FILED BY CLERK
FEB 19 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GEORGE MENDEZ, Petitioner.	2 CA-CR 2008-0304-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031786

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 After a jury trial, petitioner George Mendez was convicted of second-degree murder. This court affirmed the conviction and the sentence imposed on appeal. *State v. Mendez*, No. 2 CA-CR 2005-0354 (memorandum decision filed Jan. 23, 2007). In this

petition for review, Mendez challenges the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he raised claims of ineffective assistance of trial counsel and prosecutorial misconduct. Absent a clear abuse of discretion, we will not disturb the trial court's ruling on review. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 The facts established at trial are set forth in this court's memorandum decision. Briefly, the victim was brutally murdered in his home; he was attacked with a variety of weapons, including a knife, a potato peeler, a crowbar, and a saw blade. *Mendez*, No. 2 CA-CR 2005-0354, ¶ 2. Mendez was the victim's friend and neighbor. The victim was seventy-one years old, weighed ninety-nine pounds, and had had one leg amputated. Witnesses saw Mendez the night before the body was found, carrying a television that was covered in blood and going back and forth to the victim's home, returning with some of the victim's other belongings, including another television, a video cassette recorder, jewelry boxes, and a "boom box." Police officers recovered the victim's property from Mendez's house after they searched pursuant to a warrant. Mendez's footprints were found in blood on the floor of the victim's home.

¶3 Mendez's niece had told police Mendez had had blood on his face, head, and "from head to toe." But at trial she testified that was not entirely accurate, and she had not meant Mendez had been covered in blood but that there were specks of blood on his face and his legs between the knees and his ankles. She also had told officers and later testified that

Mendez had showered twice after returning home, which was not normal for him, and changed his clothes and washed the blood out of them and his shoes. Mendez was injured in the abdomen, legs, and forehead. Questioned by officers after Mendez's niece and sister provided information connecting him to the murder, Mendez initially denied having been at the victim's house. He subsequently changed his story after he was told his niece and sister had provided information; he admitted he had gone into the house and taken the property but denied he had murdered the victim.

¶4 In his petition for review, Mendez challenges the trial court's denial of relief on two claims of ineffective assistance of counsel. Mendez had asserted in his Rule 32 petition that counsel had failed to object to testimony by Detective Taylor during cross-examination that it had appeared to Taylor the victim's skin had been peeled with a potato peeler, which was found near the victim's body. When cross-examining the medical examiner, trial counsel had asked whether he had seen any evidence that the victim's skin had been peeled, to which he responded, "[N]ot really." Thereafter, a juror asked the following question: "You described an injury as two parallel incised incisions separated by one-eighth inch. Is it possible that measurements and injury are consistent with a blade of a potato peeler?" Defense counsel did not object to the question, and after the court posed the question to the medical examiner, he responded, "It's possible, yes." Mendez contended the evidence regarding the potato peeler suggested the victim had been tortured and that trial counsel had been ineffective in eliciting this testimony "from the detective knowing what his

answer would be" because the evidence that "the potato peeler was used to flay [the victim's] arms was detrimental to the defense." Without that evidence, Mendez claimed, "there is a reasonable probability that the outcome of the case would have been different." He asserted summarily that, without the suggestion that the victim "had been flayed[,] . . . there is a strong likelihood that the jury would have found him guilty of the lesser included offense of Manslaughter or even possibly Negligent Homicide."

¶5 Additionally, Mendez maintained in his Rule 32 petition trial counsel had not adequately interviewed Detective Taylor about calls to 911 and 88-Crime relating to whether, on the night before the body was found, Mendez had been covered in blood or had had flecks of blood on him, as Mendez's niece had testified. Taylor testified about the calls in response to a juror's question. During cross-examination by defense counsel, the detective made statements, to which counsel later objected on the ground of hearsay, that established one of the callers had mentioned Mendez was covered in blood. The court overruled counsel's objection because it was he who had asked the question.

