IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. STEPHEN EDWARD MAY, Petitioner.	2 CA-CR 2012-0257-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006030290001SE

Honorable Kristin C. Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant — Phoenix
Attorneys for Respondent

The Law Office of JoAnn Falgout, P.L.C.
By JoAnn Falgout — Tempe

and

Fahringer & Dubno
By Herald Price Fahringer and Erica T. Dubno — New York, NY
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Following a jury trial, petitioner Stephen May was convicted of five counts of child molestation. He was sentenced to consecutive prison terms totaling seventy-five years. He appealed, and this court affirmed the convictions and sentences imposed. *State v. May*, No. 1 CA-CR 2007-0144, ¶ 17 (memorandum decision filed July 24, 2008). He then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily denied relief on several of his claims. Following an evidentiary hearing on his remaining claims, which consisted primarily of claims of ineffective assistance of trial and appellate counsel, the court denied the petition in its entirety. This petition for review followed. "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, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

Precluded and Waived Claims

¶2 May argues the trial court erred when it rejected his claim that his conviction must be reversed because A.R.S. § 13-1410(A), the statute under which he was convicted, shifts from the state to the defendant the burden of proving lack of sexual motivation and is, therefore, unconstitutional. But, as the court correctly concluded, May is precluded from raising this claim, having waived it by not raising it at trial or on appeal.[1] *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding"). Indeed, on appeal May argued the

[1]Although May does not argue to the contrary, we note the trial court correctly concluded this "claim does not implicate constitutional rights which are considered personal to the defendant . . . and is not of sufficient magnitude that the State is required to prove that he knowingly, intelligently and voluntarily failed to raise it on appeal." *See Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d at 951.

court had erred when it instructed the jury that lack of sexual motivation was an affirmative defense he was required to prove, but he did not challenge the constitutionality of the statute. *See May*, No. 1 CA-CR 2007-0144, ¶¶ 4-6. Relying on *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), May asserts in his reply to the state's response to his petition for review that the error was fundamental and that this issue is, therefore, "ripe," and he is not precluded from raising it. But May misapplies *Henderson* and the fundamental error doctrine. Our supreme court explained in *Henderson* that error not raised at trial still may be addressed on appeal when the error is "fundamental." 210 Ariz. 561, ¶ 19, 115 P.3d at 607. However, a claim is not excepted from the rule of preclusion applicable to Rule 32 proceedings simply because the alleged error involved may be characterized as fundamental. *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958. The trial court did not abuse its discretion in finding this claim precluded.

¶3 May also contends the trial court abused its discretion in rejecting his claims that he was entitled to relief due to prosecutorial misconduct and the court's erroneous application at trial of Rule 404(b) and (c), Ariz. R. Evid. But again, because May could have raised these claims on appeal and failed to do so, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding Rule 32.1(a) claim "waived at trial, on appeal, or in any previous collateral proceeding").

¶4 May contends for the first time on review that he is entitled to relief because "the jury did not have jurisdiction to reach a verdict." He bases this argument on

the fact that the jurors continued deliberating after a mistrial initially was declared.[2] The propriety of the continued deliberations was raised in May's direct appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11. And the trial court correctly found that his claim it had erred by permitting the jury to continue deliberating was precluded because it had been addressed and rejected on appeal. Consequently, to the extent May argues he is entitled to relief due to the jury's continued deliberations, his argument is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 May nevertheless contends he can raise this issue in his petition for review because, given the initial declaration of a mistrial, the jury lacked subject matter jurisdiction to decide his case. But in his petition for post-conviction relief before the trial court, May did not base his argument on subject matter jurisdiction. We will not consider May's argument because we do not consider issues raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review). Moreover, this is not a subject matter jurisdiction issue. *See State v. Maldonado*, 223 Ariz. 309, ¶ 14, 223 P.3d 653, 655 (2010) ("'subject matter jurisdiction' refers to a court's statutory or constitutional power to hear and determine a particular type of case").

[2]After extensive deliberations, the jury informed the trial court that it was deadlocked. The court dismissed the jury and declared a mistrial. A few minutes later, the jury asked to begin deliberations again, and both the prosecutor and May's attorney stated they did not object.

