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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. PONGTHEP NA-AYUDHA PRAMOJ, aka PAUL PRAMOJ, Appellant/Petitioner.	2 CA-CR 2005-0018 2 CA-CR 2005-0238-PR (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200200458

Honorable Thomas E. Collins, Judge

AFFIRMED
REVIEW GRANTED; RELIEF DENIED

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P E L A N D E R, Chief Judge.

¶1 After a bench trial, appellant Pongthep Pramoj Na-Ayudhya, commonly known as Paul Pramoj,[1] was convicted of eight felony charges, including one count of fraudulent schemes and artifices, two counts of theft, two counts of money laundering, and three counts of forgery. In this consolidated appeal and petition for review of the trial court's denial of post-conviction relief, Pramoj asserts on appeal that the trial court erred by failing to inquire sua sponte about trial counsel's alleged conflicts of interest and that the evidence was insufficient to sustain his convictions. In his petition for review, Pramoj argues trial counsel was ineffective for not insisting on the presence of a Thai interpreter and because of various conflicts of interest. We affirm the convictions and sentences and, although we grant the petition for review, we deny relief.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). Pramoj was the acting manager of Angel Transport, L.L.C., a taxi company that contracted with certain Cochise County medical providers to provide non-emergency transportation for medical patients enrolled in the Arizona Healthcare Cost Containment System, or AHCCCS. Specifically, Angel Transport had contracts with Arizona Physicians, I.P.A., Southwest Catholic Health Network, which did business as Mercy Care, and Cochise Health Systems.

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[1]Although the parties' briefs and various trial court captions refer to appellant as "Pongthep Na-Ayudha Pramoj," he identified himself under oath at trial as "Pongthep Pramoj Na-Ayudhya," and the indictment also referred to him by that name. We refer to him here merely as Pramoj.

¶3 Angel Transport was owned by Pramoj's wife, Young Fillmore. Pramoj's son, Sakkapun Pramoj Na-Ayudhya, commonly known as Ahn Pramoj, acted as the assistant manager of the business. In his management position, Pramoj handled the billing for Angel Transport. In 1999, unhappy with the way Angel Transport was being compensated, Pramoj proposed rate increases to two of the health plans—Mercy Care and Arizona Physicians. Although those rate increases were not affirmatively accepted by the plans, Pramoj began billing the providers based on his proposal.

¶4 In October 2000, Arizona Physicians audited Angel Transport's claims and discovered that the miles submitted by the company far exceeded the actual miles as provided in the contract between it and Angel Transport. After discovering that Angel Transport had been overpaid by approximately $354,000, Arizona Physicians began withholding payments. Mercy Care also determined that it had "sustained a loss" because "Angel Transport [had been] overpaid for claims." Additionally, Cochise Health Systems determined that Angel Transport had over-charged on claims, submitted duplicate bills, and submitted bills when no services had been rendered. Based on those discoveries, AHCCCS began a fraud investigation of Pramoj and Angel Transport. The Arizona Attorney General's Office also investigated the parties.

¶5 Based on the latter's investigation, a grand jury indicted Pramoj, Angel Transport, and Pramoj's son, Ahn, for fraudulent schemes and artifices, three counts of theft, illegally conducting an enterprise, two counts of money laundering and sixty-two counts of forgery. On the state's motion, the trial court dismissed without prejudice one count of theft

as to all parties and fifty-seven forgery counts as to Pramoj. After a fifteen-day bench trial, the trial court acquitted Angel Transport and Ahn. As noted above, the trial court found Pramoj guilty of eight of the charged offenses. The trial court later denied Pramoj's motion for a new trial, filed pursuant to Rule 24.1, Ariz. R. Crim. P., 17 A.R.S., and sentenced him to concurrent, presumptive prison terms, the longest of which is five years. Subsequently, the trial court denied Pramoj's petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and his motion for rehearing on that petition. This court consolidated Pramoj's appeal and his petition for review of the denial of his Rule 32 claims.

