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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STATE OF ARIZONA, Respondent, v. JEREMY DEAN GARCIA, Petitioner.	2 CA-CR 2011-0060-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200701020

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Jeremy D. Garcia — Tucson
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Jeremy Garcia 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 ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Garcia was convicted after a jury trial of eight counts of sexual abuse, six counts of child molestation, three counts of attempted child molestation, and one count each of attempted sexual conduct with a minor and sexual conduct with a minor over the age of fifteen. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 132 years. Garcia filed a notice of appeal and notice of post-conviction relief. The trial court stayed the post-conviction proceeding pending the outcome of the appeal. This court affirmed Garcia's convictions and sentences except his sentence for attempted sexual conduct with a minor. *State v. Garcia*, No. 2 CA-CR 2008-0020, ¶ 33 (memorandum decision filed Jan. 15, 2009). We remanded the case to the trial court for the state to establish the age of one of the victims and for Garcia to be resentenced on the applicable count if necessary. *Id.*

¶3 On remand, the trial court resentenced Garcia on that count to a 3.5-year prison term to be served consecutively to several of his other prison terms. His attorney then filed a notice pursuant to Rule 32.4 stating she could "find no colorable claims pursuant to Rule 32." Garcia filed a pro se petition for post-conviction relief, asserting his trial counsel had been ineffective because she had applied "overbearing pressure" to prevent him from testifying, failed to call witnesses who would testify "as to his good character," and did not "properly move for and argue for" a *Willits*[1] instruction based on the state's loss of the recording of a victim's interview. He further argued that his

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

sentences imposed pursuant to former A.R.S. § 13-604.01,[2] which governed sentence enhancement for dangerous crimes against children, were improper and that his trial and appellate counsel had been ineffective for failing to raise that issue.

¶4 The trial court summarily denied Garcia's petition. It found his claim that his counsel had pressured him not to testify was "not supported by the trial transcript," which showed the court had advised Garcia that it was his decision whether to testify, and not his counsel's, and that Garcia nonetheless had declined to testify. The court also determined Garcia was not entitled to a *Willits* instruction because the missing recording was not exculpatory. As Garcia correctly notes, however, the court did not expressly address his claim that his counsel had been ineffective in failing to call character witnesses. Finally, the court determined Garcia's sentencing claim was precluded and meritless. In his petition for review, Garcia asserts his claims of ineffective assistance of trial and appellate counsel were colorable and he therefore was entitled to an evidentiary hearing. He additionally argues he should be resentenced. We address each claim in turn.

¶5 Summary disposition of claims for post-conviction relief is appropriate when a defendant presents no "material issue of fact or law which would entitle the defendant to relief" and "no purpose would be served by any further proceedings." Ariz.

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[2]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008," *id.* § 120. We refer in this decision to the sentencing statutes in force at the time of Garcia's offenses. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7 (§ 13-604.01); 2005 Ariz. Sess. Laws, ch. 2, § 1 (same), ch. 188, § 2 (same), ch. 282, § 1 (same), ch. 327, § 2 (same); 1993 Ariz. Sess. Laws, ch. 255, § 10 (A.R.S. § 13-701); 2003 Ariz. Sess. Laws, ch. 225, § 1 (A.R.S. § 13-702); 2004 Ariz. Sess. Laws, ch. 174, § 1 (same); 2005 Ariz. Sess. Laws, ch. 20, § 1 (same), ch. 133, § 1 (same), ch. 166, § 1 (same).

R. Crim. P. 32.6(c). A colorable claim of ineffective assistance of counsel is "one that, if the allegations are true, might have changed the outcome" of the case. *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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* A "strong presumption exists" that counsel provided effective assistance, and a defendant has the burden of overcoming that presumption. *Id.* ¶ 22.

¶6 As to his first claim of ineffective assistance of counsel, Garcia reiterates that he was "coerced" by his counsel "into giving up his right to testify." In his affidavit filed below, Garcia asserted his trial counsel "refused to allow [him] to testify on [his] own behalf at trial." But, beyond these generalized accusations, Garcia does not explain how his counsel actually prevented him from testifying—particularly in light of the trial court's colloquy with him during trial. As we noted above, the court relied on that colloquy in rejecting Garcia's petition for post-conviction relief. Garcia does not explain why that reliance was improper, and therefore has failed to demonstrate the court abused its discretion. Additionally, beyond generally asserting he would have given "his version of events" and "possible motives behind his accusers' allegations," Garcia offers no information about what the content of his testimony would have been. Accordingly, Garcia has not demonstrated his testimony could have resulted in a different verdict.

¶7 Although the trial court did not expressly address Garcia's claim that his trial counsel should have called certain witnesses on his behalf, Garcia did not explain in

his petition for post-conviction relief what their testimony would have been or how it could have resulted in a different verdict.[3] The trial court therefore did not err in implicitly rejecting his second claim of ineffective assistance of counsel.

¶8 Garcia reurges his argument that his trial counsel failed to "properly and competently" argue a basis for his requested *Willits* instruction. But Garcia has not explained how his counsel's argument was deficient, nor has he demonstrated he was entitled to such an instruction. A defendant is entitled to a *Willits* instruction when the state negligently fails to preserve evidence having a tendency to exonerate the defendant. *State v. Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d 787, 795 (2009). Here, the state inadvertently erased a recording of an interview with one of the victims. But, beyond speculating the jury might have been able to assess the witness's credibility during the interview based on the recording, Garcia has failed to explain how the recording would have been exculpatory. The trial court did not err in rejecting Garcia's third ineffective assistance of counsel claim.

¶9 Finally, we find unavailing Garcia's claim that his sentences imposed pursuant to former § 13-604.01 were improper and that his trial and appellate counsel therefore were ineffective in failing to raise that argument.[4] Garcia asserts that, because he had no previous felony convictions, he should have been sentenced pursuant to A.R.S.

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[3]Garcia also asserts for the first time on review that his counsel should have called "[a]n expert witness" to give the jury "an alternative viewpoint and opinion for cases such as [his]." We do not address issues raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review any issue on which trial court had not first had opportunity to rule); *see also* Ariz. R. Crim. P. 32.9(c) (aggrieved party may petition appellate court "for review of the actions of the trial court").

[4]To the extent Garcia raises his sentencing claim outside the context of ineffective assistance of counsel, such a claim plainly is precluded by Rule 32.2(a).

§§ 13-701(C) and 13-702(A) and, because those statutes do not refer to § 13-604.01, it does not apply to his sentences. As noted above, Garcia was convicted of completed and attempted charges of sexual abuse pursuant to A.R.S. § 13-1404, sexual conduct with a minor pursuant to A.R.S. § 13-1405, and child molestation pursuant to A.R.S. § 13-1410. The version of each of those statutes in effect at the time Garcia committed his crimes expressly stated a violation was "punishable pursuant to [§] 13-604.01." *See* 1997 Ariz. Sess. Laws ch. 217, § 1 (§ 13-1405(B)); 1993 Ariz. Sess. Laws, ch. 255, §§ 24, 29 (§§ 13-1404(B), 13-1410(B)). And, even absent those references, § 13-604.01 stated it applied to violations of §§ 13-1404, 13-1405, and 13-1410. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7; 2005 Ariz. Sess. Laws, ch. 2, § 1, ch. 188, § 2, ch. 282, § 1, ch. 327, § 2. There is no reason for the general sentencing statutes for first-time offenders also to refer to the dangerous crimes against children statute. *See State v. Hollenback*, 212 Ariz. 12, ¶ 15, 126 P.3d 159, 164 (2005) (§ 13-604.01 takes precedence over general sentencing statute); *cf. State v. Rice*, 110 Ariz. 210, 213, 516 P.2d 1222, 1225 (1973) ("Where we have a general statute and a specific statute that are in conflict, the specific governs.").

¶10 And we reject Garcia's argument that § 13-604.01 is inapplicable because §§ 13-1404, 13-1405, and 13-1410 do not state expressly that § 13-604.01 applies to first-time offenders. The statutes make no distinction between first-time and repetitive offenders and nothing about their language suggests § 13-604.01 would apply to one classification and not the other. *See State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003) (plain language of statute best indicator of legislative intent). Garcia does not cite, nor do we find, authority suggesting otherwise. Because § 13-604.01 plainly

applied to Garcia's sentences, his claims of ineffective assistance of trial and appellate counsel necessarily fail.[5]

¶11 For the reasons stated, although we grant review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

[5]Garcia further argues the phrase "punishable pursuant to section 13-604.01" in §§ 13-1404(B), 13-1405(B), and 13-1410(B) suggests the trial court had discretion to disregard § 13-604.01. We do not address this argument because Garcia did not raise it in his petition for post-conviction relief. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928; *see also* Ariz. R. Crim. P. 32.9(c) (aggrieved party may petition appellate court "for review of the actions of the trial court").