¶6 In denying relief on all claims Mendez had raised in his Rule 32 petition, the trial court first correctly noted that a defendant seeking relief based on ineffective assistance of counsel must establish counsel's performance was deficient under prevailing professional norms and that this deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As the court also correctly pointed out, failure to prove either element of the *Strickland* test is fatal to an ineffective assistance claim. *State v. Salazar*, 146 Ariz.

540, 541, 707 P.2d 944, 945 (1985). The court then identified and examined each of the bases for Mendez's claim that trial counsel had been ineffective, thoroughly explaining and correctly concluding that Mendez had not established either that the performance of his attorneys had been deficient or that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694.

¶7 In his petition for review, Mendez reiterates the claim of ineffective assistance based on counsel's eliciting from Detective Taylor his pretrial statement that it had appeared to him the victim's skin had been flayed with a potato peeler. Mendez contends the trial court erred to the extent it found counsel had made a reasoned, tactical decision in pursuing this line of questioning because, he insists, there could have been no strategic basis for doing so. Mendez also asserts the court erred in rejecting his claim that counsel had been ineffective because he had not conducted adequate pretrial investigation: counsel's failure to thoroughly interview Taylor about the 911 and 88-Crime calls, Mendez contends, resulted in the introduction of highly prejudicial hearsay that Mendez had been covered in blood. Mendez argues that, at the very least, he raised colorable claims for relief and was entitled to an evidentiary hearing.

¶8 Mendez has not sustained his burden on review of establishing the trial court abused its discretion in denying post-conviction relief. *See State v. Ward*, 211 Ariz. 158, ¶ 7, 118 P.3d 1122, 1125 (App. 2005). There is a strong presumption that counsel acted with

reasonable competence. *See State v. Krum*, 183 Ariz. 288, 292 n.6, 903 P.2d 596, 600 n.6 (1995). And, we give counsel's tactical decisions great deference rather than examining them in the harsh light of hindsight. *See State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). "[D]isagreements as to trial strategy or errors in trial tactics will not support an [in]effectiveness claim so long as the challenged conduct could have had some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984).

¶9 Even if Mendez were correct that the trial court's finding that counsel had made sound tactical decisions is not supported by the record, we nevertheless agree with the court that Mendez failed to establish prejudice. *See State v. Flores*, 218 Ariz. 407, ¶ 26, 188 P.3d 706, 715 (App. 2008) (rejecting trial court's reasoning but concluding it had nonetheless correctly denied post-conviction relief). The victim was elderly, physically fragile, and handicapped. He was severely beaten in numerous ways with various weapons. Detective Taylor's testimony that it was his impression the victim's skin had been flayed did not affect the outcome of the case. The state had introduced the medical examiner's testimony that it did not appear the victim's skin had been flayed; Taylor's impressions, even if erroneously elicited, were harmless. Similarly, even assuming counsel had not thoroughly interviewed Taylor and that this lack of preparation did, indeed, result in the admission of damaging hearsay, the court was correct that it made no difference here, given the abundance of evidence supporting the second-degree murder conviction and the conflicting evidence the jury was required to weigh and resolve in any event. *See State v. Cox*, 214 Ariz. 518, ¶ 13,

155 P.3d 357, 360 (App. 2007). Ultimately, it was for the jury to decide whether to accept Mendez's defense that the victim had already been murdered when he arrived. *See id*. There was ample other evidence that Mendez had blood on him and he had been injured. Thus, even assuming Mendez were correct that counsel's performance fell below prevailing professional norms, Mendez has not raised a colorable claim for relief and therefore was not entitled to an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) (evidentiary hearing warranted only on a colorable claim—one that, "if defendant's allegations are true, might have changed the outcome").

¶10 We grant the petition for review but, for the reasons stated, deny relief.

_____
PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
JOSEPH W. HOWARD, Presiding Judge