DISCUSSION

DIRECT APPEAL

I. Conflict of interest

¶6 Pramoj first argues on various grounds he "was denied his constitutionally guaranteed right to effective assistance of counsel in his defense." He also contends "[t]he trial court committed reversible error in failing to adequately inquire as to the nature and extent of defense counsel's conflict of interest in representing multiple defendants at trial of the criminal matter and in ancillary civil forfeiture proceedings." Based on that alleged error, he asserts "th[e] case [should] be returned to the trial court for an evidentiary hearing on [his] claims of ineffective assistance pursuant to Rule 32.8, [Ariz. R. Crim. P., 17 A.R.S.]"

¶7 The relief Pramoj is requesting is not available on direct appeal, and claims relating to ineffective assistance of counsel (IAC) can be raised solely in Rule 32

proceedings. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit."). Thus, to the extent Pramoj attempts to inject and argue IAC claims in his direct appeal, we do not address them here, but rather, only in connection with Pramoj's petition for review. *See* ¶¶ 25-44, *infra*.

¶8 That having been said, beyond IAC claims, "courts presented with a possible conflict have an affirmative duty to protect a defendant's [Sixth Amendment] rights" and we therefore address Pramoj's claim that the trial court should have addressed the conflict. *United States v. Allen*, 831 F.2d 1487, 1494 (9th Cir. 1987). That "duty arises when the possibility of conflict is '"brought home to the court."'" *Id., quoting Holloway v. Arkansas*, 435 U.S. 475, 485, 98 S. Ct. 1173, 1179 (1978), *quoting Glasser v. United States*, 315 U.S. 60, 76, 62 S. Ct. 457, 467 (1942).

¶9 The state claims Pramoj "forfeited any right to obtain appellate relief" on this point because it was raised "for the first time on appeal." But, even "[i]f a defendant fails to object to representation by an attorney with a conflict, but shows on appeal that 'an actual conflict of interest adversely affected his lawyer's performance,' reversal is required." *Allen*, 831 F.2d at 1495, *quoting Cuyler v. Sullivan*, 466 U.S. 335, 349, 100 S. Ct. 1708, 1718 (1980); *see also State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973) (if "an actual conflict of interest exists . . . [r]eversible error will be presumed"). Thus, contrary to the state's position, Pramoj has not waived this argument.

¶10 Still, an appellant must establish that the conflict of interest was actual and not merely "potential or speculative." *See Allen*, 831 F.2d at 1495; *Davis*, 110 Ariz. at 31, 514 P.2d at 1027. In addressing Pramoj's IAC claims raised in his petition for review, we carefully examine and address each alleged conflict of interest. For the reasons explained in that section below, we find no actual conflicts existed. Thus, Pramoj likewise has not established any reversible error based on the trial court's failure to address his trial counsel's alleged conflicts of interest.

II. Sufficiency of evidence

¶11 Pramoj next argues "[t]here was insufficient evidence of criminal intent to support [his] convictions." As noted earlier, the trial court found Pramoj guilty on eight of the charged offenses, including one count of fraudulent schemes and artifices in violation of A.R.S. § 13-2310; two counts of theft in violation of § 13-1802; two counts of money laundering in violation of § 13-2317; and three counts of forgery in violation of § 13-2002. On appeal, Pramoj broadly asserts "[n]owhere in the record of the trial of this case is there any evidence that [he] exhibited the criminal intent necessary to support his felony convictions."

