("[A]ffidavits, records, or other evidence currently available to the defendant supporting the petition's allegations."); *see also State v. Donald*, 198 Ariz. 406, ¶ 21 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). Indeed, on the record before us, counsel made numerous attempts, including issuing a subpoena for an earlier trial date,

[2] Bjertness acknowledges that one of these witnesses died "immediately subsequent to [his] arrest." And, although he suggests children present on that day also could have provided an alibi, he has provided no statement from any of them concerning their recollections, and we therefore cannot say he has established such testimony would have changed the outcome of the proceeding. *See Strickland*, 466 U.S. at 694.

but was simply unable to secure the witness's presence, by subpoena or otherwise, when he could not be located before the trial.[3]

¶11 Bjertness also maintains counsel was ineffective in failing to ask for a mistrial based on "jury members . . . consorting and fraternizing with the prosecution and witnesses during breaks in the trial." During a conference in chambers with the trial court, counsel stated that the jurors were "milling about" and seeing Bjertness "being escorted by an officer." She asked that the jurors be returned to the jury room during breaks. The court agreed and ordered "security to ensure that the jurors are kept in the jury room during breaks." While discussing the issue counsel noted that the jurors were "not speaking to people," and Bjertness has cited nothing in the record to suggest they disobeyed their instruction to not "speak with or permit [them]selves to be addressed by any person on any subject connected with the trial" or "talk with any of the parties, the lawyers, the witnesses, or . . . media representatives." *See* Ariz. R. Crim. P. 32.9(c)(4)(B); *see also State v. Gomez*, 211 Ariz. 111, ¶ 15 (App. 2005) (appellate court presumes jurors follow instructions).

¶12 Finally, Bjertness contends he is actually innocent of the offenses. His argument, however, largely repeats those made above. And, to the extent he points to evidence supporting his claim that he did not commit the offenses, he presented his testimony to that effect at trial and the jury rejected it in favor of contrary testimony. *See State v. Denz*, 232 Ariz. 441, ¶ 22 (App. 2013) (evidence supporting actual-innocence claim must do more than merely contradict trial evidence).

¶13 For all these reasons, although we grant the petition for review, we deny relief.

---

[3]Bjertness also asserts a number of people saw him at a store at 2:30 p.m. on December 24. But, according to his testimony at trial, he was at the victim's home for "an hour and a half, two hours possibly," after 2:00 p.m., and then went to the store. In any event, as outlined above, the victim sustained his injuries the following day. Bjertness has not established that the testimony that may have been provided by the witnesses at the store would have changed the outcome of his trial. *See Strickland*, 466 U.S. at 694.