

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JUREL DION ROBERSON,
Petitioner.

No. 2 CA-CR 2016-0282-PR
Filed October 19, 2016

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NOT FOR PUBLICATION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 Pima County
No. CR20101872001
The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Law Offices of Erin E. Duffy, P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Petitioner

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Jurel Roberson seeks review of the trial court’s order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Roberson has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Roberson was convicted of second-degree murder, drive-by shooting, three counts of aggravated assault, and prohibited possession of a deadly weapon. His convictions stemmed from a 2007 incident in which he pulled alongside another vehicle and fired several shots into it, killing one of the three occupants and wounding another. Roberson claimed at trial that, although he had not recognized anyone in the car, he had believed it might contain individuals with whom he fought at a nightclub a few weeks earlier, and he claimed he had seen someone reaching for what he thought was a gun. He was sentenced to a combination of concurrent and consecutive prison terms totaling twenty-two years. We affirmed his convictions and sentences on appeal. *State v. Roberson*, No. 2 CA-CR 2011-0224 (Ariz. App. Jul. 27, 2012) (mem. decision).

¶3 Roberson sought post-conviction relief, arguing his trial counsel had been ineffective in failing to interview “essential” defense witnesses, renew a motion to continue, and move to sever the prohibited possession count from the remaining charges. The trial court summarily denied relief. It concluded, inter alia, that Roberson had not demonstrated any of the witnesses that counsel purportedly should have interviewed would have offered evidence

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helpful to his defense. The court additionally determined that, as a result, Roberson could not show prejudice resulting from counsel's decision not to renew his motion to continue trial, even had there been a "demonstrable reality that this Court would have granted another continuance." Finally, the court determined that Roberson's final claim failed, in part, "in light of the fact that [Roberson] would necessarily be testifying in support of his self-defense claim and therefore the fact that he was a convicted felon would be before the jury."¹ This petition for review followed.

¶4 On review, Roberson asserts each of his claims is colorable and he is entitled to an evidentiary hearing. "To state 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); accord *State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, quoting *Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088 (2014). "To establish prejudice, a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, quoting *Hinton*, ___ U.S. at ___, 134 S. Ct. at 1089. In determining whether a claim is colorable and, thus, if a defendant is entitled to an evidentiary hearing, we treat the defendant's factual allegations as true. See *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¹In rejecting this claim, the trial court also concluded Roberson had not shown prejudice, noting the jury had found him credible at least in part because it convicted him "of the lesser included crime of manslaughter." We note that Roberson was not convicted of manslaughter, but instead of second-degree murder.

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¶6 Roberson argues the trial court erred in rejecting his claim that counsel was ineffective in failing to interview certain witnesses because he had included affidavits both by trial counsel and another defense attorney avowing “that [Roberson] was entitled to have these witnesses interviewed and that the failure to do so affected the self defense claim.” He further asserts that “[w]ithout an evidentiary hearing there is no way to determine exactly what information these witnesses possess” and, therefore, “no way to definitively decide if [he] was prejudiced.” First, this argument misstates the law—in order to be entitled to a hearing he must first make a colorable claim of prejudice—that is, he must produce evidence to support his claim that, had counsel interviewed those witnesses, there is a reasonable probability it would have changed the result of his trial. *See Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64.

¶7 Below, Roberson provided an affidavit by his trial counsel in which counsel stated his failure to interview the witnesses caused him to “not have all the information and evidence necessary to fully present the self-defense claim to the jury.” The trial court was free to reject this conclusory affidavit, which contained no information about what evidence further investigation would have yielded or explanation as to why that information would have changed the outcome of his trial. *Cf. State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995) (court may disregard “conclusory” affidavit “completely lacking in detail”); *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim “must consist of more than conclusory assertions”).

¶8 The affidavit provided by another defense attorney, however, included slightly more detail. That attorney avowed that one of the witnesses counsel had not interviewed had been involved in the earlier confrontation with Roberson and that the witness “and his friends had in fact informed Mr. Roberson that they had weapons and were going to shoot [him].” But the affidavit does not state the attorney’s basis for these assertions and, in any event, they are inconsistent with the witness’s own account. As the trial court pointed out, the witness stated he had not told Roberson they would

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shoot him and did not know if anyone else had. Neither affidavit contained any further details about what any witness would have said if interviewed. Roberson has not identified any helpful testimony or evidence that trial counsel would have uncovered with further investigation. And he does not address the court's conclusion that another witness provided testimony that Roberson had been threatened. Thus, the trial court did not err in summarily rejecting this claim.

¶9 Roberson also asserts the trial court erred in rejecting his claim that counsel should have renewed his motion to continue so that he could further investigate the case. He argues that, had counsel renewed the motion "either the trial court would have granted the motion and the interviews would have taken place or the trial court would have denied the motion and the conviction would have been overturned on appeal." But, as we have explained, Roberson has not demonstrated that interviewing the witnesses would have aided in his defense. Nor has he developed any argument that the court would have erred had it rejected a motion to continue or that he would have been entitled to relief on appeal had it done so. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

¶10 Finally, Roberson contends the trial court erred by determining he had "suffered no prejudice" resulting from trial counsel's decision to not seek severance of the weapon-possession charge. He cites as evidence of prejudice the defense attorney's affidavit, in which she stated without elaboration that the failure to sever "damaged both [trial counsel]'s and Mr. Roberson's credibility in front of the jury, contradicted and confused the self-defense claim, and ultimately prevented Mr. Roberson from obtaining a fair trial." Even were this conclusory opinion sufficient to show prejudice, Roberson ignores the trial court's observation that, in light of his decision to testify, evidence of his previous conviction would have been admitted in any event. He also overlooks that trial counsel raised a necessity defense to the weapon-possession charge based on Roberson having acted in self-defense. "[D]isagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis.'" *State v. Denz*, 232

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Ariz. 441, ¶ 11, 306 P.3d 98, 102 (App. 2013), *quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). Roberson has cited no evidence or authority suggesting counsel's decision lacked a reasoned basis. The court did not err in summarily rejecting this claim.

¶11 We grant review but deny relief.