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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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STATE OF ARIZONA, *Respondent*,

*v.*

ROBERT PATRICK MONAHAN, *Petitioner*.

No. 1 CA-CR 15-0246 PRPC  
FILED 4-20-2017

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Petition for Review from the Superior Court in Mohave County

No. CR2008-1323

The Honorable Rick A. Williams, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Mohave County Attorney's Office, Kingman  
By Matthew J. Smith  
*Counsel for Respondent*

The Brewer Law Office, Show Low  
By Benjamin M. Brewer  
*Counsel for Petitioner*

STATE v. MONAHAN  
Decision of the Court

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**MEMORANDUM DECISION**

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

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**THOMPSON, Judge,:**

¶1 Petitioner Robert Patrick Monahan petitions for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 A jury found Monahan guilty of three counts of sexual conduct with a minor and one count of attempted sexual conduct with a minor. Monahan requested a new trial, arguing, among other things, that the prosecutor engaged in misconduct by shaking or nodding her head in order to influence a detective's testimony during defense counsel's cross-examination. After denying a motion by Monahan pursuant to Arizona Code of Judicial Conduct Rule 2.11(a)(1) to recuse the trial judge,<sup>1</sup> the court held an evidentiary hearing and denied the new trial motion, finding the prosecutor did not engage in the conduct Monahan alleged, and even if the prosecutor had, the conduct did not influence the detective's testimony. The court proceeded to sentencing and imposed three consecutive life terms of imprisonment to be followed by a 10-year prison term. This court affirmed the convictions and sentences, specifically upholding the trial court's finding that prosecutorial misconduct did not occur. *State v. Monahan*, 1 CA-CR 10-1011, 2012 WL 2499662, at \*6, ¶ 24 (Ariz. App. June 6, 2012).

¶3 Monahan petitioned the superior court for post-conviction relief (PCR) pursuant to Arizona Rule of Criminal Procedure (Rule) 32. Monahan also unsuccessfully requested that the PCR court provide him the contact information for the jurors who had deliberated at trial so he could interview them to determine whether they considered the prosecutor's alleged misconduct. In his petition, Monahan raised claims of ineffective assistance of trial counsel (IAC) and he challenged the PCR court's denial of the motion requesting juror information. The court found Monahan's

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<sup>1</sup> In his recusal motion, Monahan recited the substance of Conduct Rule 2.11(a)(1) but incorrectly attributed it to "The Code of Judicial Conduct Canon 3(E)."

STATE v. MONAHAN  
Decision of the Court

IAC claims were not colorable and the challenge to the court's dismissal of the motion requesting juror information was precluded because this court addressed the purported prosecutorial misconduct in Monahan's direct appeal. Accordingly, the court summarily dismissed the petition, and this timely petition for review followed.

¶4 On review, Monahan repeats six of the eight IAC claims he asserted in superior court in addition to the purported error regarding the PCR court's denial of the motion seeking release of juror contact information.<sup>2</sup>

¶5 "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, 393, ¶ 4 (App. 2007). We will uphold the trial court if the result is legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464 (1984).

¶6 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687(1984); *State v. Nash*, 143 Ariz. 392 (1985). If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540 (1985). To show prejudice from IAC in failing to file a particular motion, defendant is required to demonstrate a reasonable likelihood that the motion would have succeeded. *State v. Fillmore*, 187 Ariz. 174, 181 (App. 1996).

¶7 Monahan first argues his trial counsel was ineffective by failing to make a "specific" motion for judgment of acquittal under Rule 20 regarding Count 3, a sexual conduct with a minor offense that allegedly occurred during April of 2002. He relies on the following exchange at trial between the prosecutor and the victim to support his argument that he would have prevailed on such a specific motion because no evidence supports the conviction on count 3:

Q. After that first time in Kingman in February of 2002, did the defendant ever have sex with you again?

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<sup>2</sup> The two IAC arguments not subject to review relate to trial counsel's failure to timely object when the prosecutor referred to Monahan as a "predator" in her mini-opening statement during voir dire and counsel's failure to obtain the victim's complete medical records.

STATE v. MONAHAN  
Decision of the Court

A. Yes.

Q. Okay. How did that happen?

A. The same as it always had.

Q. Okay.

A. He'd take me from my room and take me to his room.

Q. How often did it happen?

A. Around two times a month.

Q. Okay. Did it happen in March of 2002?

A. Yes.

Q. Did it happen in April of 2002?

A. No.

¶8 Monahan admits trial counsel made a “general” Rule 20 motion, however, and he cites no authority standing for the proposition that, under these circumstances, counsel’s failure to make a more specific argument regarding the sufficiency of evidence of a charged offense falls below an objectively reasonable standard. Moreover, to the extent Monahan is substantively arguing he was entitled to Rule 20 relief with respect to count 3, such a claim is precluded because he could have raised the issue in his direct appeal. *See* Ariz. R. Crim. P. 32.2(a)(1); *State v. Curtis*, 185 Ariz. 112, 115 (App. 1995) (rearguing substantive claims in the context of ineffective assistance of counsel to avoid preclusion is not a valid claim) *disapproved with on other grounds by Stewart v. Smith*, 202 Ariz. 446 (2002). Finally, Monahan fails to establish a reasonable likelihood that a Rule 20 motion specifically focused on count 3 would have been successful. Although the victim initially testified that sex with Monahan did not “happen” in April of 2002, she later clarified that they had sex “a couple times a month” beginning in February 2002, and she was “not certain” whether Monahan last attempted to do so in either April or May, 2002. For these reasons, the superior court properly denied this IAC claim.