¶12 "Every conviction must be based on 'substantial evidence.'" *State v. Miles*, 211 Ariz. 475, ¶ 23, 123 P.3d 669, 675 (App. 2005), *quoting* Ariz. R. Crim. P. 20(a), 16A A.R.S. "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996); *see also State v. Terrazas*, 189 Ariz. 580,

586, 944 P.2d 1194, 1200 (1997). We will reverse a conviction for insufficient evidence "only if 'there is a complete absence of probative facts to support [the trier-of-fact's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988); *see also State v. Alvarado*, 178 Ariz. 539, 541, 875 P.2d 198, 200 (App. 1994). In determining whether sufficient evidence supports a conviction, the evidence is "'viewed in the light most favorable to sustaining the conviction and all reasonable inferences will be resolved against a defendant.'" *State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983), *quoting State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981); *see also Miles*, 211 Ariz. 475, ¶ 23, 123 P.3d at 675.

A. Fraudulent schemes and artifices

¶13 To be convicted of fraudulent schemes and artifices under § 13-2310 (A), the state must prove that the defendant knowingly obtained a benefit "by means of false pretenses, representations, promises or material omissions" pursuant to a scheme or artifice to defraud. *State v. Bridgeforth*, 156 Ariz. 60, 64, 750 P.2d 3, 7 (1988). "The crime of fraudulent schemes and artifices requires that a defendant act with the specific intent to defraud." *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985).

> "[F]raudulent intent, as a mental element of crime, is often difficult to prove by direct evidence. In many cases it must be inferred from acts of the parties, and inferences may arise from a combination of acts, even though each act or instance, standing by itself may seem unimportant."

State v. Thompson, 194 Ariz. 295, ¶ 13, 981 P.2d 595, 597 (App. 1999), *quoting State v. Maxwell*, 95 Ariz. 396, 399, 391 P.2d 560, 562 (1964). "Typically an intent to defraud is found where the defendant intends to cause a pecuniary loss or gain." *Id.* ¶ 13.

¶14 The trial court found that Pramoj had "knowingly obtained a benefit by means of false or fraudulent pretenses" by "submitt[ing] claims to Cochise Health Systems, Arizona Physicians I.P.A. and Mercy Care for payment which contained false information." Evidence exists to support that finding. Pramoj admitted he had handled Angel Transport's billing. Other testimony established that "paid claims were being resubmitted"; that claims contained extra miles; and that Angel Transport submitted claims for runs they never took. Further, there was testimony that Pramoj had admitted he had "pad[ded] the miles" because he wasn't being paid "the way that he thought his contract should be paid" and that "he [had] adjusted the miles so that it would . . . equal the rates that he wanted [Mercy Care] to pay."

¶15 Pramoj dismisses those facts as merely evidence of his "determination to bill for services in a manner he believed to be fair and just, and to accept in payment whatever his clients were willing to pay." Even assuming Pramoj believed he was owed this money, however, the trial court could find fraudulent his attempt to obtain it by double billing or over billing. The evidence supports an inference that he sought a pecuniary gain and thus supports a conclusion that Pramoj acted with a fraudulent intent. *See Thompson*, 194 Ariz. 295, ¶ 13, 981 P.2d at 597.

¶16 Still, Pramoj claims that "[n]o one ever attempted to explain [the] complex contract terms" and that "he did his best to comply with their demands." But the contracts coordinator for Cochise Health Systems testified that the contract between that entity and Angel Transport defined "mileage charge" as "the rate assessed by the contractor measured in the miles from the point at which the vehicle receives the member to the member's destination (loaded miles)." She further testified that before executing the contract with Angel Transport, she had explained to Pramoj "that the member shall be in the vehicle for those miles [charged]" and that she would not have ended the conversation without being sure Pramoj had understood that. Thus, the evidence supports a finding that Pramoj was aware of what he should be billing but chose to bill in a more lucrative way.

¶17 Pramoj also claims his conduct was not fraudulent because he "routinely told clients—without any clear objection from them—to pay whatever they thought appropriate even if he billed for more than they wanted to pay." But, regardless of whether Pramoj may have warned the providers that he intended to bill them for more than he was contractually owed, he attempted to obtain a pecuniary gain beyond the terms of his contracts. That supports a finding of an intent to defraud, and thus the evidence supports his conviction for fraudulent schemes and artifices.

B. Theft

¶18 "A person commits theft if, without lawful authority, the person knowingly . . . [o]btains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services . . . ." A.R.S. § 13-

1802(A)(3). The trial court found that Pramoj was guilty of theft for "having knowingly and without lawful authority obtained property or service of Arizona Physicians IPA and received payment." Pramoj asserts the "record is . . . bereft of evidence that he ever had the culpable state of mind required to establish sufficient intent to take anything he did not firmly and fairly believe was his."

¶19 But, as explained above, there was testimony that Pramoj had been informed about the correct way to bill providers and still had over billed and padded miles in an effort to get more than the contracts allowed. Specifically, there was evidence that Arizona Physicians was significantly over billed. That Pramoj may have firmly believed he had deserved more does not negate that he knowingly took money that was not owed him under the contracts. Accordingly, the evidence supports his theft convictions.

C. Money laundering

¶20 "A person is guilty of money laundering . . . if the person . . . [a]cquires or maintains an interest in . . . racketeering proceeds knowing or having reason to know that they are the proceeds of an offense" or "[m]akes property available to another by transaction, transportation or otherwise knowing that it is intended to be used to facilitate racketeering." A.R.S. § 13-2317(B)(1)-(2).[2] To establish guilt under this statute, "the state

[2]The trial court sentenced Pramoj pursuant to his violation of A.R.S. § 13-2317(A). Since his indictment, § 13-2317 was amended, and former subsection (A) now appears in subsection (B). *See* 2002 Ariz. Sess. Laws, ch. 219, § 12.

need only prove that the perpetrator knew, or had reason to know, that the proceeds were stolen." *State v. Harper*, 177 Ariz. 444, 446, 868 P.2d 1027, 1029 (App. 1993).

¶21 As the state points out, the trial court found that Pramoj had received an interest in racketeering proceeds, knowing or having reason to know the proceeds came from the filing of false claims against Cochise Health Systems, Arizona Physicians, and Mercy Care and that Pramoj knowingly had made vehicles and office space available to another knowing they would be used to facilitate racketeering. Evidence supports those findings.

¶22 Pramoj testified that he had used his personal credit to purchase vehicles that he "lent to Angel Transport." As mentioned above, he knew that Angel Transport, through his billing practices, was overcharging healthcare providers. Thus, he essentially provided property intended to be used to facilitate racketeering. Further, his wife, Young Fillmore, transferred some of Angel Transport's proceeds—which contained money that was stolen—to the account of P&S Check Cashing, a business owned by Pramoj, and other funds from Angel Transport's account went directly to Pramoj's account. Accordingly, the evidence was sufficient to support the convictions on these counts.

D. Forgery

¶23 Lastly, Pramoj claims there was insufficient evidence of "intent to defraud," which is required for the crime of forgery. "A person commits forgery if, with intent to defraud, the person . . . [f]alsely makes, completes or alters a written instrument . . . ." A.R.S. § 13-2002(A)(1). As mentioned above, "an intent to defraud is found where the

defendant intends to cause a pecuniary loss or gain." *Thompson*, 194 Ariz. 295, ¶ 13, 981 P.2d at 597.

¶24 The trial court found that on or about December 23, 1999, Pramoj had submitted three false claims to Cochise Health Systems. Evidence supports that finding. Pramoj billed a sixty-five-mile trip from Benson to Sierra Vista for patient N.C. as a 135-mile trip. He later resubmitted the 135-mile claim under a different code number for the same patient on the same date. Further, Pramoj submitted a claim form for patient E.W. for $35; he later resubmitted a duplicate claim seeking $25. And, Pramoj submitted a claim for patient E.S. for $112.50—a ninety-mile trip at $1 per mile and an additional fee of $22.50—and then resubmitted it for $56.25—a forty-mile trip at $1 per mile and an additional fee of $16.25. A Cochise Health Systems contract specialist testified that claim should have been "a flat rate of forty dollars." As the state points out, that evidence, coupled with testimony that Pramoj had padded some miles to get what he thought Angel Transport deserved, supports an inference "that [Pramoj] inflated the mileage on these claims with the intent to defraud—to receive more money from [Cochise Health Systems]." Sufficient evidence supported the forgery convictions. In sum, we find no basis for reversal of any of Pramoj's convictions on appeal.

PETITION FOR REVIEW

¶25 In his petition for review, Pramoj challenges the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which he had claimed his trial counsel had been ineffective. We will not disturb a trial

court's order granting or denying post-conviction relief absent a clear abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990); *see also State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) ("We review for abuse of discretion the superior court's denial of post-conviction relief based on lack of a colorable claim."). We find no such abuse here.

¶26 To state a colorable IAC claim, a defendant must establish counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing of either prong of the *Strickland* test, the claim necessarily fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). A colorable claim entitling a defendant to an evidentiary hearing is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). A reviewing court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

¶27 The trial court denied relief without an evidentiary hearing on Pramoj's petition for post-conviction relief, finding "[n]one of [Pramoj's] claims [had] present[ed] a material issue of fact or law which would entitle [him] to relief and no purpose would be served by further proceedings." In his petition for review, Pramoj claims we should grant

relief because his trial counsel's "'ineffective assistance' appears affirmatively in the record." Alternatively, Pramoj asserts he "has stated a 'colorable claim'" "entitling him to an evidentiary hearing." After addressing the various aspects of his IAC claims below, we reject these assertions.

I. Interpreter

¶28 Pramoj first argues "[d]efense counsel was ineffective for failing to insist on the presence of a Thai interpreter." Pramoj was born in Thailand and became a legal resident of the United States in 1992, making English his second language. A couple of weeks before his trial, Pramoj filed a "request for translator," asking the court to "appoint a Thai translator and make said translator available for the duration of the criminal trial." Having learned that a Thai interpreter was available, the trial court granted Pramoj's request, stating the "translator will be utilized on an as-needed basis for particular technical terms or concepts only." But, on the first day of trial, March 22, 2004, the court informed the parties that an interpreter would not be available until March 29. The following exchange then occurred:

> The Court: We are proceeding here. So, Mr. Bays, [counsel for Pramoj] I just bring that up because we have gone this far, and I did grant the motion.
>
> But, I am disinclined to do anything about it, because we are here.
>
> Mr. Bays: (After conferring with client). Your Honor, I would ask the Court to inquire of Mr. Pramoj what his—what he would prefer to do.

> My recommendation to him,—as I told the Court last time, he understands English. There are some areas of English that he doesn't understand, and that is going to become very clear to this Court as we go through this trial.
>
> My recommendation is, is that, since it is the State that is going forward, that we just waive a Thai interpreter until such time as one is made available, so that we don't lose time on this case.
>
> But, if the Court would inquire, out of abundance of caution, of Mr. Pramoj, I would appreciate it.

¶29 The trial court proceeded to question Pramoj, stating, inter alia, "I thought your command of the English language was very good, for legal purposes," "[b]ut, in any case, do you think that you can proceed here? What is your position on going ahead without having an interpreter?" Pramoj answered: "I will—you can go. I think that I can go ahead." An interpreter was made available on April 6, 2004, the tenth day of trial and before the state rested. The interpreter was present throughout Pramoj's testimony, which lasted three days. According to Pramoj's own admission, during those three full days of testimony the interpreter "was called to clarify terms on nine occasions."

¶30 Pramoj has failed to establish that his counsel's actions with respect to the interpreter fell below objectively reasonable standards. *See Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064. Counsel did not make any determination as to Pramoj's ability to proceed without an interpreter. Rather, he asked the court to inquire directly of his client whether he wanted to continue without an interpreter, which the court then did. The trial court ultimately left the issue up to Pramoj, who agreed that the trial could initially proceed without an interpreter.

¶31 "The trial court . . . is in the best position to determine whether a defendant possesses the requisite degree of fluency in the English language so that his right to confront witnesses, right to cross-examine those witnesses and right to competent counsel will not be abridged." *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974). In ruling on Pramoj's Rule 32 petition below, the trial court determined that he had been able to proceed without an interpreter, finding:

> Based on the Court having sat through all the proceedings in this case, including a fourteen day trial, having observed the Defendant interact with everyone in court, having heard him respond to the court, observed him reject the services of an interpreter, testify, and communicate with []his attorney and heard testimony of his interaction during the course of running his business, including negotiating contracts, no amount of evidence produce[d] subsequent to the above facts would have sufficient credibility to convince this court that Defendant's command of the English language, while not idiomatically at the level of a native-speaker, was so insufficient as to have denied him a fair trial . . . .

We have no basis for rejecting those findings, particularly in view of the trial court's first-hand observations of and experience with Pramoj during the lengthy trial.

¶32 In addition, Pramoj has failed to establish that he was prejudiced by the lack of an interpreter. Although he points to various excerpts in his testimony to illustrate his lack of proficiency in the English language, during the particular instances he cites, a translator was present. We fail to see how those isolated examples provide evidence of prejudice. And Pramoj has failed to point to any specific testimony that he failed to understand and would have objected to if an interpreter had been made available for the entire trial. Thus, Pramoj failed to sustain his burden of producing some facts that, if true,

would have likely changed the outcome of the trial. *See Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69. Accordingly, the trial court did not abuse its discretion in dismissing Pramoj's petition on this point, and we deny relief.[3]

II. Conflicts of interest

¶33 Pramoj also argues his "[d]efense counsel was ineffective when he engaged in conflicts of interest." Specifically, Pramoj asserts trial counsel was ineffective because of three conflicts of interest: he simultaneously represented both Pramoj and co-defendant Angel Transport, L.L.C.; he represented Pramoj and his wife, Young Fillmore, the owner of Angel Transport; and he allowed "a fellow member of his firm" to represent Pramoj's son, Ahn. We address each alleged conflict in turn.

A. Representation of Pramoj and Angel Transport

¶34 Pramoj asserts that "[t]rial counsel represented [him] and the company for which [he] worked, Angel Transport LLC, in the same criminal proceeding, without ever explaining the risks and consequences of or obtaining written permission from [him] for the

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[3]Pramoj also argues that, because an interpreter was provided on an "as-needed basis," the "sporadic form of interpretation . . . [wa]s constitutionally deficient under [*State v.*] *Hansen*[, 146 Ariz. 226, 705 P.2d 466 (App. 1985)]. Yet, in *Hansen* this court did not hold that continuous translation was necessary. Rather, when the record established that the defendant fundamentally misunderstood basic concepts, we found in *Hansen* that "the entire record show[ed] that the interpretation afforded the appellant was so inadequate that she was deprived of due process of law." *Id.* at 229-30, 232, 705 P.2d at 469-70, 472. Those facts are clearly distinguishable from this case, where Pramoj was able to successfully communicate in English most of the time. In addition, when the trial court granted Pramoj's request for a translator, it specifically noted that the "translator will be utilized on an as-needed basis for particular technical terms or concepts only." Pramoj never objected to that ruling.

co-representation, in violation of Ethical Consideration 1.7."[4] We first note without deciding that even if Pramoj's counsel had a conflict of interest under ER 1.7, "[t]he existence of a conflict of interest under the Arizona Rules of Professional Conduct does not necessarily mean a defendant received ineffective assistance of counsel." *State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416, 418 (1990). Further, "[j]oint representation does

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[4]That rule provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent[,] confirmed in writing[,] and:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client[;]
>
> (2) the representation is not prohibited by law; and
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

ER 1.7, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S.

not, of itself, deny a defendant effective assistance of counsel." *Id.; see also State v. Gutierrez*, 116 Ariz. 207, 208, 568 P.2d 1105, 1106 (App. 1977) ("The fact that a single attorney represents two defendants in a joint criminal trial is not in and of itself evidence of lack of effective counsel but it is necessary for the appellant to show that a conflict of interest actually existed . . . .").

¶35 Rather, in order to prove ineffective assistance based on a conflict of interest, "the defendant must demonstrate (1) that an actual conflict existed; and (2) that the conflict had an adverse effect on the representation." *Martinez-Serna*, 166 Ariz. at 425, 803 P.2d at 418. To establish an "actual conflict," a petitioner must demonstrate first, "'that some plausible alternative defense strategy might have been pursued,'" and "'[s]econd, he must establish that the alternative defense was inherently in conflict with the attorney's other loyalties.'" *Id., quoting State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986).

¶36 Here, Pramoj has failed to demonstrate a plausible alternative defense strategy. The charges against him were based on fraudulent over billing. Pramoj admitted that he had handled Angel Transport's billing. Thus, it is not clear how Pramoj's counsel could have effectively shifted blame to the entity in order to exculpate Pramoj. *Cf. Martinez-Serna*, 166 Ariz. at 425, 803 P.2d at 418 (counsel had conflict when he was disinclined to "shift[] emphasis (and, hopefully, the blame) to the co-defendant"). This is not a case in which two codefendants' interests were likely adverse. *See State v. Padilla*, 176 Ariz. 81, 85, 859 P.2d 191, 195 (App. 1993) (joint representation rose to level of conflict of interest when

counsel's representation of one defendant required "implicit advocacy against" the other). Rather, because Pramoj admitted he had done the billing for the codefendant company, the interests of Angel Transport and Pramoj were one in the same. As the state pointed out below, "[c]ounsel for [Pramoj] argued, with apparent success, that [Angel Transport] did not undertake any criminal conduct. As such, any argument favoring the acquittal of [Angel Transport] was similarly an argument for the acquittal of [Pramoj]."

¶37 Pramoj also asserts, however, that "[a]s a result of [counsel's] duty to vigorously represent the interest of Angel Transport, LLC, who was found not guilty of all charges at trial, he could not decline to have [Pramoj] testify at trial." In his affidavit filed in support of his Rule 32 petition below, Pramoj said his trial counsel "never asked [him] if [he] wanted to testify. [Counsel] just told [him] you will be a witness and you will be on the stand." But, nowhere in the affidavit did Pramoj say he would have refused to testify if Angel Transport had not been a party. The record does not establish that, but for counsel's co-representation of Pramoj and Angel Transport, Pramoj would not have testified. Without showing an actual conflict existed or any resulting prejudice, we cannot say the trial court abused its discretion in denying relief on this claim.

B. Representation of Pramoj and Young Fillmore

¶38 Pramoj also argues, "[b]y representing the owner of Angel Transport, Young Fillmore, in forfeiture proceedings, trial counsel effectively tied his hands in attempting to make any blame-shifting strategy." Pramoj's trial counsel briefly represented Fillmore in the ancillary civil forfeiture proceedings. Pramoj asserts such representation prevented his trial

counsel from "point[ing] to the company owner as the party who bore ultimate responsibility for actions taken on behalf of the company . . . because by doing so he would prejudice the economic interests of his client Young Fillmore."

¶39 But Pramoj has failed to establish that a plausible defense strategy—shifting the blame to Fillmore—was actually prevented. *See Martinez-Serna*, 166 Ariz. at 425, 803 P.2d at 418. To the contrary, Pramoj testified that he had acted as a manager for Angel Transport and denied any ownership of the company. Further, through questioning, counsel emphasized that Fillmore had owned the company, that she had entered into the contracts, that she had had control of the finances, that Pramoj had had no signatory power, that he had received no dividends, and that he had never filed official documents that would show he shared any ownership of the company. Pramoj also was able to and did shift emphasis, and possibly blame, to Fillmore. He testified, "I bill[ed] everything according to what Young Fillmore gave it [sic] to me, to bill." And when asked about why proceeds from Angel Transport were deposited into other business accounts, Pramoj answered that the accounts were Fillmore's and that only she could answer such questions.

