

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AARON MICHAEL ROSE,
Petitioner.

No. 2 CA-CR 2021-0104-PR
Filed April 11, 2022

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NOT FOR PUBLICATION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. S1100CR201702367
The Honorable Jason Holmberg, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Bureau Chief – Criminal Appeals, Florence
Counsel for Respondent

Rosemary Gordon Pánuco, Tucson
Counsel for Petitioner

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Aaron Rose seeks review of the trial court’s ruling denying, after an evidentiary hearing, his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Rose has not met his burden of establishing such abuse here.

¶2 After a jury trial, Rose was convicted of two counts of sexual conduct with a minor under the age of fifteen, and the trial court imposed two consecutive life sentences. This court affirmed Rose’s convictions and sentences on appeal. *State v. Rose*, 246 Ariz. 480 (App. 2019).

¶3 In February 2020, Rose filed a notice of post-conviction relief, and the trial court appointed counsel.¹ In his subsequently filed petition, Rose raised several claims of ineffective assistance of trial counsel under Rule 32.1(a), including, among other things, that she had failed to present witnesses on his behalf, had failed to adequately cross-examine the witnesses against him, and had incorrectly advised him “as to the use of his prior conviction against him if he took the stand.” The trial court granted Rose an evidentiary hearing solely on the last issue: whether his counsel had rendered ineffective assistance by telling Rose that if he chose to testify at trial, “the jury would get to hear all the little details about [his] prior adult conviction.”

¶4 At the evidentiary hearing, Rose explained that the trial court had precluded evidence at trial of his prior adult conviction involving J.P. under Rule 404(c), Ariz. R. Evid., but that the court had cautioned the

¹Rose’s first notice, filed in December 2019, was not signed by Rose or an attorney, and the trial court therefore dismissed it with leave to refile. *See* Ariz. R. Crim. P. 32.4(b)(3)(A) (requiring notice for claim under Rule 32.1(a) to be filed within thirty days after issuance of mandate in appeal). We therefore treat the notice as timely, as did the trial court.

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parties the evidence may ultimately come in if they “open[ed] the door.”² Rose stated his trial counsel had informed him that, by taking the stand, he would be opening the door and the jury would hear the details of that conviction. And Rose maintained this advice led him to decide against testifying. Rose’s trial counsel, however, testified that she had not told Rose “just by taking the stand” he would be opening the door and the state could present the evidence related to J.P.

¶5 After the evidentiary hearing, the trial court issued its ruling denying Rose’s petition and rejecting each of his claims of ineffective assistance of counsel. As to Rose’s claim of “erroneous advice” about his prior conviction, the court found his “trial counsel’s testimony credible in her denial” that she had advised Rose “the way [he] claims.” The court further found that Rose’s counsel had advised him against testifying for several reasons, including that she was “concerned [his] emotions may be high after hearing the state’s witnesses testify and as a result, [he] would have made a statement that would open the door to the non 404(c) incident,” as well as his history of fabricating work experience to conceal time spent in prison and the “general denials lacking specifics” in his proposed testimony. The court therefore concluded Rose had “failed to show his trial counsel’s conduct fell below objectively reasonable standards.” This petition for review followed.

¶6 On review, Rose repeats his claim that he “received ineffective assistance of counsel when counsel’s inaccurate advice interfered with [his] decision whether to testify at his trial.”³ Relying on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Rose maintains that this case involves a “conclusive presumption of deficient performance” because his counsel infringed on “client autonomy.” He therefore reasons that the trial court erred by focusing on “[c]ounsel’s strategic decisions regarding Rose not testifying.” But, as the state points out, *McCoy* is inapposite.

¶7 In *McCoy*, the defendant “adamantly objected to any admission of guilt,” but trial counsel, during the guilt phase of the trial,

²The trial court allowed at trial evidence of Rose’s prior juvenile conviction involving L.J. under Rule 404(c).

³Rose does not challenge on review the trial court’s denial of his other claims of ineffective assistance of counsel. We therefore do not address them. See Ariz. R. Crim. P. 32.16(c)(4) (“A party’s failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.”).

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admitted to the jury that the defendant had committed the murders, based on counsel's view that "confessing guilt offer[ed] the defendant the best chance to avoid the death penalty." 138 S. Ct. at 1505. The Supreme Court ordered a new trial, explaining that while "[t]rial management is the lawyer's province," some decisions "are reserved for the client," including the "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508, 1512. The court noted that this was not a case of ineffective assistance of counsel "[b]ecause a client's autonomy, not counsel's competence," was at issue. *Id.* at 1510-11.

¶8 Here, Rose expressly raised, in both his notice and his petition, a claim of ineffective assistance of counsel pursuant to Rule 32.1(a). *See State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance of counsel cognizable under Rule 32.1(a)). He maintained his trial counsel had failed to "advise him correctly as to the use of his prior conviction against him if he took the stand." *Cf. State v. Donald*, 198 Ariz. 406, ¶ 16 (App. 2000) (claim for ineffective assistance includes lawyer giving "erroneous advice"). However, Rose admitted at the evidentiary hearing that his trial counsel had informed him it was his right to testify and that he had knowingly and intelligently waived that right, thereby preserving his autonomy.

¶9 "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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Whether counsel's performance fell below objectively reasonable standards requires consideration of the prevailing professional norms. *State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016); *see also State v. Bigger*, 251 Ariz. 402, ¶ 12 (2021) (matters of trial strategy reserved for defense counsel's judgment and generally cannot serve as basis for claim of ineffective assistance). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Bennett*, 213 Ariz. 562, ¶ 21.

¶10 Rose's argument that the trial court erred in adopting his trial counsel's testimony is nothing more than a request that we reweigh the evidence. That, however, is the trial court's function. *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009); *see also State v. King*, 250 Ariz. 433, ¶ 21 (App. 2021) (we defer to trial court's credibility determinations). Our review is limited to a determination of whether the findings of fact are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993).

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¶11 At the evidentiary hearing, Rose and his trial counsel offered different versions of the advice given. Although Rose stated his counsel had informed him that, by testifying, he would be opening the door for the jury to hear about his prior adult conviction, his counsel avowed she had not done so. She explained that Rose knew he had the right to testify, which Rose himself acknowledged, but that she had advised against it based on several factors, including Rose’s “habit for not telling the truth,” his credibility, and her fear that “he would say something along the lines of . . . , ‘I’ve never done anything like this in my life,’” which would open the door for his prior adult conviction to come in.

¶12 Based on the record before us, substantial evidence supports the trial court’s findings that Rose’s trial counsel did not misadvise him regarding the risks posed by his testimony.⁴ *See id.* The court therefore did not err in concluding Rose had failed to meet his burden of showing his counsel’s conduct fell below prevailing professional norms, *see Kolmann*, 239 Ariz. 157, ¶ 9, or in denying Rose’s petition for post-conviction relief, *see Roseberry*, 237 Ariz. 507, ¶ 7.⁵

¶13 Accordingly, we grant review but deny relief.

⁴Assuming, without deciding, the trial court’s statement that Rose’s testimony lacked specificity is not supported by the record, as Rose contends on review, the court’s finding that his counsel had advised him against testifying for several reasons is supported. *See Roseberry*, 237 Ariz. 507, ¶ 7 (we will affirm if trial court’s ruling is legally correct for any reason).

⁵Because we find no error in the trial court’s determination that Rose failed to establish his trial counsel’s conduct fell below objectively reasonable standards, we need not address Rose’s additional argument that “he was prejudiced by counsel’s error.” *See Bennett*, 213 Ariz. 562, ¶ 21.