IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KNUTE ECKHARD KOLMANN,
Petitioner.

No. 2 CA-CR 2015-0071-PR
Filed April 8, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Yavapai County
No. P1300CR20061557
The Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Sullivan Polk, Yavapai County Attorney
By Steven A. Young, Deputy County Attorney, Prescott
Counsel for Respondent

White Law Offices, PLLC, Flagstaff
By Wendy F. White
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Knute Kolmann seeks review of the trial court's orders denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Kolmann has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Kolmann was convicted of ten counts of sexual exploitation of a minor and one count of conspiracy to commit sexual exploitation of a minor and was sentenced to consecutive prison terms totaling 155 years. We affirmed his convictions and sentences on appeal. *State v. Kolmann*, No. 1 CA-CR 10-0378 (memorandum decision filed Mar. 22, 2012).

¶3 Kolmann filed a notice of and petition for post-conviction relief. His claims centered on the trial court's decision to excuse a juror, L.M., during deliberations. After deliberations had begun, a juror notified the court that another juror needed to speak to the judge about a "personal matter." After being admonished that she "cannot talk to [the court] about what is going on in the jury room or anything having to do with the deliberations," L.M. informed the court that she felt she "can't judge anybody." Both counsel declined to question L.M. further, and the court briefly spoke with L.M.:

> The Court: I need to discuss it with the lawyers, then. Is there anything more that you wanted to say on this issue? It is just a

> matter of not feeling like you can make a judgment in this particular case?
>
> [L.M.]: Right
>
> The Court: For personal reasons.
>
> [L.M.]: Right.

¶4 After some discussion with counsel, the court excused L.M. from the jury and contacted an alternate. The court also apprised the jury that L.M. had been excused and that an alternate would take her place. The court further admonished the jury that L.M.'s replacement "hasn't had the benefit of the discussions with you of what has taken place already in the jury room. So to some extent you are going to have to start over again and involve her in discussions with regard to any individual and all of the counts, generally." It further instructed the jury not to "discuss whatever has been going on in the deliberations" or "start deliberating [before] all 12 [jurors] are present."

¶5 Kolmann included with his petition an affidavit by L.M. in which she avowed that, although she "did not feel competent to be a juror or to judge anyone," she additionally was "the only one that was not convinced that Mr. Kolmann was guilty" and "did not want to be the one that 'hung' the jury." L.M. further claimed she did not "fully understand" that her "job was only to decide if [she] believed that the State had proven the defendant guilty beyond a reasonable doubt," and not "to decide if he was guilty or if he was innocent." L.M. also asserted another juror had advised her, in order to be excused from jury service, to tell the court that she did not "feel competent to judge another human[ ]being," not that she "didn't agree with the rest of [the jurors]."

¶6 In his petition for post-conviction relief, Kolmann raised several instances of alleged ineffective assistance of trial counsel. Specifically, he argued counsel (1) had failed to sufficiently voir dire L.M. about her reasons for claiming she could not render a verdict, or in the alternative, for failing to argue against her release or move

for a mistrial; (2) did not request that the court instruct the jury pursuant to Rule 18.5(h), Ariz. R. Crim. P., that the jury was required to "begin deliberations anew"; and (3) should not have waived his right to be present during the substitution proceedings. He also suggested the court had conducted an insufficient inquiry into L.M.'s reasons for seeking to be excused, and he maintained appellate counsel should have raised the Rule 18.5(h) instruction issue. Last, Kolmann claimed juror misconduct, based on L.M.'s actions and those of the juror who had allegedly coached L.M. on how to be excused from the jury.

¶7 The trial court summarily denied relief. It concluded that counsel's decision not to seek further voir dire of L.M. was strategic and that, in any event, Kolmann had not shown any likelihood L.M. would have changed her answers. It further noted that, to the extent Kolmann argued it had erred in failing to further question L.M., his claim was precluded because it had not been raised on appeal. The court further determined the jury had been adequately instructed pursuant to Rule 18.5 and, thus, trial and appellate counsel had no basis to raise that issue. And the court concluded counsel's waiver of Kolmann's presence did not fall below prevailing professional standards and, in any event, Kolmann had not demonstrated resulting prejudice. In rejecting Kolmann's claim of juror misconduct, the court concluded that many of the assertions in L.M.'s affidavit were unsupported by any other evidence, that portions of it attributing statements to the other juror were hearsay, and that it was "internally contradictory." This petition for review followed the court's denial of Kolmann's motion for rehearing.

¶8 On review, Kolmann first argues he is entitled to an evidentiary hearing on his claims of ineffective assistance of trial and appellate counsel. "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). "To state a colorable claim of ineffective assistance of counsel," Kolmann was required to "show both that counsel's performance fell below objectively reasonable standards and that

this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶9 "[W]e must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 100-01 (App. 2013), *quoting Strickland*, 466 U.S. at 689. Therefore, "disagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis,' even if the tactics counsel adopts are unsuccessful." *Id., quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

¶10 Kolmann argues the trial court erred in characterizing counsel's decision to not further question L.M. as tactical. He correctly points out that counsel professed having no experience with such circumstances. This is hardly surprising, given that the trial court also was unsure how to proceed, and Kolmann has cited no Arizona authority discussing similar circumstances. Counsel's lack of experience with a unique legal situation does not demonstrate Kolmann has made a colorable claim that counsel fell below prevailing professional norms by declining to further question L.M. We note that counsel refrained from further questioning only after extensive discussion with the trial court and the state. And Kolmann has not identified any particular questions counsel should have asked, or would have been permitted to ask, in light of the court's admonition that L.M. could not discuss "what is going on in the jury room or anything having to do with the deliberations." Thus, he has not made a colorable claim of prejudice.

¶11 Kolmann further argues that "whether [counsel made] a strateg[ic] decision is a factual determination requiring an evidentiary hearing." But he misstates the law. We presume counsel made a tactical decision, and Kolmann must identify evidence that, if taken as true, suggests he did not. *Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 100-01. Kolmann has not done so here. Nor do we agree with his suggestion that the trial court improperly made factual findings in rejecting his claims of ineffective assistance of

counsel. Although the court's ruling did not recite the precise burden Kolmann is required to meet in order to be entitled to an evidentiary hearing, we must presume the court knew and followed the law. *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008). In any event, Kolmann has not met that burden.[1]

¶12 Kolmann also repeats his argument that trial and appellate counsel were ineffective in failing to question whether the trial court complied with Rule 18.5(h) by instructing the jury to restart deliberations when L.M. was replaced with an alternate. First, trial counsel's decision whether to object to jury instructions plainly is tactical, and Kolmann has not argued counsel's restraint was without a tactical basis. And, in any event, Kolmann has not demonstrated the court's instructions here were insufficient.

¶13 Pursuant to Rule 18.5(h), a court is required to instruct a jury "to begin deliberations anew" if an alternate joins the jury. Consistent with that requirement, the court here instructed the jury it would "have to start over again and involve [the new juror] in discussions with regard to any individual and all of the counts, generally." Although Kolmann insists this instruction was "insufficient as a matter of law," he has not explained why. Although it arguably could have been more forceful, the court's instruction adequately conveyed to the jury that it was required to restart its deliberations with the participation of the new juror.

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[1]In reference to his claim that counsel should not have waived his presence during substitution proceedings, Kolmann cites *State v. Guytan*, 192 Ariz. 514, 968 P.2d 593 (App. 1998). There, we noted that "it is not good practice for defense counsel to waive or for the trial court to allow defense counsel to waive the presence of the defendant without consultation with the defendant when issues of substance are before the court." *Id.* ¶ 17. But even assuming, without deciding, that counsel falls below prevailing professional norms by waiving a defendant's presence in these circumstances, Kolmann has not attempted to show he was prejudiced by his absence. *Cf. id.* n.4, 968 P.2d at 593 n.4 (presence error subject to harmless error analysis).

