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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OF ARIZONA, Respondent, v. DAVID YULO MARTINEZ III, Petitioner.	2 CA-CR 2012-0320-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083774

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Lori J. Lefferts, Pima County Public Defender
By Rebecca McLean
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner David Martinez III seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Martinez has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Martinez was convicted of four counts each of aggravated assault with a deadly weapon and armed robbery. The trial court imposed a combination of consecutive and concurrent, aggravated sentences totaling ninety years' imprisonment. This court affirmed Martinez's convictions and sentences on appeal. *State v. Martinez*, No. 2 CA-CR 2009-0186 (memorandum decision filed Apr. 29, 2010). Our supreme court denied his subsequent petition for review.

¶3 Martinez then initiated a Rule 32 proceeding, arguing in his petition that trial counsel had been ineffective in relation to an offered plea agreement; in failing to file pretrial motions based on *Dessureault*,[1] voluntariness, or *Miranda*;[2] in failing to object or objecting inadequately to the admission of certain evidence; and in not challenging a search warrant. Additionally, Martinez alleged appellate counsel was ineffective in failing to claim a police detective was unqualified to give drug-identification testimony, to challenge the trial court's refusal to give certain instructions Martinez had requested, or to "move for the dismissal of the aggravated assault counts." He also asserted "the cumulative effect of the errors demonstrates that he did not receive . . . effective assistance." Finally, he challenged the court's imposition of consecutive sentences and alleged ineffective assistance of both trial and appellate counsel in relation thereto. In a subsequent amendment to his petition, he also raised a claim of prosecutorial misconduct and ineffective assistance of appellate counsel for having failed to raise the claim on appeal.

[1]*State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

¶4 In his reply to the state's response to his petition, Martinez withdrew one of his claims of ineffective assistance of trial counsel—that counsel had been ineffective in relation to his rejecting a plea offer because counsel had failed to show him video footage of himself taken at the robberies. Concluding "no colorable claims ha[d] been raised," the trial court summarily dismissed Martinez's petition in February 2012. Martinez moved to extend the time to file his petition for review numerous times, and during that time also moved "to retract [his] withdrawal of [the] claim in [his] reply." The court noted that Martinez had submitted "a certification satisfying Rule 32.5" after he had withdrawn the claim, that the court already had ruled on his petition, and that Martinez had not filed a timely motion for rehearing. The court decided to "treat [Martinez's] motion as a motion for rehearing" because, at that point in the proceeding, it determined Martinez could petition only for review or move for rehearing. The court deemed the motion as untimely, but noted that even if it were timely it would be "procedurally barred" because Martinez would be "unable to set forth grounds wherein the Court erred," as the court had not ruled on the issue in its decision.

¶5 On review, Martinez first contends the trial court abused its discretion by treating his request to assert the claim retracted in his reply as a motion for reconsideration. Citing *Canion v. Cole*, Martinez maintains the court should have treated the motion as one to amend his petition, and should have granted the motion in light of our supreme court's indication that Rule 32.6(d) "adopts a liberal policy toward amendment of [Rule 32] pleadings." 210 Ariz. 598, ¶ 16, 115 P.3d 1261, 1264 (2005). But, that rule also requires a showing of "good cause." Ariz. R. Crim. P. 32.6(d).

¶6 Even accepting arguendo Martinez's argument that the court was required to treat the motion as one to amend, this was an argument Martinez had presented to the court and then expressly withdrew. And the only reasons he has given for attempting to reassert the claim, below and on review, were that he had completed his affidavit stating he would have accepted the state's plea offer had he seen the video recordings and that the United States Supreme Court had decided *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012). Martinez did not provide any explanation for the late filing of his affidavit, and it long has been the law in Arizona that a defendant may raise a claim of ineffective assistance of counsel relating to the plea bargaining process. *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). Thus, Martinez did not establish good cause, and we cannot say the court abused its discretion in denying his motion.

¶7 Martinez next maintains the trial court abused its discretion in rejecting his claims of ineffective assistance of trial counsel. Generally, "[t]o 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). That is, he must show that "if the allegations are true, [they] might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). "Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation." *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984). There is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant may overcome only by

providing evidence that counsel's conduct did not comport with prevailing professional norms. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶8 Martinez maintains the trial court abused its discretion in rejecting his claim of ineffective assistance of counsel based on trial counsel's failure to move to suppress his statements to the law enforcement officers who interviewed him on the grounds the statements were made in violation of the *Miranda* requirements or were involuntary. As the court pointed out, trial counsel did object on *Miranda* grounds, and counsel objected on essentially the same grounds raised in the post-conviction proceeding. To the extent Martinez asserts counsel should have argued something more or argued more effectively, he has not established counsel's performance was deficient. *See State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) ("Defendants are not guaranteed perfect counsel, only competent counsel."), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). In any event, as the court also concluded, Martinez was not prejudiced by the alleged deficiency because "there is 'no talismanic incantation' required by *Miranda*," *State v. Carlson*, 228 Ariz. 343, ¶ 9, 266 P.3d 369, 372 (App. 2011), *quoting California v. Prysock*, 453 U.S. 355, 359 (1981) (per curiam), and the warnings given here encompassed the information courts have required as part of the *Miranda* warnings.

