IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KEITHEN RAY HAROLD JR.,
Petitioner.

No. 2 CA-CR 2016-0146-PR
Filed August 3, 2016

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NOT FOR PUBLICATION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 Pima County
No. CR20112427001
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Harold L. Higgins, P.C., Tucson
By Harold Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Keithen Harold Jr. seeks review of the trial court's order denying his petition for post-conviction relief. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Harold has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Harold was convicted of sexual assault and sentenced to a 10.5-year prison term. Harold's conviction stems from an incident in which he and another man lured the victim into their car by offering her drugs; after she ingested the drugs, Harold's companion drove the car to a dead-end street, and both men took turns sexually assaulting the victim. On appeal, we vacated an improper criminal restitution order but otherwise affirmed his conviction and sentence. *State v. Harold*, No. 2 CA-CR 2012-0316 (Ariz. App. Feb. 14, 2014) (mem. decision).

¶3 Harold then sought post-conviction relief raising various claims of ineffective assistance of trial and appellate counsel, as well as a sentencing claim and "due process" claim. Specifically, he asserted: (1) his trial and appellate counsel failed to adequately argue his speedy trial rights had been violated; (2) his trial counsel failed to competently argue the case should be dismissed due to preindictment delay and his appellate counsel was ineffective for failing to raise the issue on appeal; (3) trial counsel was ineffective in arguing a motion to preclude a criminalist from testifying about the presence of drugs in the victim's urine and in failing to call a contradicting expert witness; (4) trial and appellate counsel inadequately raised purported prosecutorial misconduct during

closing argument; (5) trial counsel failed "to present a cogent and well-supported consent defense"; (6) trial counsel should have requested a jury instruction for sexual conduct with a minor; (7) trial counsel failed to move to suppress portions of Harold's statement to law enforcement; (8) he was entitled to a jury trial on the allegation he had committed the offense while on work furlough; and (9) as a result of ineffective assistance, preindictment delay, and prosecutorial misconduct, he was denied due process. The trial court summarily denied relief, and this petition for review followed.

¶4 On review, Harold repeats most of his arguments and asserts he "is entitled to dismissal, or to an evidentiary hearing and a new trial."[1] A claim is colorable, thereby entitling a defendant to an evidentiary hearing, only if the "allegations, if true, would have changed the verdict." *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). "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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶5 "[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, 101 (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

[1]In his petition for review, Harold does not raise his argument that trial counsel failed to move to suppress portions of his statement to law enforcement. It is therefore waived. *See State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

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).

¶6 We first address Harold's assertion that his trial and appellate counsel inadequately argued that his speedy trial rights were violated. His concern centers on the trial court's decision to continue the trial pursuant to Rule 8.5, Ariz. R. Crim. P., so the state could complete scientific testing. He contends that, had counsel informed the court that the state had waited until only a month before trial to request the testing, despite having had ample opportunity to have tested the evidence sooner, the court would have denied the state's motion to continue. But we rejected this argument on appeal, concluding the court had acted well within its discretion in granting the motion even in light of the state's purported tardiness. Thus, Harold has not shown any prejudice resulting from any deficiency in trial counsel's argument. And he has identified no deficiency in appellate counsel's argument on this issue.[2]

¶7 Harold next asserts trial counsel failed to adequately argue his motion to dismiss for preindictment delay and appellate counsel was deficient for failing to raise the issue on appeal. "To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally

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[2]Harold appears to conflate two arguments raised on appeal—that the trial court erred in granting the continuance and that the court erred by failing to "state the specific reasons for the continuance on the record" as required by Rule 8.5(b). The first issue was raised and addressed on its merits. We concluded the second issue was waived, however, because the issue was not raised at trial and appellate counsel did not argue on appeal that any error was fundamental. To the extent Harold argues appellate counsel was ineffective in failing to raise that claim, he again has not established any error was fundamental and thus has not shown prejudice. Nor has he addressed the trial court's conclusion that he was not prejudiced by the lack of a specific finding.

delayed proceedings to gain a tactical advantage over the defendant or to harass him, and that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988) (emphasis omitted).

¶8 Harold seems to acknowledge there is no evidence the state deliberately delayed his indictment to gain a tactical advantage. Quoting *Hinson v. Coulter*, he instead asserts that "unjustified delay can ripen into intentional delay when the state fails to prosecute diligently." 150 Ariz. 306, 310, 723 P.2d 655, 659 (1986), *overruled on other grounds by State v. Mendoza*, 170 Ariz. 184, 192, 823 P.2d 51, 59 (1992). But the court in *Hinson* did not address preindictment delay, instead addressing post-arrest delay under a former rule requiring that certain defendants be tried within 150 days of arrest. *Id.* at 309, 723 P.2d at 658. Harold cites no authority, and we find none, applying *Hinson* in the context of unintentional preindictment delay. Indeed, our supreme court has specifically observed that *Hinson* has no relevance beyond the rule it was addressing. *See Wood v. Goodfarb*, 155 Ariz. 32, 33, 745 P.2d 90, 91 (1987) ("We expressly stated that *Hinson* was not being decided on the constitutional grounds of pre-indictment delay but was, instead, being decided strictly as a matter of the application of [former] Rule 8.2(a), Arizona Rules of Criminal Procedure."). Because Harold has cited no relevant authority, we do not address this issue further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (failure to adequately argue claim constitutes waiver).

¶9 Harold also repeats his arguments that trial counsel was ineffective in arguing a motion to preclude a criminalist from testifying about the presence of drugs in the victim's urine and in failing to call an expert witness to contradict that testimony. But, although he identifies what he claims are deficiencies in counsel's argument, he does not cite relevant authority or develop any argument that the testimony should have been precluded. *See id.* Having failed to show any likelihood the motion to preclude would have been granted, he has not shown prejudice, and his first claim fails.

¶10 Nor has Harold established counsel performed below prevailing professional norms by declining to call a controverting witness. The decision whether to call an expert witness is a strategic one, "and avoiding a so-called 'battle of the experts' may, in some cases, constitute sound trial strategy." *Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102. As the trial court noted, the criminalist's testimony was extremely qualified—he stated the drug analysis was "inconclusive" and "short of an ideal match by a considerable amount." Trial counsel might have concluded it was not necessary to controvert such testimony or that calling an additional expert would call undue attention to the evidence. *See id.*

¶11 Harold also claims that trial and appellate counsel were ineffective in arguing a motion for a mistrial based on prosecutorial misconduct. During closing arguments, the prosecutor asked the jury to "take a minute and just think about the first time, the first sexual experience you all have had" and asked the jury to "try to remember, where were you, who were you with, what were they wearing, how did it start, what happened" and consider what it would be like to tell that information to a jury. After the state's closing, trial counsel "reserve[d] the opportunity to make a motion" and later moved for a mistrial, asserting the prosecutor had improperly suggested the sexual assault had been the victim's first sexual experience and improperly appealed to the jury's "passion and prejudice." The trial court denied the motion, concluding the comment was not meant to refer to the victim's sexual history and noting the comment "is one that is made in almost all, if not all, of these cases." We determined on appeal that the court had not erred in rejecting the mistrial motion.[3]

[3]A trial court's rulings should constrain both parties from suggesting facts or arguments that would be improper to squarely present. In so doing, trial courts should apply common sense in evaluating whether counsels' arguments are objectionable. And prosecutors should refrain from asking jurors to contemplate life experiences about matters such as "first sexual experiences" when the topic of the victim's first sexual experiences would be inadmissible in the trial. But we owe the trial court considerable deference in assessing the propriety of such arguments in the

¶12 Harold suggests that counsel should have directed the trial court to the prosecutor's earlier avowal that he did not wish to address the victim's sexual history, including that Harold's sexual assault "was her first experience of sexual intercourse." In addressing Harold's petition below, the trial court concluded that nothing about the avowal altered its previous calculation, and Harold has identified no error in that conclusion. Thus, he has shown neither that counsel should have raised this argument nor that it would have made any difference.

¶13 Harold next asserts trial counsel did not effectively present a "consent defense." The core of this argument is his claim that counsel should have called as a witness the other assailant, whom he claims would have testified the incident was consensual. The trial court pointed out that Harold's companion had been indicted as well, and thus was unlikely to testify. And Harold has not provided any evidence suggesting he would have done so. Thus, this claim fails.

¶14 We also reject Harold's argument that trial counsel should have requested a jury instruction for "sexual conduct with a minor over 15 years of age." Harold was not charged with that offense, nor is it a lesser-included offense of sexual assault. *See* A.R.S. §§ 13-1405, 13-1406; *State v. Brown*, 204 Ariz. 405, ¶ 21, 64 P.3d 847, 852 (App. 2003) (defining lesser-included offense). "A defendant is not entitled to an instruction on an uncharged offense that does not qualify as a lesser-included offense, even if he might have been charged and convicted of the offense." *State v. Gonzalez*, 221 Ariz. 82, ¶ 8, 210 P.3d 1253, 1255 (App. 2009). There was no basis to give that instruction and counsel, necessarily, was not ineffective in declining to request it.

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context of an individual case. Applying this deference, we concluded on appeal that the trial court did not err in viewing the statement, in context, "as an explanation of why, given the passage of time, [the victim] did not remember all of the details of the assault and not to suggest that this was her first sexual experience." *Harold*, No. 2 CA-CR 2012-0316, ¶ 48.

¶15 Last, Harold argues pursuant to *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151 (2013), that the allegation that he committed the offense while on work furlough should have been tried to the jury. This issue could have been raised on appeal and is precluded from being raised under Rule 32, Ariz. R. Crim. P.[4] *See* Ariz. R. Crim. P. 32.2(a). We therefore do not address it.

¶16 We grant review but deny relief.

[4]Harold asserts *Alleyne* was decided "while this case was pending on appeal." But *Alleyne* was issued two months before Harold filed his opening brief on appeal. Harold does not assert appellate counsel was ineffective for failing to raise this issue.