¶14 Kolmann correctly notes, however, that the alternative juror was not present when the trial court gave this instruction. But we must presume the original eleven jurors followed the court's instruction to "start [their deliberations] over" to include the new juror. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Thus, we can discern no prejudice to Kolmann that could have resulted from that juror not receiving the instruction, and he has proposed none.

¶15 Kolmann additionally argues he raised a colorable claim of juror misconduct. He claims on review that L.M. committed misconduct because she "did not tell the judge the real reason that she wanted to be released from the jury" and that the other juror she had consulted committed misconduct because he "advised her to be untruthful to the judge so that she would be released." He argues that, in rejecting this claim, the court improperly characterized part of L.M.'s affidavit as inadmissible hearsay and made determinations about her credibility.

¶16 We agree with Kolmann that L.M.'s statements in her affidavit about her conversation with the other juror are not hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *State v. Palmer*, 229 Ariz. 64, ¶ 7, 270 P.3d 891, 893 (App. 2012), *citing* Ariz. R. Evid. 801(c). L.M.'s avowals about the other juror's statements were not made to show the juror's statements were true, but instead to explain her reasons for what she had done.[2] And, to the extent the court made any credibility determinations, we agree those determinations would have been

[2]To the extent Kolmann asserts the other juror's statements to L.M. allow the inference that juror had some subjective motive to encourage L.M. to seek to be excused from the jury, the statements are not admissible for that purpose. *See* Ariz. R. Crim. P. 24.1(d) ("No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.").

premature, because the court was required to treat L.M.'s assertions as true. *See Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d at 114. However, we decline to grant relief because Kolmann has not made a colorable claim of juror misconduct. *See State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007) (appellate court may affirm for any reason supported by record).

¶17 Rule 24.1(c)(3)(iii), Ariz. R. Crim. P., provides that a defendant may seek relief for juror misconduct if a juror "[p]erjur[ed] himself or herself or willfully fail[ed] to respond fully to a direct question posed during the voir dire examination."[3] Kolmann argued in his petition below that L.M. had committed misconduct by not giving a complete answer to the trial court. He did not argue, as he does now, that L.M. had lied about her reasons for wanting to be excused from the jury. We do not address arguments raised for the first time on review. *See State v. Vera*, 235 Ariz. 571, ¶ 8, 334 P.3d 754, 756-57 (App. 2014); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review "shall contain . . . issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

¶18 In light of the trial court's admonition that L.M. not reveal "anything having to do with the deliberations," we cannot agree with Kolmann's position that L.M.'s answer was incomplete. Pursuant to that directive, she could not have disclosed she was the sole juror who would not find Kolmann guilty or her own lack of confidence in the face of the other jurors' opinions. And the court did not inquire into her reasons for believing she could not "judge anybody." Thus, there was no reason for her to have told the court she did not understand her role or the state's burden of proof.

¶19 And Kolmann acknowledged below that the other juror's purported misconduct is not encompassed by Rule 24.1(c)(3).

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[3]We assume, without deciding, that Kolmann is not precluded from raising a claim of juror misconduct when such a claim could have been raised in a motion for new trial. *See* Ariz. R. Crim. P. 24.1(c)(3), 32.2(a).

Without citing relevant authority, he nonetheless asserted that the juror's conduct was "more serious" and violated his "right to a unanimous jury, to a fair and impartial jury, to a twelve person jury and to due process of law." Although we agree that a juror commits misconduct by giving another juror strategic advice on how to seek removal from the jury, Kolmann must nonetheless demonstrate resulting prejudice. *See State v. Miller*, 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994). He has not done so. L.M. did not suggest the other juror encouraged her to attempt to seek release from jury service, nor does Kolmann provide any evidentiary support for his claim that the other juror's advice was part of a scheme to end deliberations. Ultimately, Kolmann is entitled to an impartial jury, not a particular jury. *See State v. Morris*, 215 Ariz. 324, ¶ 40, 160 P.3d 203, 213 (2007).

¶20 Although we grant review, we deny relief.