Alleged Juror Misconduct

¶6 May next contends the trial court erred in rejecting his claim of juror misconduct. The jury foreman brought a stuffed animal into deliberations for demonstrative purposes. May argues, as he did below, that the stuffed animal was "extrinsic evidence" and should not have been permitted in the jury room. He contends the court erred by finding he was not prejudiced by its use.

¶7 In neither his petition for post-conviction relief nor in his petition for review did May specify the subsection of the rule under which he was seeking relief for this purported misconduct. *See* Ariz. R. Crim. P. 32.5 ("The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him . . . ."). To the extent the claim fell under Rule 32.1(a), it clearly was precluded because it could have been raised on appeal. Ariz. R. Crim. P. 32.2(a). But May seemed to assert this claim under Rule 32.1(e) based on newly discovered evidence. In his petition for post-conviction relief, he stated that "significant relevant facts were not available until after trial and appeal." "Evidence is not newly discovered unless . . . at the time of trial . . . neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Thus, even assuming May was attempting to raise a claim of newly discovered evidence, he did not show he exercised the requisite due diligence in attempting to secure the new evidence. *See* Ariz. R. Crim. P. 32.1(e)(2). Consequently, May has not sustained his burden of establishing the trial court abused its discretion by denying relief on this ground.

Ineffective Assistance of Counsel Claims

¶8 May also challenges the trial court's denial of relief on his claims of ineffective assistance of trial and appellate counsel, which the court rejected after an evidentiary hearing. To establish such a claim, a defendant must show that counsel's performance fell below prevailing professional norms and the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The Sixth Amendment does not entitle a defendant to mistake-free representation. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006); *see also State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (defendants "not guaranteed perfect counsel, only competent counsel"), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). And there is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel's conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶9 "Matters of trial strategy and tactics are committed to defense counsel's judgment . . . ." *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988); *accord State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) ("Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel."). And "'disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some

reasoned basis.'" *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), *quoting State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987).

¶10 Furthermore, even if counsel's strategy proves unsuccessful, tactical decisions normally will not constitute ineffective assistance. *State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975); *see also Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d at 636 ("strategic decision to 'winnow[] out weaker arguments on appeal and focus[] on' those more likely to prevail is an acceptable exercise of professional judgment"), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (alterations in *Febles*). And, when the trial court has held an evidentiary hearing, we defer to its factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶11 May advances several claims of ineffective assistance of trial and appellate counsel. Two of his claims—that counsel was ineffective for failing to raise a jurisdiction challenge to the continued deliberations and failing to object to a video of post-arrest questioning—are being raised for the first time on review.[3] Therefore, we do not address these claims. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶12 May also contends the trial court erred in rejecting his claim that trial counsel was ineffective for failing to object to the continued jury deliberations. But even

[3]May asserts in his reply to the state's response to his petition for review that the issue of the video was raised below. Although this claim was mentioned briefly in May's petition for post-conviction relief and during the evidentiary hearing, he did not present the trial court with sufficient argument to allow it to rule on the issue. *Cf. State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy").

assuming, without deciding, that counsel's performance was deficient, May cannot show prejudice because we rejected the underlying claim of error on appeal. *May*, No. 1 CA-CR 2007-0144, ¶¶ 7-11; *see also Strickland*, 466 U.S. at 694 (to establish prejudice, defendant must show "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Inability to show prejudice is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance.").

¶13 Similarly, the trial court correctly rejected his fourth claim—that trial counsel "did not adequately confer with [him]" before allowing the jury deliberations to continue. In rejecting this claim, the court found that counsel's decision was "a tactical and strategic decision" that cannot "form the basis for a claim of ineffective assistance." But the claim also fails because May does not assert he would have made a different decision had he been consulted further. *See id.* (defendant must prove prejudice; without it, court need not address counsel's performance); *see also Strickland*, 466 U.S. at 694.

¶14 With respect to the remaining claims of ineffective assistance of counsel, the trial court correctly identified and resolved them in a manner permitting this or any other court to review and determine the propriety of its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by restating the court's ruling, and because the ruling is supported by the record and the applicable law, we adopt it. *See id.*

¶15 Accordingly, although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge