

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

DONNIE RAY FRANKS,  
*Petitioner.*

No. 2 CA-CR 2013-0378-PR  
Filed January 15, 2014

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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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Pima County

No. CR20100760001

The Honorable Richard S. Fields, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Donnie Ray Franks, Tucson  
*In Propria Persona*

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Donnie Franks petitions this court for review of the trial court's order summarily denying his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Franks has not met his burden of demonstrating such abuse here.

¶2 Franks was convicted after a jury trial of second-degree burglary and theft by control and sentenced to concurrent, 11.25-year prison terms for each offense. We affirmed his convictions and sentences on appeal. *State v. Franks*, No. 2 CA-CR 2010-0384 (memorandum decision filed Oct. 21, 2011). He sought post-conviction relief, claiming trial counsel had been ineffective in failing to contact or interview several potential defense witnesses, therefore depriving him of a mere-presence defense. The trial court rejected that claim, concluding, inter alia, that a mere-presence defense would have been inconsistent with Franks's statements to police and that counsel had made a strategic choice not to pursue such a defense. We denied relief on review. *State v. Franks*, No. 2 CA-CR 2012-0179-PR (memorandum decision filed Sep. 14, 2012).

¶3 Franks filed a successive notice of post-conviction relief and appointed counsel filed a notice stating she had reviewed the record but found no colorable claims to raise in a successive petition. Franks then filed a pro se petition for post-conviction relief claiming, pursuant to *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012), that he had an "equitable" right to the effective assistance of Rule 32 counsel and that his Rule 32 counsel had been ineffective in his first

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proceeding for failing to raise a claim of actual innocence based on the witness statements that, according to Franks, establish his mere presence. The trial court summarily denied relief, concluding that Franks had merely “rebranded” his mere-presence argument as a claim of actual innocence and that, if Franks could not demonstrate the witnesses’ statements probably would have changed the verdict as part of a claim of ineffective assistance of counsel, those statements necessarily would not support a claim of actual innocence. This petition for review followed.

¶4 Franks claims on review that the trial court “overrule[d Rule] 32.1(h) by stating that as mere presence was previously addressed it cannot be the basis for” post-conviction relief.<sup>1</sup> Franks misapprehends the court’s ruling. The court did not determine he could not raise a claim of actual innocence as a matter of law; it instead referred to its previous ruling to illustrate that the evidence he relied on to support that claim was insufficient.

¶5 To sustain a claim of actual innocence, Franks must “demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h). Any testimony that Franks was merely present would have only contradicted the victim’s testimony that he had participated in the burglary and thus cannot establish a claim of actual innocence pursuant to Rule 32.1(h). See *State v. Denz*, 232 Ariz. 441, ¶ 22, 306

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<sup>1</sup>The trial court did not address Franks’s claim of ineffective assistance of Rule 32 counsel, and he does not raise it on review. In any event, such a claim is not cognizable for a non-pleading defendant like Franks. See *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4-6, 307 P.3d 1013, 1014 (App. 2013). Although he couched his actual-innocence claim in terms of ineffective assistance of Rule 32 counsel, because an actual-innocence claim is not necessarily subject to preclusion, we address its merits. See Ariz. R. Crim. P. 32.1(h), 32.2(b).

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P.3d 98, 105 (App. 2013) (evidence supporting actual-innocence claim must do more than merely contradict trial evidence).

¶6 Although review is granted, relief is denied.