¶9 We likewise reject Martinez's claim that counsel was ineffective in failing to move to suppress his statements on voluntariness grounds. He maintains police coerced his confession by promising to "serve as his advocate to the county attorney's office." When determining whether a statement is voluntary, a court "must look to the

totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *State v. Lopez*, 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992). A confession, in order to be voluntary within the meaning of the Fifth Amendment, must not have been obtained by any direct or implied promises, however slight. *Brady v. United States*, 397 U.S. 742, 753 (1970); *State v. Torres*, 121 Ariz. 110, 113-14, 588 P.2d 852, 855-56 (1978).

¶10 However, when the alleged promise is expressed as a mere possibility or an opinion, it is not a sufficient promise so as to render a confession involuntary. *State v. Steelman*, 120 Ariz. 301, 310, 585 P.2d 1213, 1222 (1978). In this case, the interviewing detective did not promise Martinez any particular action, but merely stated, in the context of questing Martinez about his motivations in committing the robberies, that he wanted to give Martinez "the opportunity to—to let us know. I mean, we're kinda your advocate when we go to the county attorney and we can explain, you know, this is what he explained to be on his mind when these things were happening." We cannot say this is more than a possibility or opinion. *Cf. State v. McVay*, 127 Ariz. 18, 20, 617 P.2d 1134, 1136 (1980) (interviewer stating he would mention cooperation to warden not promise creating involuntary statement).

¶11 Martinez also has failed to establish that he relied on the detective's purported promise in making his statement. *See Lopez*, 174 Ariz. at 138, 847 P.2d at 1085 (to establish statement involuntary because of promise, evidence must show promise and reliance thereon). Throughout the interview, Martinez stated he did not remember what had happened or robbing any pharmacies. Beyond that, he stated in

response to the detectives' questions about the use of guns, that "[t]hey were empty." He also stated that if his girlfriend had said he had robbed one of the pharmacies, that was "probably true." But both statements were made before the detective's "advocate" statement. Moreover, Martinez did not aver he had relied on the detective's statement in connection with his Rule 32 petition. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). Thus, nothing in the record suggests Martinez relied on any purported promise to advocate with the county attorney when he made the statements used against him. The trial court did not abuse its discretion in concluding Martinez had failed to state a colorable claim of ineffective assistance of counsel on this point.

¶12 Furthermore, Martinez argues the trial court abused its discretion in rejecting his claim of prosecutorial misconduct based on the prosecutor or his assistant having told a witness during trial that other witnesses had identified Martinez as the robber. The witness testified to that effect at trial, and Martinez moved for a mistrial on that basis. The court denied the motion, but the jury ultimately failed to reach a verdict on the counts related to that victim's robbery, and the court declared a mistrial with respect to those counts. Martinez's claim of prosecutorial misconduct is precluded by his failure to raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).[3]

[3]Although Martinez claimed in his amended petition for post-conviction relief that appellate counsel was ineffective in failing to raise this claim on appeal, he does not specifically present that argument on review and it therefore is waived. *See* Ariz. R. Crim. P. 32.9(c)(1) ("Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue."); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to

¶13 According to Martinez, the trial court also erred in rejecting his argument that trial counsel "should . . . have filed *Dessureault* motions challenging the identifications [of him] pretrial." We agree with the court, however, that Martinez has failed to establish that counsel's purportedly deficient performance prejudiced him. Although "defendants are entitled to a hearing to determine whether a pretrial identification was unduly suggestive," *State v. Osorio*, 187 Ariz. 579, 581, 931 P.2d 1089, 1091 (App. 1996), we disagree with Martinez that the photographic lineups presented to the witnesses here were unduly suggestive. As the court concluded, "the subjects in both line-ups resemble one another," and "[t]here is no requirement that the accused be surrounded by nearly identical persons." *State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995).

¶14 Martinez further maintains, however, that trial counsel should have requested a *Dessureault* hearing "once witnesses started testifying as to contaminating influences." But Martinez has not established that any of these asserted "influences" was sufficient to create a due process violation requiring suppression. *See State v. Prion*, 203 Ariz. 157, ¶ 14, 52 P.3d 189, 192 (2002) ("Pretrial identifications which are fundamentally unfair implicate the due process clause of the Fourteenth Amendment."). Martinez contends two witnesses had seen "pictures of the robber on television," but when the state does not bear "'sufficient responsibility for the suggestive pretrial

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address argument not raised in petition for review); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

identification,'" suppression is not required. *Gonzales*, 181 Ariz. at 509, 892 P.2d at 845, *quoting State v. Williams*, 166 Ariz. 132, 137, 800 P.2d 1240, 1245 (1987); *accord Perry v. New Hampshire*, ___ U.S. ___, ___, 132 S. Ct. 716, 726 (2012) ("The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct."). Martinez also asserts a witness's identification was tainted because a detective had told her a person "had been caught" and asked her to come in for a lineup. When the witness was shown the photographic lineup, however, the detective made clear that "the man might be present, he might not, [and] that [she] wasn't obligated to tell if he was there." Martinez cites no authority to suggest these circumstances require suppression. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii), (iv) (requiring petition for review to include "issues . . . decided by the trial court . . . which the defendant wishes to present . . . for review" and "reasons why the petition should be granted"). And, as discussed above, the trial court dismissed the charges related to the witness who was told by the prosecutor that other witnesses had identified Martinez. Because Martinez has not established that counsel having requested a *Dessureault* hearing might have led to suppression of any of the witnesses' testimony or otherwise shown that counsel's performance, even if deficient, prejudiced him, the court did not abuse its discretion in denying him relief on this claim.

¶15 Martinez further contends trial counsel was ineffective because he "fail[ed] to articulate clearly the hearsay nature of" certain statements to which he objected. But, counsel's objection at trial, although admittedly not supported by case citations, given the trial context, was similar to the objection Martinez now claims counsel should have

asserted. In any event, as noted above, Martinez was not entitled to perfect counsel, *see Valdez*, 160 Ariz. at 15, 770 P.2d at 319, and he has not established that counsel's performance in this regard fell below prevailing professional norms. *See Herrera*, 183 Ariz. at 647, 905 P.2d at 1382.

¶16 We also reject Martinez's arguments that trial counsel was ineffective for failing to challenge a search warrant and not objecting to the trial court's purported belief that the former A.R.S. § 13-708 created a presumption in favor of consecutive sentences.[4] Martinez does not direct us to anything in the record suggesting the officer who applied for the warrant "knowingly, intentionally, or with reckless disregard for the truth made a false statement to obtain the warrant." *State v. Nordstrom*, 200 Ariz. 229, ¶ 42, 25 P.3d 717, 733 (2001), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). Rather, he contends only that the officer did not tell the court that some witnesses had failed to identify him. But he again cites nothing in the record to support this contention, and he fails to cite any authority to suggest that such an omission would invalidate a warrant. *See* Ariz. R. Crim. P. 32.9(c)(1) (requiring legal argument and "specific references to the record" in non-capital cases).

¶17 Likewise, Martinez cites nothing in the record to support his contention the court believed it was required to presumptively impose consecutive sentences. *See id.* And, our review of the record suggests otherwise—the court did not refer to § 13-708 or

[4]Martinez refers to the version of the statue applicable at the time he committed his offenses, in 2008. *See* 2007 Ariz. Sess. Laws, ch. 20, § 1.

state it was acting presumptively; indeed, it stated it could not "find that . . . concurrent sentences are appropriate."[5]

¶18 We also reject Martinez's claims of ineffective assistance of appellate counsel. Appellate counsel is presumed to have provided effective assistance. *Bennett*, 213 Ariz. 562, ¶ 22, 146 P.3d at 68. And "counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal." *Id.* Generally, "'[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.'" *Id.*, *quoting Herrera*, 183 Ariz. at 647, 905 P.2d at 1382 (alteration in *Bennett*). It is only "if counsel ignores issues that are clearly stronger than those selected for appeal . . . [that] a defendant can overcome the presumption of effective assistance of counsel." *Id.*

¶19 Martinez first contends appellate counsel was ineffective for failing to address on appeal the trial court's refusal to give two requested jury instructions.[6] Trial counsel requested two instructions at issue here. One would have instructed the jury it should not consider statements made by the detectives who interrogated Martinez about alleged statements made by his girlfriend. The other would have instructed the jury it "must be satisfied beyond a reasonable doubt that the in court identification was

[5]In a single paragraph in his petition for post-conviction relief and his petition for review, Martinez raises five other claims of ineffective assistance of counsel relating to various actions he asserts trial counsel should have taken or should have undertaken differently. Because he did not develop these arguments adequately below or on review, we do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

[6]Appellate counsel did challenge on appeal the trial court's jury instruction on aggravated assault. *See Martinez*, No. 2 CA-CR 2009-0186, ¶¶ 10-11.

independent of any suggestive statements [by] the staff of the county attorney[']s office, law enforcement, or others." The trial court refused to give either instruction.

