

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

STATE OF ARIZONA, *Respondent*,

v.

OSCAR ROBLES REAL, *Petitioner*.

No. 1 CA-CR 15-0250 PRPC
FILED 6-22-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2010-101722-001
The Honorable Roger E. Brodman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Respondent

Oscar Robles Real, Kingman
Petitioner

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which
Judge Donn Kessler and Judge Paul J. McMurdie joined.

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S W A N N, Judge:

¶1 A jury found Oscar Robles Real guilty of two counts of aggravated assault, and the superior court sentenced him to an aggregate prison term of 9.5 years. We affirmed Real's convictions and sentences on direct appeal in *State v. Real*, 1 CA-CR 11-0423, 1 CA-CR 11-0426, 2012 WL 6719576 (Ariz. App. Dec. 27, 2012) (mem. decision). Real then timely filed a petition for post-conviction relief, arguing that his trial counsel provided ineffective assistance by (1) failing to investigate and interview eyewitnesses who would have testified in Real's favor, and (2) failing to object, or to move for a curative instruction or for mistrial, when the prosecutor engaged in misconduct. The superior court held that Real failed to establish a colorable claim, and the court therefore dismissed the petition. Real now seeks relief from this court, renewing his claims of ineffective assistance of counsel and arguing that he was entitled to an evidentiary hearing.

¶2 "We review for abuse of discretion the superior court's denial of post-conviction relief based on lack of a colorable claim." *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17 (2006). We discern no abuse of discretion here.

¶3 First, regarding Real's contention that trial counsel was ineffective based on counsel's failure to interview eyewitnesses, Real was required to provide affidavits containing the testimony those witnesses would have offered. *State v. Borbon*, 146 Ariz. 392, 399 (1985). Because he failed to do so, he did not raise a colorable claim requiring an evidentiary hearing. *Id.*

¶4 Second, regarding Real's contention that trial counsel was ineffective based on counsel's failure to object, move for a curative instruction, or move for a mistrial in response to prosecutorial misconduct, Real was required to demonstrate both deficient performance and actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 688-92 (1984). We specifically addressed the alleged prosecutorial misconduct on direct appeal and found no error, fundamental or otherwise. Real therefore could not have been prejudiced by trial counsel's inaction. Real may not preserve issues raised on appeal by couching them as claims of ineffective assistance of counsel when he was not prejudiced by his counsel's decisions at trial.

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¶5

For these reasons, we grant review but deny relief.



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