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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RAYMOND ALFRED LATHAM IV, Petitioner.	)	2 CA-CR 2012-0387-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR2007109937001

Honorable Roland J. Steinle III, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel — Phoenix
Attorneys for Respondent

Raymond Alfred Latham IV — Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Raymond Latham IV seeks review of the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 After a jury trial, Latham was convicted of three counts of sexual conduct with a twelve-year-old minor. The trial court sentenced him to consecutive terms of life in prison without the possibility of release for thirty-five years. This court affirmed his convictions and sentences on appeal. *State v. Latham*, No. 1 CA-CR 08-0182 (memorandum decision filed Nov. 28, 2008).

¶3 Latham then filed a notice of post-conviction relief. Appointed counsel notified the trial court he had reviewed the trial and appellate records and could find no viable issues or colorable claims for Rule 32 relief, and Latham filed a supplemental petition alleging ineffective assistance of trial and appellate counsel and a procedural error at sentencing. In its response, the state argued Latham's petition was subject to summary dismissal. Specifically, the state maintained that Latham's claim of sentencing error was precluded because it could have been raised on appeal, but was not, and that his claims of ineffective assistance of trial and appellate counsel were not colorable. *See* Ariz. R. Crim. P. 32.6(c) (court shall dismiss petition upon determination that "no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief . . . and that no purpose would be served by any further proceedings"). The court dismissed the petition "[f]or the reasons stated in the response filed by the

State," and this petition for review followed. On review, Latham reasserts the claims raised in his petition for post-conviction relief.

¶4 "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, ¶ 17, 146 P.3d 63, 67 (2006). A colorable claim 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). "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Bennett,* 213 Ariz. 562, ¶ 21, 146 P.3d at 68. We find no abuse of discretion here.

¶5 First, we agree with the state and the trial court that Latham's claim of error during his sentencing hearing is precluded. Latham asserts the court erred in failing to cite former A.R.S. § 13-604.01, 2006 Ariz. Sess. Laws, ch. 295, § 2, when it sentenced him to terms of life imprisonment.[1] Because Latham failed to raise this claim on appeal, it is waived and, therefore, precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding relief "based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding").

[1]Although the trial court did not refer expressly to this statute at sentencing, it entered judgment against Latham pursuant to "statutes set forth in the indictment." The indictment, in turn, clearly alleged sentencing enhancements pursuant to former § 13-604.01, which mandated the sentences imposed. *See* 2006 Ariz. Sess. Laws, ch. 295, § 2.

¶6 Latham contends his trial counsel was ineffective for a number of reasons. Many of these claims appear to relate to Latham's insistence that he should have been entitled to defend against the charges on the ground he did not know the victim's age.[2] This is not the law in Arizona. *See State v. Falcone*, 228 Ariz. 168, ¶ 18, 264 P.3d 878, 883 (App. 2011) (affirmative defense to sexual conduct in A.R.S. § 13–1407(B), based on reasonable lack of knowledge of minor's age "limited to cases in which the victim was fifteen or older"); *State v. Carlisle*, 198 Ariz. 203, ¶ 12, 8 P.3d 391, 394-95 (App. 2000) (sexual conduct with minor under age of fifteen "involves two elements: (1) the defendant intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; and (2) the other person ha[d] not reached his or her fifteenth birthday"). Counsel is not required to pursue a defense that is legally unavailable or seek admission of irrelevant evidence, and these claims are not colorable with respect to either trial or appellate counsel.

¶7 Latham also contends counsel was ineffective in failing to object to a deputy's testimony that, during his interview, Latham appeared "subdued" and "[k]ind of

[2]According to evidence at trial, Latham admitted his sexual conduct with the victim to police, but denied knowing she was twelve years old. Latham asserts trial counsel was deficient in failing "to subpoena crucial defense witnesses" or "records from [his] cell phone carrier" which, he maintains, would have rebutted testimony that he had received a text message regarding the victim's true age, and also in failing to object to the admission of photographs of the victim "that made her look younger than she was." He also asserts counsel was deficient in failing to file petitions for special action to challenge the trial court's rulings precluding a defense based on his lack of knowledge of the victim's age and precluding the admission of videotapes intended to show the victim "was not hiding" in his truck before the two were apprehended.

felt like he was in a lot of trouble. His world was kind of crashing in on him." Without explanation, Latham contends this statement was inadmissible hearsay. But he fails to develop any legal argument in support of this assertion or suggest how the testimony prejudiced him. Indeed, it appears from the deputy's later testimony that he essentially had paraphrased statements Latham himself had made while admitting the sexual conduct, and Latham does not challenge the admission of those statements. Latham has thus failed to make a colorable showing that counsel had been deficient in failing to object or that this omission caused him prejudice.

¶8 Similarly, Latham misunderstands the law when he apparently suggests counsel was deficient for failing to object to testimony about a letter Latham had written to the victim, because admission of "[t]he complete letter could [have] impeach[ed] the accuser." We fail to see how a letter written by Latham could be used to impeach his victim. Moreover, Latham fails to explain what other statements in the letter might be relevant and otherwise admissible. We see no basis to conclude counsel performed deficiently in this regard or that Latham was prejudiced by counsel's actions or omissions.

¶9 Latham next contends counsel was ineffective because he "made it clear he did not want [Latham] to testify, even though [Latham] wanted to." But the record establishes that Latham understood it was his choice, not counsel's, to either testify or refrain from doing so. Latham fails to provide any basis to conclude counsel's professional advice that he not testify was either objectively unreasonable or prejudicial. Latham also argues counsel rendered ineffective assistance during closing argument by

referring to the victim as "a monster" who intentionally had misled Latham about her age. But "disagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). As explained above, the only defense Latham was inclined to offer—his lack of knowledge of the victim's age—was legally unavailable to him. Counsel's comments during oral argument were apparently intended to engender sympathy for Latham, notwithstanding the limitations of his defense and the strong evidence against him. Latham has failed to offer any evidence that counsel's strategy in this regard fell below prevailing professional norms or caused him prejudice.

¶10 Finally, Latham contends counsel was ineffective for failing to assert the jury panel had been tainted when a venireperson, who ultimately was excused, stated he would "be troubled" if the defendant did not take the stand, in light of the alleged age of the victim. As we explained when Latham raised a similar argument in his direct appeal, he "bears the burden of showing that remarks of the excused juror prejudiced others," and statements like the one made by the excused juror "are not presumed to taint the jury pool." *Latham*, No. 1 CA-CR 08-0182, ¶ 15, *citing State v. Doerr*, 193 Ariz. 56, ¶ 19, 969 P.2d 1168, 1174 (1998). We found "no evidence in the record that the jury was affected in any way by this prospective juror's comment," *id.*, and Latham has provided no other evidence of such prejudice in his Rule 32 petitions. Accordingly, he has failed to

establish even a colorable claim that, had counsel challenged the jury pool, there is a reasonable probability the result of his trial would have been different.

¶11 Based on the record before us and the applicable law, the trial court did not abuse its discretion in dismissing Latham's petition for post-conviction relief. Accordingly, although we grant 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