

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JUN -3 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0049-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ROBERT WILLIAM WHITE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR 20053547

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins

Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Robert William White was convicted after a jury trial of illegally conducting an enterprise, conspiracy to possess a dangerous drug for sale, and three counts of possession of a dangerous drug for sale. On appeal, this court affirmed the

convictions and the sentences imposed. White filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and a petition for post-conviction relief in which he contended the prosecutor had committed misconduct during his opening statement and closing arguments, and trial counsel had been ineffective because he neither objected to the prosecutor's improper statements nor requested a mistrial. The trial court denied relief without an evidentiary hearing, and this petition for review followed. Absent a clear abuse of discretion, we will not disturb the court's ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is colorable and thus warrants an evidentiary hearing, "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶3 White contends, as he did below, that the prosecutor committed misconduct by making statements conveying his belief in White’s guilt, comments prohibited under *State v. Filipov*, 118 Ariz. 319, 576 P.2d 507 (App. 1977). In a thorough, well-reasoned minute entry, however, the trial court concluded that none of the statements demonstrated the prosecutor had been “arguing his personal belief of [White’s] guilt as [White] argues, but commenting on the evidence.” The court also found “the prosecutor’s use of the words ‘locust’ and ‘bad guys’ d[id] not rise to the level of prosecutorial misconduct.” The court therefore found counsel’s failure to object to the statements had not fallen “below an objective standard of reasonableness.”

¶4 In its order denying relief, the trial court clearly identified and correctly resolved the claims White raised. Therefore, we adopt that ruling, as no purpose would be served by rehashing it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). White has not persuaded us on review that the court’s ruling is erroneous. Specifically, we reject White’s contention that the court did not apply *Filipov* correctly. Similarly, he has not established the court abused its discretion when it rejected White’s claim regarding the derogatory terms the prosecutor had used. Finally, we reject White’s contention on review that the court erred by failing to consider the prejudice portion of the *Strickland* test. A defendant’s failure to establish any one of the two portions of this test is fatal to a claim of ineffective assistance of counsel. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). And because the court correctly found White had failed to establish his counsel’s performance was deficient, the

court was not, as it noted, required to determine whether White had been prejudiced by counsel's performance. *See id.*

¶5 We grant White's petition for review but deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge