

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ESTEBAN RUIZ,
Petitioner.

No. 2 CA-CR 2015-0067-PR
Filed April 3, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2006114616001DT
The Honorable Kristin Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By E. Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Respondent

Esteban T. Ruiz, Globe
In Propria Persona

STATE v. RUIZ
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Esteban Ruiz seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Ruiz has not sustained his burden of establishing such abuse here.

¶2 Ruiz's first trial on the charged offenses ended in a mistrial when the jury was unable to reach a verdict. After a second jury trial, Ruiz was convicted of aggravated assault and two counts of manslaughter. The trial court imposed enhanced, concurrent, presumptive prison terms, the longest of which were 10.5 years, and the convictions and sentences were affirmed on appeal. *State v. Ruiz*, No. 1 CA-CR 09-0780 (memorandum decision filed May 5, 2011).

¶3 Ruiz thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was "unable to find any claims for relief to raise in post-conviction relief proceedings." Ruiz filed a pro se supplemental petition in which he argued he had received ineffective assistance of trial counsel because counsel "was well acquainted with the family of the victims" and had failed to call an accident reconstruction expert at the second trial. He also claimed appellate counsel was ineffective because he failed to challenge the "Weight of the Evidence" on appeal and because he did not adequately support the double jeopardy argument he raised. The trial court summarily denied relief.

STATE v. RUIZ
Decision of the Court

¶4 On review, Ruiz repeats his arguments that appellate counsel was ineffective in failing to provide the appellate court with an affidavit in support of his double jeopardy claim and that trial counsel was ineffective in not calling the expert witness who had testified at his first trial. Because Ruiz does not develop an argument on review as to his remaining claims, we do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “[t]he reasons why the petition should be granted”); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

¶5 We also reject Ruiz’s claim that the trial court erred in denying his claim of ineffective assistance of counsel. As the court pointed out, to establish a colorable claim of ineffective assistance of counsel, “a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Trial counsel is presumed to have acted properly unless a petitioner can show that counsel’s decisions were not tactical, “but, rather, revealed ineptitude, inexperience or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

¶6 Furthermore, “[m]atters of trial strategy and tactics are committed to defense counsel’s judgment” and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). In this case, we cannot say the trial court abused its discretion in determining that counsel’s decision not to call the expert witness who had testified at Ruiz’s first trial was such a tactical matter. “Calling an expert witness is a matter of trial strategy, and unless counsel’s decision has no ‘reasonable basis,’ a reviewing court will not find ineffectiveness.” *State v. Sammons*, 156 Ariz. 51, 56, 749 P.2d 1372, 1377 (1988) (citation omitted), *quoting State v. Oppenheimer*, 138 Ariz. 120, 123, 673 P.2d 318, 321 (App. 1983). We cannot say that is the case here. As the state pointed out in its response below, counsel may simply have

STATE v. RUIZ
Decision of the Court

concluded he could effectively cross-examine the state's experts without risking the possibility of a defense expert conceding favorable points to the state on cross-examination. And it was during a hearing on the defense's motion to preclude the state's witnesses from testifying about the unreliability of eyewitness testimony that defense counsel informed the court its expert would not be called. In response to the motion, the state argued that Ruiz's expert had made similar statements at the first trial, at which point counsel stated he would not be called at the second trial. In light of such a position we cannot say counsel lacked a reasonable basis for his decision.

¶7 Ruiz also contends his appellate counsel was ineffective in relation to his double jeopardy claim. Following the first trial, the jury indicated it could not reach a verdict. After the trial court declared a mistrial, the prosecutor and defense counsel spoke with some of the jurors. One of the jurors indicated the jury had unanimously decided Ruiz was not guilty of the greater charges and had become deadlocked in deciding the lesser included charges. She showed counsel a handwritten list of what purported to be the jury's vote tallies, which she later tore up and threw away. Ruiz moved for an evidentiary hearing on the matter or to amend the record to show that the jurors had found him not guilty on the greater charges. The trial court denied the motion.

¶8 Appellate counsel raised a double jeopardy claim on appeal. This court rejected the claim, concluding the trial court had properly declared a mistrial based on the jurors' statements about their deadlock, and stating that "[e]ven assuming, *arguendo*, that the jury had come to a tacit agreement while deliberating that [Ruiz] was not guilty of the two counts of manslaughter, the jury never actually rendered a verdict on those counts and, without a verdict, double jeopardy cannot bar retrial." Ruiz claims, however, that counsel was ineffective in raising this claim because he did not include an affidavit from one of the jurors in support of the claim.¹

¹He also argues this court rejected the claim due to the lack of such an affidavit, citing the note that he had "failed to present any evidence outside of his own statements that the jury had arrived at a

STATE v. RUIZ
Decision of the Court

He included with his petition an affidavit from the juror with whom counsel had spoken, in which the juror confirmed counsel's above account of their discussion.

¶9 Even in light of the juror's affidavit, however, we reject Ruiz's double jeopardy claim. Unlike the situation in *Green v. United States*, on which Ruiz relies, no verdict was entered on a lesser included offense. 355 U.S. 184, 186 (1957); *see also* Ariz. R. Crim. P. 23.1(a) ("The verdict of the jury shall be in writing, signed by the foreman, and returned to the judge in open court."). Nor can we agree with Ruiz that the juror's statements to counsel or the tally sheet amounted to a verdict on the charges.

¶10 Ruiz cites no authority, and we have found none, concluding that a note or statement from a juror or jury can be considered a verdict when there has not been compliance with Rule 23.1. Indeed, in *Gusler v. Wilkinson*, our supreme court specifically reserved that issue. 199 Ariz. 391, ¶ 13, 18 P.3d 702, 704-05 (2001). There, the jury sent the judge a note, stating, *inter alia*, that it was deadlocked on certain issues, asking what to do, and stating, "Not guilty on manslaughter." *Id.* ¶ 5. The *Gusler* court considered whether, assuming *arguendo* that some jury notes could be taken as a verdict, the note at issue was a verdict. *Id.* ¶ 13. The court stated, "To gain that status, a note must provide 'clear and uncontradicted evidence' that it 'represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case.'" *Id.*, quoting *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982).

¶11 In this case, unlike *Gusler*, the jury as a whole did not send a note to the court during its deliberations reporting an agreement as to any offense. And not all of the jurors were present at the discussion with counsel. Rather, the juror's affidavit establishes only that at a point in the deliberation that juror believed there had been agreement about the charges. But, as the *Gusler* court

unanimous verdict on any of the counts." But as we discuss, even in light of the affidavit, the claim fails.

STATE v. RUIZ
Decision of the Court

pointed out, the “jury could have resumed its discussion of the . . . charge[s] when and if it became probable it could reach no agreement as to the [lesser] charge[s]” or there could have been “a tentative compromise” that may have been broken had deliberation continued. *Id.* ¶ 14; *see also State v. Espinoza*, 233 Ariz. 176, ¶ 11, 310 P.3d 52, 56 (App. 2013). Therefore, double jeopardy did not bar Ruiz’s retrial. That being so, we cannot say appellate counsel was ineffective in presenting the claim.

¶12 Finally, Ruiz raises on review what he acknowledges is a new claim regarding disciplinary actions against his trial counsel in other cases. This court, however, does not consider issues raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶13 For these reasons, although we grant the petition for review, we deny relief.