¶9 Monahan next argues the court erred in failing to find trial counsel ineffective based on counsel’s failure to interview jurors in connection with the prosecutorial misconduct allegation in the motion to dismiss. This argument fails because, in Monahan’s direct appeal, this court

STATE v. MONAHAN  
Decision of the Court

upheld the trial court's finding that no prosecutorial misconduct occurred. *Monahan*, at \*5-6, ¶¶ 23-24. Furthermore, the goal of Monahan's request to interview jurors was to impeach the verdicts by "inquir[ing] into the subjective motives or mental processes [that] led a juror to assent or dissent from the verdict." Rule 24.1(d) specifically prohibits such an inquiry.<sup>3</sup> Ariz. R. Crim. P. 24.1(d).

¶10 Monahan next contends trial counsel was ineffective by failing to request a change of judge for cause pursuant to Rule 10.1 for purposes of presiding over the evidentiary hearing conducted in connection with the motion for new trial. Monahan argues a different judge should have been assigned to hold the hearing so the trial judge could be called as a witness based on Monahan's allegations that the judge had made statements to Monahan's trial counsel regarding the prosecutor's similar misconduct in previous cases. In its written order denying the new trial motion, the court clarified that it never made such statements to trial counsel.

¶11 We reject Monahan's IAC claim. First, he fails to cite any authority supporting the proposition that a Rule 10.1 motion for change of judge would have reasonably been successful under the circumstances present in this case. Furthermore, assuming such a motion would reasonably have been granted, the trial judge's express finding that he did not make any statements to defense counsel regarding the prosecutor's purported misconduct in previous cases indicates the judge's testimony would not have been helpful to Monahan's claim of prosecutorial misconduct. Thus, Monahan fails to establish ineffectiveness of trial counsel in failing to file a motion for change of judge for cause,<sup>4</sup> and he does not show any resulting prejudice from the trial judge not testifying at the hearing on the motion for new trial.

¶12 Monahan also asserts the court erred in denying his IAC claim based on trial counsel allegedly coercing Monahan not to testify at trial. As

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<sup>3</sup> For the same reasons, we reject Monahan's argument on review that the court should have granted his request during the PCR proceedings to interview jurors.

<sup>4</sup> We also note that the strategic decision not to file a Rule 10.1 motion undercuts Monahan's IAC claim. See *State v. Vickers*, 180 Ariz. 521, 526 (1994) ("[D]isagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis.") quoting *State v. Nirschel*, 155 Ariz. 206, 208 (1987).

STATE v. MONAHAN  
Decision of the Court

he did in his petition for PCR, Monahan contends trial counsel told him that if Monahan did testify, he (counsel), would not ask him questions.

¶13 The record does not support Monahan's IAC claim. When he informed the trial court that he would not testify, the court engaged in a colloquy with Monahan that established Monahan knew he had the right to testify and the decision whether to do so was his alone, he was aware of the process of examination and cross-examination, and he voluntarily chose to accept his counsel's advice and forego testifying. Although Monahan provided an affidavit to the PCR court avowing trial counsel told him that he (counsel) would not ask Monahan questions, thus causing Monahan to feel coerced into not testifying, a petitioner's self-serving statements in his or her own affidavit are generally insufficient to raise a colorable claim. *State v. Goswick*, 142 Ariz. 582, 585 (1984); *State v. Wilson*, 179 Ariz. 17 (App. 1993).

¶14 Monahan next argues trial counsel was ineffective for failing to object to the admission of other-act evidence at trial. The evidence consisted of witness testimony establishing Monahan had been observed getting into the victim's bed while she was sleeping, which was not an incident alleged in the indictment.

¶15 Trial counsel was not ineffective for failing to object to this testimony because the testimony was admissible. It was relevant to bolster the victim's testimony that Monahan would carry her from her bedroom at night to his bedroom to engage in sexual intercourse with her. Thus, Monahan cannot establish a reasonable likelihood that the trial court would have sustained an objection to the testimony pursuant to Ariz. R. Evid. 404(b).<sup>5</sup> Consequently, Monahan cannot establish counsel's ineffectiveness on this basis. Monahan also cannot show that the admission of the testimony prejudiced him. As this court noted in Monahan's direct appeal,

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<sup>5</sup> Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character or "to show action in conformity therewith." Such evidence may be admissible, however, when offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). "The list of 'other purposes' in [R]ule 404(b) . . . is not exclusive; if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts." *State v. Jeffers*, 135 Ariz. 404, 417 (1983).

STATE v. MONAHAN  
Decision of the Court

the jury was properly instructed on how to consider other-act evidence.  
*Monahan*, at \*4, ¶ 17.

¶16 For the foregoing reasons, the superior court did not abuse its discretion in dismissing Monahan's petition for PCR. Accordingly, we grant review but deny relief.



AMY M. WOOD • Clerk of the Court  
FILED: AA