¶20 "'A party is entitled to an instruction on any theory reasonably supported by the evidence.'" *State v. Musgrove*, 223 Ariz. 164, ¶ 6, 221 P.3d 43, 46 (App. 2009), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). But "a court need not give an instruction that is covered adequately by other instructions." *Id.* "'[T]he test is whether the instructions adequately set forth the law applicable to the case.'" *Id.*, *quoting Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009 (alteration in *Musgrove*). "In determining whether the court's instructions set forth the applicable law, we view them in their entirety." *Id.* Further, "in evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel." *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003).

¶21 In this case, the trial court instructed the jurors that "[t]he state must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable." The court provided several factors as examples of what the jurors could consider in determining if the identification was reliable, including "any other factor that affects [the] reliability of the identification." During closing argument, Martinez's counsel reminded the jury about the prosecutor's staff having told one witness about other witnesses' identifications. Thus, viewing the instructions as a whole and in connection with closing argument, the court adequately informed the jurors they were required to determine the reliability of the witnesses' identifications of Martinez beyond a reasonable doubt.

¶22 Likewise, in relation to Martinez's girlfriend's purported statements, which were discussed during Martinez's interview with detectives, the prosecutor stated in his closing argument that Martinez's girlfriend was not present at trial and they therefore could not "talk about what she may or may not have said." And he stated that "[w]hat Jessica may or may not have said is not evidence in this case." He also pointed out that the detectives had lied to Martinez during the interview. And, indeed, one of the interviewing detectives testified they had "use[d] some deception in talking to [Martinez]." We cannot say any purported error in rejecting this proposed instruction was reversible. *See State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 81, 228 P.3d 909, 932 (App. 2010) (appellate court will reverse case for erroneous instructions only when, taken as whole, "it is reasonable to suppose the jury would be misled"). Thus, we cannot say Martinez has established these claims were clearly stronger than those presented on appeal, *see Bennett*, 213 Ariz. 562, ¶ 22, 146 P.3d at 68, nor has he established that by raising these claims, appellate counsel "would have changed the outcome of the appeal." *Febles*, 210 Ariz. 589, ¶ 19, 115 P.3d at 636. The trial court did not abuse its discretion in denying relief on this claim.

¶23 Martinez also contends appellate counsel was ineffective because he failed to challenge a detective's testimony that pills found in an apartment where Martinez had been staying were Oxycontin. He maintains the detective "was unqualified as an expert to opine on the identification of the drug" and that "[s]uch opinion is not permitted except by expert witness." He asserts the detective "agreed he was not an expert." But, the detective only testified he was not a "forensic chemist," and he went on to testify that he

had "years of dealing with that kind of drug on occasions, what the pill looks like and the identifier." And he also testified he had identified the drug based on comparing the pills he had found "to the Physicians' Desk Reference book," which he noted contained "detailed photos of all kinds of prescription drugs."

¶24 Martinez cites no authority to support the proposition that the detective's experience and training was insufficient to qualify him as a witness under former Rule 702, Ariz. R. Evid., or that the testimony of a chemist was required to establish the identity of the pills. *See* Ariz. Sup. Ct. Order No. R-10-0035, 34 (Sept. 8, 2011) (stating witness may be qualified "by knowledge, skill, experience, training, or education"); *cf. State v. Nightwine*, 137 Ariz. 499, 503, 671 P.2d 1289, 1293 (App. 1983) (circumstantial evidence, including price and lack of complaint by user that substance not cocaine, sufficient to establish substance as cocaine); *cf. also State v. Saez*, 173 Ariz. 624, 629-30, 845 P.2d 1119, 1124-25 (App. 1992) (finding sufficient evidence to establish substance cocaine by testimony of drug's appearance, narcotic effect, and purchase price); *State v. Ampey*, 125 Ariz. 281, 282, 609 P.2d 96, 97 (App. 1980) (concluding sufficient evidence of marijuana presented through officer's report and defendant's admission). Thus, because Martinez has not established that a different performance by counsel "would have changed the outcome of the appeal," *Febles*, 210 Ariz. 589, ¶ 19, 115 P.3d at 636, the trial court did not abuse its discretion in denying relief on this claim.[7]

[7]In his petition for post-conviction relief, Martinez also claimed "[a]ppellate counsel was ineffective in failing to move for the dismissal of the aggravated assault counts." On review, however, he makes this claim only in relation to trial counsel's ineffectiveness. The issue therefore is waived, and we need not address it. *See* Ariz. R.

¶25 For all these reasons, although we grant the petition for review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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

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

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.

Crim. P. 32.9(c)(1). In any event, Martinez's claim is based on *State v. Jorgenson*, 108 Ariz. 476, 502 P.2d 158 (1972), decided by our supreme court before the revision of what is now A.R.S. § 13-116. *See* 1977 Ariz. Sess. Laws, ch. 142, § 41. The statute has, since 1978, provided that a defendant may be punished in different ways under different laws for the same act or omission, but cannot be sentenced to consecutive sentences.