

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

FILED BY CLERK

OCT 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0373-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JIMMY KELLY CONTRERAS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2004125536002DT

Honorable Margaret R. Mahoney, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Jimmy K. Contreras

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Jimmy Contreras seeks review of the trial court's orders denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and his

request for DNA¹ testing made pursuant to A.R.S. § 13-4240. We will not disturb those rulings unless the court clearly has abused its discretion. *See State v. Gutierrez*, 229 Ariz. 573, ¶ 19, 278 P.3d 1276, 1280 (2012); *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Contreras has not met his burden of establishing such abuse here.

¶2 Contreras was convicted after a jury trial of three counts of sexual conduct with a minor, one count of child molestation, one count of attempted child molestation, nine counts of kidnapping, and eleven counts of child abuse and sentenced to consecutive prison terms totaling more than 250 years. His convictions and sentences were affirmed on appeal. *State v. Contreras*, No. 1 CA-CR 06-0368 (memorandum decision filed June 21, 2007). He filed a notice of post-conviction relief and appointed counsel filed a notice stating he had reviewed the record but found “no colorable claims which can be raised . . . in post-conviction proceedings.”

¶3 Contreras filed a pro se petition for post-conviction relief arguing that the court lacked subject matter jurisdiction over him because the indictment was obtained by perjured testimony and that his trial counsel had been ineffective in failing to interview or re-interview various witnesses and victims and in failing to preserve and raise a third-party culpability defense. He also argued that his appellate counsel had been ineffective in failing to argue the trial court had erred in denying his motion to sever, that his “right to [an] impartial jury” had been violated, and that the state had committed misconduct during jury voir dire. Finally, he argued that the rule permitting the state’s designated

¹Deoxyribonucleic acid.

case agent to be present during the entire trial violated his right to a fair trial, that this court failed to search the record on appeal for fundamental error, and that the adoption of Rule 32 proceedings to replace relief by means of a writ of habeas corpus violated his constitutional rights.

¶4 The trial court summarily denied relief, concluding the majority of Contreras's claims were precluded or were not cognizable under Rule 32 and he had not made a colorable claim of ineffective assistance of trial or appellate counsel. The court also rejected various claims Contreras had first raised in his reply to the state's response to his petition for post-conviction relief. After the court denied Contreras's subsequent motion for reconsideration, Contreras filed a "Request for DNA Evidence," citing § 13-4240 and asserting he was entitled to DNA testing of various items. The trial court denied that request, stating Contreras had not met the requirements of § 13-4240, including demonstrating that the evidence existed, was in the state's possession, and was suitable for DNA testing. This petition for review followed.

¶5 On review, Contreras raises various claims that his trial counsel was ineffective. Specifically, he claims counsel failed to adequately develop his claim that he was not able to engage in sexual intercourse and therefore could not have sexually abused the victim. He additionally argues counsel was ineffective because he did not obtain an "expert on Child Psychology" to provide testimony rebutting that of the state's expert or a medical expert to provide testimony that his sexual assaults of the victim were impossible because her hymen was intact. And he claims counsel failed to properly cross-examine various witnesses, did not adequately consult with him about the case, did

not seek the preclusion of a witness's testimony, and failed to "vigorously" argue that the fact the state had presented no DNA evidence required his acquittal or to seek dismissal of the sexual abuse charges on that basis. But Contreras raised none of these claims of ineffective assistance of counsel in his petition below and, in any event, does not support them with citations to the record or relevant authority. We therefore do not address the merits of these claims. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to, or ruled on by, trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "specific references to the record" and "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review).

¶6 Contreras also asserts on review that the state knowingly relied on false evidence in obtaining his indictment and convictions and committed misconduct during its opening statement. To the extent Contreras raised these arguments below, they are precluded because he could have raised them on appeal but did not. Ariz. R. Crim. P. 32.2(a)(3). In any event, he again does not support these arguments with citations to the record. *See* Ariz. R. Crim. P. 32.9(c)(1). Contreras also appears to argue that his claims are not subject to preclusion because he is actually innocent. But a claim of actual innocence does not allow a defendant to raise precluded claims. It instead would afford relief if Contreras "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would

have found [him] guilty of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h). But he raised no such claim below, and we therefore do not address his actual-innocence argument further. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶7 Finally, Contreras contends the trial court erred in rejecting his request for DNA testing. But we do not address this argument because, again, Contreras has failed to develop it in any meaningful way, providing no citations to either the record or competent authority. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶8 For the reasons stated, although review is granted, relief is denied.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge