

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

FILED BY CLERK

MAR 27 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0033-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICHARD ROBERT ROMAR,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR20060838

Honorable Rick A. Williams, Judge

REVIEW GRANTED; RELIEF DENIED

Matthew J. Smith, Mohave County Attorney
By Gregory A. McPhillips

Kingman
Attorneys for Respondent

The Gillespie Law Firm, P.C.
By Craig C. Gillespie, Carolyn Macias, and
Dave Roscoe

Phoenix
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Richard Romar seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an

evidentiary hearing on his claim of ineffective assistance of counsel. For the following reasons, we grant review but deny relief.

¶2 After a jury trial, Romar was convicted of molestation of a child, sexual conduct with a minor, and continuous sexual abuse of a child, all dangerous crimes against children, with Romar having been previously convicted of a predicate felony. The trial court sentenced him to enhanced, mitigated terms of imprisonment, the longest of which is twenty-five years. We affirmed his convictions and sentences on appeal. *State v. Romar*, 221 Ariz. 342, ¶ 10, 212 P.3d 34, 38 (App. 2009). Romar filed a notice of post-conviction relief and, in the petition that followed, alleged trial counsel had been ineffective in failing to honor Romar’s request to testify, failing to object to leading questions during direct examination of the state’s nine-year-old key witness and failing to cross-examine her effectively, and in pursuing a defense theory unsupported by law.¹

¶3 The trial court found Romar had stated a colorable claim, and heard testimony from his trial counsel, as well as an expert witness Romar called in support of his claim, at an evidentiary hearing. In a detailed, under-advisement ruling addressing each of the allegations raised, the court explained its conclusion that “[t]rial counsel’s performance did not fall below an objective standard of reasonableness under the prevailing professional norms,” as required to prevail on a claim of ineffective assistance of counsel. *See State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998) (to establish

¹Romar also alleged trial counsel had been ineffective in failing to preserve for appeal an issue regarding a pretrial evidentiary ruling, but he appears to have withdrawn this claim. In any event, he does not address it on review, and it is therefore waived. *See* Ariz. R. Crim. P. 32.9 (“Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.”).

claim of ineffective assistance of counsel, petitioner must show counsel's performance fell below prevailing professional norms and caused prejudice to defense). This petition for review followed.

¶4 On review, Romar essentially repeats the substantive arguments he raised below and contends the trial court erred in denying relief. In challenging the court's ruling more specifically, he argues the court "did not apply an analysis to the specific facts of [his] trial" in finding trial counsel's advice that Romar refrain from testifying was a strategic decision and not ineffective assistance. Similarly, he contends the court's statement that a brief cross-examination may be "sound strategy" did not apply to trial counsel's decision to limit cross-examination of the nine-year-old victim, because, according to the expert witness, defense counsel was required to do "something . . . to undermine her testimony." He notes several times that his legal expert's opinion of trial counsel's performance "was un rebutted" by the state, but does not cite any authority suggesting this has any legal relevance to our review.

¶5 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). We reject Romar's assertion that the court failed to consider the specific facts of this case to find trial counsel had made reasoned, strategic decisions and, although his strategy had not been "ultimately successful," had not performed deficiently. Although he had prevailed on a pretrial motion to prevent the

state from using a 1985 conviction to impeach Romar's overall credibility if he testified, trial counsel explained he had been concerned Romar might inadvertently "open the door" to admission of that evidence, and had consulted a supervising attorney about those concerns.² In its ruling, the court agreed this was a realistic concern in general; more specifically, the court noted trial counsel's advice about testifying had been based on his contacts and experience with Romar. Similarly, in concluding counsel's limited cross-examination of the victim was not ineffective, the court's ruling specifically addressed trial counsel's explanation for taking this approach.

¶6 We also reject any suggestion that the opinion of Romar's expert witness was entitled to any particular weight because it was "unrebutted" by other expert testimony. "In assessing deficient performance, an effort is made to 'eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *State v. Valdez*, 167 Ariz. 328, 331, 806 P.2d 1376, 1379 (1991), quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984). This appears to have been the approach taken by the trial court here, and that court is the sole arbiter of witness credibility in post-conviction proceedings. See *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988).

²Romar's expert witness appeared to agree this was a possibility, notwithstanding the pretrial ruling in limine, if, for example, Romar were to testify, "I would never touch a child under any circumstances."

¶7 The trial court has identified, addressed, and resolved Romar’s claims in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Based on the record before us, the applicable law, and the court’s assessment of the testimony presented at the evidentiary hearing, the court did not abuse its discretion in denying relief on Romar’s claim of ineffective assistance of counsel. No purpose would be served by repeating the court’s full analysis here. *See id.*

¶8 Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

/s/ Michael Miller

MICHAEL MILLER, Judge