

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ESLYN ADRIAN VILLA,
Petitioner.

No. 2 CA-CR 2016-0168-PR
Filed August 31, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201202164
The Honorable Jason R. Holmberg, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Nanette C. Morrow, Assistant Attorney General, Tucson
Counsel for Respondent

Eslyn Adrian Villa, San Luis
In Propria Persona

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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 Eslyn Villa seeks review of the trial court’s order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Villa has not met his burden of demonstrating such abuse here.

¶2 After his first trial resulted in a hung jury, Villa was convicted after a second trial of conspiracy and possession of a dangerous drug for sale, and sentenced to concurrent prison terms, the longer of which is twelve years. *State v. Villa*, 236 Ariz. 63, ¶ 2, 335 P.3d 1142, 1144 (App. 2014). We affirmed his convictions and sentences on appeal. *Id.* ¶ 27. The court appointed counsel to represent Villa in post-conviction proceedings, and counsel filed a notice stating she had reviewed the record but found no claims to raise pursuant to Rule 32.

¶3 Villa then filed a pro se petition raising numerous claims, including that: (1) the trial court improperly allowed the state to amend his indictment by instructing the jury on the offense of possession of a dangerous drug for sale when he had been indicted for transportation of a dangerous drug for sale; (2) prosecutorial misconduct contributed to the declaration of a mistrial and his retrial thus was barred by double jeopardy principles; (3) his sentence was illegal; (4) trial counsel was ineffective for failing to argue his claims of prosecutorial misconduct and his claim the indictment had been improperly amended, in asking him to reject a plea deal, and in failing to file a motion pursuant to Rule 24, Ariz. R. Crim. P., to vacate his verdict based on the discovery of a “not presented verdict form” that had been signed and indicated the jury

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had found him not guilty of possession of a dangerous drug; (5) appellate counsel was ineffective in failing to argue on appeal “the issue presented” in his pro se Rule 24 motion, the purported improper amendment of the indictment, the trial court’s error admitting “the recording and transcripts” of his interview with law enforcement and “fail[ure] to rule” on his motion for an acquittal, and “all the constitutional claims raised in this petition”; and (6) Rule 32 counsel was ineffective in failing to raise these arguments. He also asserted that the court had erred in allowing the state to admit into evidence in his second trial statements he had made during his first trial and that he had been denied his right to access the court because the court had denied or ignored his requests for various transcripts and other materials. The trial court summarily denied relief, stating only that it had “read and considered [Villa’s] Petition for Post-Conviction Relief and the State’s response.” This petition for review followed.

¶4 On review, Villa first argues the trial court’s summary denial of his petition “without [a] statement” was “capricious and arbitrary” and violated his constitutional rights. Rule 32.6(c) permits a trial court to summarily dispose of a petition for post-conviction relief and reads, in pertinent part:

On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law.

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¶5 Villa acknowledges that Rule 32.6(c) permits the summary disposition of a petition, but asserts the trial court’s ruling is nonetheless defective because it did not “indicate that the court follow[ed] any of the proce[dures] described” in the rule and denied his petition instead of dismissing it. We encourage trial courts to clearly identify the bases for their decisions. *See Brown v. Superior Court*, 137 Ariz. 327, 331 n.5, 670 P.2d 725, 729 n.5 (1983). But that does not entitle Villa to relief; nothing in Rule 32.6(c) requires the court to explain its reasoning on the record—its summary rejection of Villa’s claims necessarily means it complied with Rule 32.6(c). *See State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008) (trial court presumed to know and follow law). If our supreme court intended to require specific, on-the-record findings, it would have used language similar to that found in Rule 32.8(d), which states a court must “make specific findings of fact, and state expressly its conclusions of law relating to each issue presented” in ruling on a post-conviction claim after an evidentiary hearing. And we cannot agree with Villa’s suggestion that any technical distinction between dismissing and denying his claim is material here. *See Ariz. Const. art. VI, § 27* (“No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.”).

¶6 Villa next reurges several of the claims he raised below.¹ The bulk of these claims, however, are precluded because they either were or could have been raised on appeal. *See Ariz. R. Crim. P. 32.2(a), (c)*. Accordingly, we address Villa’s claims of trial error only insofar as Villa raises them in the context of ineffective assistance of trial and appellate counsel. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (claim of ineffective assistance can only be litigated in Rule 32 proceeding). “To state a colorable claim of

¹ For numerous claims, Villa attempts to incorporate by reference his petition for post-conviction relief. This procedure does not comply with our rules. *See Ariz. R. Crim. P. 32.9(c)(1); State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991). We limit our discussion to the issues raised and developed in Villa’s petition for review.

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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); *State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088 (2014). "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.'" *Id.*, *quoting Hinton*, ___ U.S. at ___, 134 S. Ct. at 1089.

¶7 Villa asserts that trial counsel was ineffective because she did not move for a mistrial based on purported prosecutorial misconduct during his first trial. He claims the state "intentionally" permitted the jury to review during deliberations "[t]wo CD's containing damaging statements" that apparently had not been admitted into evidence. But Villa has not identified anything in the record suggesting the state acted intentionally or that the jury actually reviewed the content of those CDs.² Thus, he is unable to establish any reason for counsel to have moved for a mistrial on the basis of prosecutorial misconduct. His related claim that his second trial was thus barred on double jeopardy grounds necessarily fails. *See generally Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (double jeopardy bars retrial if mistrial caused by prosecutor's intentional misconduct). Insofar as Villa asserts his appellate counsel was ineffective for failing to raise this argument on appeal, that claim also necessarily fails because no mistrial was warranted on the basis of prosecutorial misconduct.

²As we discuss later in this decision, Villa asserts he needs the trial transcript from his first trial to adequately develop this claim. But Villa was present for the proceeding, and he has not explained what occurred that would support a conclusion that the state acted deliberately or that the jury reviewed the improper materials.

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¶8 Villa additionally claims counsel was deficient because she did not file a motion to vacate the guilty verdict following the discovery of the “unpresented” not guilty verdict form.³ But he has identified no legal basis for that motion, and we therefore do not address this argument further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

¶9 Villa further identifies other “instance[s]” of deficient performance, including that trial counsel did not “argue that the weight of the illegal drug” is irrelevant to his “guilt or innocence” or raise arguments related to the sufficiency of the evidence for his conspiracy conviction. But he did not raise these claims below, and we thus do not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not address claims not raised below).

¶10 Villa again claims his appellate counsel was ineffective for failing to adequately argue issues related to the jury instruction for possession of a dangerous drug for sale. He suggests, for the first time on review, that counsel should have argued the state had “waived the opportunity” to request the instruction and that “transportation of [a] dangerous drug for sale is the substantive offense of conspiracy to transportation for sale not possession for sale.” We do not address these arguments because they were not presented to the trial court. *See id.*

¶11 Villa also repeats his argument that the instruction constituted an improper amendment of the indictment. That claim was implicitly rejected on appeal, when we determined that possession of a dangerous drug for sale was a necessarily included offense of transportation of a dangerous drug for sale. *Villa*, 236 Ariz. 63, n.2, 335 P.3d at 1144 n.2. As such, it was encompassed by the indictment and Villa had sufficient notice of the charge. *See State*

³Although Villa asserts he filed a pro se motion, and attaches a motion to his petition for review, nothing in the record suggests that motion was actually filed with the trial court.

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v. Erivez, 236 Ariz. 472, ¶ 21, 341 P.2d 514, 518 (App. 2015); *see also* Ariz. R. Crim. P. 13.2(c) (“Specification of an offense in an indictment, information, or complaint shall constitute a charge of that offense and of all offenses necessarily included therein.”).

¶12 Villa next reurges his claim of ineffective assistance of Rule 32 counsel. As a non-pleading defendant, he is not constitutionally entitled to the effective assistance of Rule 32 counsel and such claims are not cognizable under Rule 32. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013). Accordingly, we do not address his arguments.

¶13 Finally, Villa repeats his contention that he was “denied access to the court” because he was not provided with trial and hearing transcripts from his first trial, as well as “copies of the not guilty verdict at the second trial and [transcripts] from the hearings on 8/23/2013 and 9/10/2013.” Villa is entitled to transcripts only if they are “necessary to resolve the issues to be raised in the petition.” Ariz. R. Crim. P. 32.4(d). Villa has not described to this court anything that occurred that would be contained in the requested transcripts that supports his various claims. The content of the verdict form is included in the record; Villa has not explained why the form itself was necessary for him to adequately raise his argument. Thus, we reject this contention.⁴

¶14 We grant review but deny relief.

⁴We are nonetheless troubled by the trial court’s failure to rule on Villa’s request. Although the failure to rule on a motion can constitute an implicit denial, *see State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 22, 154 P.2d 1046, 1053 (App. 2007), Rule 32.4(d) expressly tolls “[t]he time for filing the petition . . . from the time a request for the transcripts is made until the transcripts are prepared or the request is denied.” Thus, a timely ruling on such a motion is necessary for the defendant to properly calculate the due date for the petition for post-conviction relief.