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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. WESTLEY NAT LEWIS, Petitioner.	2 CA-CR 2009-0154-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20052560

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Chief Judge.

¶1 In this petition for review, Westley Nat Lewis challenges the trial court's denial of the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., alleging he had received ineffective assistance of trial counsel. We will not disturb the court's ruling unless we find a clear abuse of its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 A jury found Lewis guilty of second-degree burglary but acquitted him of a related charge of theft by control. Finding Lewis had "three historical prior felony convictions and had committed the present offense while on probation," the trial court sentenced him to an enhanced, presumptive prison term of 11.25 years. He appealed, and this court affirmed his conviction and sentence. *State v. Lewis*, No. 2 CA-CR 2006-0327 (memorandum decision filed Oct. 25, 2007).

¶3 Lewis's claim of ineffective assistance of counsel stems from the jury's having found him guilty of second-degree burglary but not guilty of theft in connection with the same incident. As he did in his petition for post-conviction relief below, he contends in his petition for review that counsel was ineffective in failing to bring a post-trial motion for new trial or for dismissal of the burglary charge pursuant to Rule 24.1(c)(1), Ariz. R. Crim. P., based on insufficient evidence.[1]

[1]Rule 24.1 does not authorize dismissal but, rather, permits a trial court to "order a new trial or, in a capital case, an aggravation or penalty hearing."

¶4 Following the jury's verdict, trial counsel moved for new trial pursuant to Rule 24.1, asserting the trial court had erred in refusing to instruct the jury that trespass was a lesser-included offense of burglary. The court denied the motion after oral argument, ruling as a matter of law that trespass was not a lesser-included offense of burglary. Lewis challenged that ruling in the single issue he raised on appeal.

¶5 Relying on our supreme court's decision in *State v. Malloy*, 131 Ariz. 125, 131, 639 P.2d 315, 321 (1981), we held on appeal that "'[c]riminal trespass is not necessarily a lesser included offense of burglary' because the former contains an additional element—the defendant's knowledge that his entry into or continued presence in a residential structure was unlawful—that the offense of burglary does not." *Lewis*, No. 2 CA-CR 2006-0327, ¶ 6 (alteration in *Lewis*). Further, we ruled, even if Lewis were legally correct that criminal trespass was a lesser-included offense of second-degree burglary, the trial court still had not abused its discretion by refusing to give Lewis's requested instruction, because the evidence in his case did not support it. *Id.* ¶¶ 7-10. We concluded that the evidence presented at trial had established all the elements of second-degree burglary, permitting the trial court to "conclude that the jury could not rationally have found that Lewis had committed criminal trespass" without having also committed burglary. *Id.* ¶ 11. Consequently, we concluded the court had not abused its discretion in refusing to instruct the jury on the elements of criminal trespass as a lesser-included offense of burglary. *Id.*

¶6 Lewis has now brought this post-conviction proceeding claiming trial counsel was ineffective in failing to file a post-trial motion for dismissal of the burglary charge pursuant to Rule 24.1(c)(1) based on insufficient evidence. Lewis argued below that, because he was acquitted of theft, "the only basis" on which the jury could have found him guilty of second-degree burglary is that, "irrespective of [his] failure to steal anything from the [victim's] apartment, he nevertheless entered the apartment with the intent to do so."

¶7 We essentially resolved the predicate for Lewis's claim of ineffective assistance of counsel when we determined on appeal that the evidence at trial had established all the elements of the charged offense of second-degree burglary. *Lewis*, No. 2 CA-CR 2006-0327, ¶ 11. If the offense was clearly proven by the evidence presented, counsel cannot have been ineffective in failing to move to dismiss the burglary charge. And Lewis himself acknowledges that Arizona, like most other jurisdictions, does not require consistency between verdicts. *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969). Nonetheless, he contends the alleged inconsistency in the verdicts means there was insufficient evidence to support his conviction for burglary: if the jury determined he had not stolen the victim's property, he claims, then there was no basis on which it could have found he had broken into the apartment intending to commit a theft. *See* A.R.S. § 13-1507(A) (second-degree burglary committed by "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein"). He contends trial counsel therefore

performed deficiently by not "ensur[ing] the State's evidence supported the verdict." *See* Ariz. R. Crim. P. 24.1(c)(1).

¶8 To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-92 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). If a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶9 The trial court determined that Lewis had not made a colorable showing of prejudice and therefore denied his petition for post-conviction relief without an evidentiary hearing. The court wrote:

> Here, the Petitioner has failed to demonstrate a reasonable likelihood that the motion [for new trial] would have succeeded. To set aside a jury verdict for insufficient evidence, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury. In burglary cases like the case at hand, achieving success while attempting a theft is not required under A.R.S. § 13-1507(A). The statute defines burglary in the second degree as "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." The crime of burglary is complete when entrance to the structure is made with the requisite criminal intent. Burglary does not require the successful completion of the theft or underlying felony. Acquittal of that underlying charge does not necessitate an acquittal on the separate and distinct charge of burglary. . . . Therefore, a motion for a new trial based on lack of sufficient

> evidence would likely have been unsuccessful had it been filed by the Petitioner's trial counsel. Accordingly, no prejudice has been shown and the Petitioner's trial counsel cannot be held to have been ineffective in failing to file a motion for new trial based upon that argument.

(Citations omitted.)

¶10 We agree with the trial court's analysis. Finding no abuse of its discretion in denying post-conviction relief, we grant the petition for review but deny relief.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge