IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MILTON BARNETT III,
Petitioner.

No. 2 CA-CR 2021-0043-PR
Filed October 1, 2021

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pinal County
No. S1100CR201501389
The Honorable Christopher J. O'Neil, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Milton Barnett, Buckeye
In Propria Persona

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Milton Barnett seeks review of the trial court's ruling 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 abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Barnett has not shown such abuse here.

¶2 After a jury trial, Barnett was convicted of conspiracy to possess marijuana for sale, attempted possession of marijuana for sale, conspiracy to commit armed robbery, attempted armed robbery, and two counts of weapons misconduct. The trial court sentenced him to concurrent prison terms, the longest of which is twenty years. We affirmed his convictions and sentences on appeal. *State v. Barnett*, No. 2 CA-CR 2015-0433 (Ariz. App. Aug. 10, 2017) (mem. decision).

¶3 Barnett sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no "colorable claims pursuant to Rule 32." Barnett filed a pro se petition arguing his trial counsel had been ineffective for failing to object to "perjured testimony" by two witnesses and to request jury instructions regarding conspiracy and specific intent. He also argued appellate counsel had been ineffective in failing to raise those claims. Last, he asserted trial counsel had been ineffective "at the plea stage." The trial court summarily dismissed the proceeding and denied Barnett's subsequent motion for rehearing. This petition for review followed.

¶4 On review, Barnett repeats his claims of ineffective assistance of counsel and asserts he is entitled to an evidentiary hearing. To prevail on his claims, Barnett was required to "demonstrate that counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced thereby." *State v. Bigger*, 251 Ariz. 402, ¶ 8 (2021). He is entitled to an evidentiary hearing only if he has alleged facts that, if true, "would *probably* have changed" his verdicts. *Id.* ¶ 9 (quoting *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016)). Absent such a showing, his claims may be

summarily dismissed. *Id.* We additionally note that, to the extent Barnett attempts in his petition to incorporate by reference his filings below, this procedure does not comply with our rules. *See* Ariz. R. Crim. P. 32.16(d). We limit our review to the arguments made and facts identified in his petition for review.

¶5 Barnett first repeats his argument that his trial counsel failed to object to "perjured video deposition testimony" in which a witness claimed he had met Barnett when Barnett came to inspect marijuana the witness was selling. Barnett asserts his counsel should have moved for a mistrial, apparently based on an officer's report that the witness had initially stated he had no contact with Barnett, another witness's testimony that suggested Barnett had not been at the meeting,[1] and the prosecutor's purported "admission" to the trial court that Barnett and the witness had no contact.

¶6 Inconsistencies in testimony are expected. *See State v. Dalglish*, 131 Ariz. 133, 139 (1982). And Barnett has identified no evidence on review that the inconsistencies here were anything out of the ordinary. And we agree with the state that the prosecutor's comment to the trial court regarding no contact between the witness and Barnett was properly understood to refer to a lack of telephone contact, not personal contact. The discussion was in the context of whether Barnett was entitled to an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964), for a missing cell phone. In short, Barnett has identified no reasonable basis for trial counsel to have moved for a mistrial or for the court to have granted one. *See Bigger*, 251 Ariz. 402, ¶ 8.

¶7 Barnett also repeats his claim that trial counsel should have objected to an investigating officer's purported perjury. He claims the officer committed perjury by testifying, for the first time at trial, about an "amended" call log showing telephone contact between Barnett and a coconspirator when phone records disclosed to the defense showed no such contact.

¶8 But Barnett has not included any call logs with his petition for review and instead includes only snippets of the officer's testimony. In one such snippet, the officer explains a phone belonging to a coconspirator

[1]As the state points out, the jury could have concluded this witness was simply mistaken, or had described a different meeting that did not involve Barnett.

showed a call from that phone to Barnett, although the call did not appear on the "printout" from Barnett's phone. Nothing about this snippet suggests the officer committed perjury. Thus, again, Barnett has established neither that counsel should have raised the issue nor that the trial court would have granted relief. *See id.*

¶9 As he did below, Barnett also asserts trial counsel erred by failing to request a jury instruction on conspiracy that included the statement, consistent with A.R.S. § 13-1003(C), that he "could only be found guilty of one conspiracy if multiple offenses are the object of the same agreement." His argument focuses on a portion of the prosecutor's closing argument in which the prosecutor discussed the agreement to purchase marijuana. But, he ignores the remainder of the closing argument, in which the prosecutor discussed the separate agreement to rob the victim of that marijuana. Nor has he cited any evidence in the record suggesting a jury would have been likely to find only one conspiracy had it been instructed consistent with § 13-1003(C). Accordingly, even if counsel should have requested the instruction, Barnett's claim of ineffective assistance fails. *See Bigger*, 251 Ariz. 402, ¶ 8.

¶10 Barnett further asserts counsel should have requested an instruction on specific intent. But, he has not identified any reason a jury would have been less likely to convict him of any offense had they been instructed on specific intent. Thus, Barnett has failed to show prejudice even if counsel fell below prevailing professional standards by failing to request that instruction. *See id.*

¶11 Barnett next claims that his counsel gave him "erroneous advice during the plea bargaining stage," causing him to reject a plea offer from the state. He asserts counsel told him the state lacked sufficient evidence to "reindict[]" him on the robbery charges and that his conviction would be "overturned on appeal" if a particular witness "does not show up for trial" because his "confrontation [rights] would be violated."

¶12 To show his counsel was deficient, Barnett must prove counsel gave him erroneous advice or "failed to give information necessary to allow [him] to make an informed decision whether to accept the plea." *State v. Donald*, 198 Ariz. 406, ¶ 16 (App. 2000). To show prejudice, Barnett must show "'a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer' and declined to go forward to trial." *Id.* ¶ 20 (quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997), *abrogated on other grounds by Missouri v. Frye*, 566 U.S. 134 (2012)).

¶13 Barnett was initially charged with attempted possession of marijuana for sale, conspiracy to possess marijuana for sale, and weapons misconduct. At a hearing in March 2015, he rejected a plea offer, complaining that trial counsel "wants me to sign a plea that I am not willing to sign" and insisting he wanted "to go to trial" despite counsel's urging that he "take a plea." At a settlement conference in April, the state offered a plea agreement that would call for a 3.5-year prison term to be followed by probation. The state made clear that it intended to return to the grand jury to seek new charges if Barnett did not accept the offer. Barnett indicated he would be "willing to go ahead and go to prison for something [he] didn't do" and insisted on a plea agreement calling for a 2.5-year prison term, which the state rejected. Trial counsel confirmed with the state that the offer would be open until the state went before the grand jury the following week so that he could "deal with [his] client to see if he would take this."

¶14 Barnett provided an affidavit below that largely mirrors his claims on review—he asserts counsel told him he would not be convicted of additional charges and, even if convicted, his convictions would be reversed. He also asserted he would have taken the plea offer had counsel properly advised him. When evaluating a claim of ineffective assistance of counsel, the trial court typically must treat a defendant's affidavit as true. *See State v. Jackson*, 209 Ariz. 13, ¶ 6 (App. 2004). However, a court is not required to accept a facially incredible affidavit, *see State v. Krum*, 183 Ariz. 288, 294 (1995), and Barnett must do more than simply contradict the record, *see State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998).

¶15 Barnett's alleged facts are entirely inconsistent with every public statement he previously had made about his desire to go to trial and about counsel's advice, and his affidavit is equally inconsistent with counsel's statements on the record. Barnett has offered no reason to conclude counsel changed his mind after the March and April hearings and came to believe, despite all apparent previous advice, that Barnett should forgo the state's plea offers and go to trial. Indeed, Barnett acknowledged at sentencing that it had been his choice to go to trial rather than accept a guilty plea. The trial court did not abuse its discretion in rejecting this claim.

¶16 Barnett also complains the state did not provide a promised affidavit from his trial counsel contesting his allegations. But, because his claim fails irrespective of whether the state provided an affidavit, we need not address this argument.

¶17 Last, we address Barnett's claim that his appellate counsel was ineffective "for failing to raise any of these claims." He contends the trial court failed to evaluate his claims under the proper standard. But, in the absence of any argument that these claims are viable under any standard, he has not established an abuse of discretion, and we need not address this issue further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶18 We grant review but deny relief.