¶40 In his affidavit filed below, Pramoj said that he had asked counsel "to list . . . Fillmore as a witness" and that counsel had responded, "it would not make a difference and it was too late." But Pramoj has never claimed that Fillmore would have implicated herself or helped to prove his innocence in any way. In fact, trial counsel might have made the tactical decision to not call Fillmore because she could have implicated Pramoj. *See State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) ("the decision of what witnesses to

call [i]s counsel's to make"); *see also State v. Atwood*, 171 Ariz. 576, 600, 832 P.2d 593, 617 (1992) (counsel given wide latitude with respect to tactical decisions). Because Pramoj has failed to show either that an actual conflict existed or any prejudice with respect to trial counsel's representation of Fillmore in the forfeiture proceedings, he cannot establish that counsel had been ineffective on this point. Accordingly, we cannot say the trial court abused its discretion in denying relief without a hearing.

C. Alleged conflict based on co-representation

¶41 Lastly, Pramoj alleges ineffective assistance because "[t]rial counsel . . . allowed a fellow member of his firm to represent a co-defendant, Ahn Pramoj, in the same criminal proceeding without informing the Court or [him] of the existence of the relationship and without obtaining . . . informed written consent . . . in violation of [ER] 1.10(a)."[5] He asserts "on information and belief" that his attorney, Mr. Bays, is the "City Attorney for the City of Tombstone," and that Ahn's attorney, Mr. Wakefield, "served at the time of trial of this case as assistant city attorney and city prosecutor for the City of Tombstone."

¶42 In denying relief on this ground, the trial court found that "[a]ttorneys Bays and Wakefield were not in the same firm or same office. While Mr. Bays was the part-time contract Town Attorney of Tombstone, handling civil matters[,] Mr. Wakefield was the part-time City Prosecutor in the Tombstone Magistrate Court." The court ultimately determined "[t]here was no conflict." We cannot say the trial court abused its discretion in so finding.

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[5]That rule deals with the imputation of conflicts of interest among members of a law firm. *See* ER 1.10, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S.

¶43 "Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation." ER 1.0(c). In determining conflicts of interest, government attorneys are guided by ER 1.11. Here, Pramoj has failed to establish that Bays and Wakefield should be treated as a firm for purposes of imputation, let alone that an actual conflict arose based on the alleged firm relationship. *See Martinez-Serna*, 166 Ariz. at 425, 803 P.2d at 418. Pramoj has set forth no facts that would illustrate or define the precise working relationship between Bays and Wakefield and allow us to determine whether a conflict of interest actually existed. *See State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998) ("[M]ere generalizations and unsubstantiated claims" are insufficient to establish a colorable claim.).

¶44 Pramoj asserts, without more, that the co-representation "ha[d] an adverse effect on [him]" because "it impaired [his] ability to shift blame to his co-defendant." But Pramoj has failed to establish that "'the alternative defense was inherently in conflict with the attorney's other loyalties,'" which is required to show an actual conflict of interest. *Martinez-Serna*, 166 Ariz. at 425, 803 P.2d at 418, *quoting Jenkins*, 148 Ariz. at 466, 715 P.2d at 719. To the contrary, he admits that, "[a]s a father, [he] would naturally be inclined to shift the blame to himself rather than to admit any criminal liability on the part of his son." Thus, it appears that it was not his counsel's relationship with Wakefield that "impaired [his] ability to shift blame." Because Pramoj has failed to establish that an actual conflict of interest existed, and thus that his counsel was ineffective on this ground, we deny relief.

DISPOSITION

¶45 Pramoj's convictions and sentences are affirmed. Although we grant his petition for review, we deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge