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.

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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OF ARIZONA, Respondent, v. MONDRE KAMONIE BELLE, Petitioner.	2 CA-CR 2008-0159-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20010581

Honorable John E. Davis, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By John F. Palumbo — Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 A jury found petitioner Mondre Belle guilty of second-degree burglary, kidnapping, sexual abuse, and four counts of sexual assault. The trial court sentenced him to consecutive, aggravated, twelve-year prison terms on the four counts of sexual assault, to be followed by lifetime probation on the remaining three. On appeal, this court affirmed his

convictions; modified two of his three probationary terms to lesser, five- and seven-year terms; and affirmed his sentences as modified. *State v. Belle*, No. 2 CA-CR 2002-0222 (memorandum decision filed Feb. 26, 2004). Belle then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting a claim of ineffective assistance of trial counsel. The trial court found he had not presented a colorable claim and denied relief summarily, giving rise to the present petition for review.

¶2 As summarized in our memorandum decision in Belle's appeal, the essential underlying facts are these:

> In the early morning hours of October 13, 2000, seventy-five-year-old E. was physically and sexually assaulted repeatedly by an intruder who had entered her apartment through an unlocked patio door as she slept. She described her assailant as a tall, slender, black male in his mid-twenties. Suspicion eventually focused on Belle, who had lived near the victim in the same apartment complex on October 13.
>
> The following month Belle moved to Illinois, where officers contacted him at the request of Tucson police.

Belle, No. 2 CA-CR 2002-0222, ¶¶ 2-3. The Illinois investigators obtained blood and tissue samples from Belle for deoxyribonucleic acid (DNA) testing, which showed that Belle's DNA matched samples recovered from E. after the assaults. Belle was arrested in Illinois and, in an interview conducted soon after his arrest, acknowledged having entered the victim's apartment on the night she was assaulted. He was then extradited to Arizona, tried, convicted, and sentenced as noted above.

¶3 Belle's defenses at trial were misidentification and alibi. In his petition for post-conviction relief, Belle contended trial counsel had been ineffective (1) in "choosing

a hopeless misidentification defense" over an "arguable and viable" insufficiency-of-the-evidence defense; (2) in acceding to, rather than overriding, Belle's stated wish that the jury not be instructed on any lesser-included offenses; and (3) in failing to argue insufficiency of the evidence as an alternative defense to three of the four sexual assault counts.

¶4 The trial court denied relief in a written minute entry, stating, in part:

> This court remembers the trial well. Mr. Belle was represented by Eric Larsen, an experienced criminal practitioner.
>
> Adequacy of counsel is not to be judged by the harsh light of hindsight. There is a strong presumption that defense counsel's decisions were made for strategic or tactical purposes. This court finds that the choice of defense was well within the bounds of a proper strategic choice rather than a "hopeless" one as characterized by current counsel. In addition Mr. Belle wanted an all or nothing defense. He told defense counsel that he did not want jury instructions on lesser included offenses. While trial counsel can override his client's decision in such circumstances it would be an extremely unusual decision. Had he done so we would probably be here today on a post-conviction relief petition with different grounds.
>
> Petitioner has not met his burden of showing that his trial counsel's performance fell below an objective standard of reasonableness as defined by prevailing professional norms under *Strickland v. Washington*[,] 466 U.S. 668, 104 S. Ct. 2052 (1984). He has not raised a colorable claim of ineffective assistance of counsel.

(Citations omitted.)

¶5 To present a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient under prevailing professional norms and that counsel's substandard performance prejudiced the defense. *See Strickland*,

466 U.S. at 688, 692; *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). Whether a claim is colorable is, "to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). On review, we indulge a strong presumption that counsel acted with reasonable competence, *State v. Krum*, 183 Ariz. 288, 292, n.6, 903 P.2d 596, 600 n.6 (1995), and we accord counsel's tactical decisions great deference. *Strickland*, 466 U.S. at 689; *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). "[D]isagreements as to trial strategy or errors in trial tactics will not support an [in]effectiveness claim so long as the challenged conduct could have had some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984).

¶6 We find no abuse of the trial court's discretion in determining that counsel's "choice of defense was well within the bounds of a proper strategic choice." Although Belle now argues that counsel should have urged, or urged more forcefully, other defenses at trial, Belle has not demonstrated that counsel's tactical choices lacked a reasoned basis or that counsel's conduct fell below prevailing professional norms. *See Meeker*, 143 Ariz. at 262-63, 693 P.2d at 917-18. As a result, he has not shown that the trial court abused its discretion in finding his ineffective assistance claim was not colorable.

¶7 Belle contends the trial court's ruling left unresolved "the crucial issue in this case of whether it is the defendant or defense counsel who has the ultimate authority on whether to request lesser included offense[] [instructions]." Despite having personally

insisted at trial that counsel not request any such instructions,[1] Belle now argues that the decision was a matter of trial strategy; that defense counsel, not Belle, "ha[d] the ultimate authority" over whether to seek lesser-included-offense instructions; and that he was prejudiced by counsel's failure to have ignored his wishes and requested such instructions on counts one, three, and four notwithstanding Belle's objection.

¶8 We reject Belle's contention that "the crucial issue" for decision now is whether it is the defendant or defense counsel who legally has "ultimate authority" to decide whether to request lesser-included-offense instructions. Even if Belle were correct that trial counsel had the legal authority to override his client's express desire to pursue an "all or nothing" defense, the issue for purposes of Belle's ineffective assistance claim is whether counsel's failure to request lesser-included-offense instructions amounted to a breach of the standard of care for defense counsel. Belle has neither asserted—nor, obviously, supported the assertion—that counsel fell below prevailing professional norms by following his client's clearly expressed wishes. As the Supreme Court noted in *Strickland*, albeit in a somewhat different context, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691.

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[1]As the state noted below in its response to Belle's petition for post-conviction relief, defense counsel stated at trial that he had explained to Belle that "if the jury decided, they could go for a lesser-included finding of guilt just with a lesser penalty"; that counsel believed Belle "underst[ood] that very clearly"; and that Belle "indicated this was all or nothing and he was going to go to trial and be found innocent." The trial transcript also contains a colloquy between Belle and the court, during which the court confirmed that Belle had discussed the decision with his attorney and did not "want any instructions on lesser-included crimes such as attempted sexual assault or false imprisonment."

¶9 Because Belle neither alleged nor established that, under the circumstances of this case, counsel departed from the standard of care by honoring Belle's own clearly stated wish, we need not resolve the related question whether counsel had the "ultimate authority" to ignore Belle's directives in this instance. If counsel had authority to make the decision to request lesser-included-offense instructions but, under prevailing professional standards, was not obliged to do so, then the issue of counsel's "ultimate authority" is irrelevant. Because Belle failed to demonstrate deficient performance—that is, that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," *id.*, 466 U.S. at 686—the trial court did not abuse its discretion in concluding Belle had failed to state a colorable claim of ineffective assistance of counsel.[2]

¶10 We grant the petition for review, but we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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[2]The court based its ruling on Belle's failure to show that counsel's performance had been deficient. It therefore did not reach *Strickland*'s second requirement, proof of resulting prejudice. *See State v. Salazar*, 146 Ariz. 540, 541-42, 707 P.2d 944, 945-46 (1985) (if petitioner fails to establish either of two elements required by *Strickland*, court need not address the other).

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GARYE L. VÁSQUEZ, Judge