NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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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. JUSTIN CRAIG BOWMAN, Petitioner.	2 CA-CR 2013-0005-PR DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200901544

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Justin Craig Bowman — Florence, In Propria Persona

E S P I N O S A, Judge.

¶1 Following a jury trial, petitioner Justin Bowman was convicted of five counts of furnishing obscene materials to a minor, six counts of child molestation, fifteen counts of sexual conduct with a minor twelve years of age or under, three counts of public sexual indecency to a minor, and three counts of sexual exploitation of a minor. The trial court sentenced him to a combination of concurrent and consecutive sentences totaling 682 years. We affirmed Bowman's convictions and sentences on appeal. *State*

v. Bowman, No. 2 CA-CR 2010-0229 (memorandum decision filed Apr. 1, 2011). He then filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Appointed counsel notified the court he was unable to find any colorable issues to raise in a petition for post-conviction relief, and Bowman then filed a pro se petition. This petition for review followed the court's summary denial of that petition. We review a trial court's denial of post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 Bowman asks that we review "de novo" the following issues on review: (1) he did not waive his right to counsel voluntarily[1]; (2) prosecutorial misconduct; (3) the trial court failed to grant his motion to continue the trial date; (4) he did not waive his right to testify voluntarily; (5) he lacked "[a]ccess to the [c]ourts"; and, (6) he was denied "[r]aw [m]aterials to [p]repare a [d]efense." Because Bowman could have, but did not raise all of these issues on appeal, the court found they were precluded under Rule 32.2(a)(3).[2]

¶3 On review, Bowman argues the trial court incorrectly found claims one through six precluded because he "failed to competently demonstrate his decision [to not raise those claims] was knowingly, voluntarily or intelligently made, then he did not

[1]Bowman apparently asked to represent himself from January 2010 until the week before the May 2010 trial, when he requested counsel be reappointed to represent him.

[2]To the extent Bowman's claim that he did not voluntarily waive his right to testify may be characterized as one of ineffective assistance of counsel, it is not precluded. However, because Bowman has not presented any such argument on review, we do not address it.

waive any rights to appeal or post-conviction relief." To the extent Bowman argues these claims are not subject to preclusion because they are of sufficient constitutional magnitude to require his personal waiver, he did not raise this argument below and we thus do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review"); *State v. Espinosa*, 200 Ariz. 503, ¶ 7, 29 P.3d 278, 280 (App. 2001) (preclusion does not apply to claims of sufficient constitutional magnitude absent knowing, voluntary and intelligent waiver). We note, moreover, that Bowman does not assert appellate counsel was ineffective for failing to raise these arguments. Because claims one through six clearly are precluded, the court did not abuse its discretion by denying relief.

¶4 Additionally, although Bowman raised numerous claims of ineffective assistance of counsel in his petition below, on review he appears only to argue that trial counsel should have moved for a mistrial, and that the trial court erroneously stated counsel had in fact done so in its ruling denying post-conviction relief. In its ruling, the court found: "As to Petitioner's argument that his counsel did not request a mistrial when a juror, while riding in an elevator with the other jurors, asked: 'Well why are we doing this if he's [Bowman] already talked about pleading guilty[?'] Petitioner's counsel did, in fact, request a mistrial." Bowman directs us to that portion of the trial transcript where

his attorney explained that, because the jury knew Bowman had considered accepting a plea offer, he may have been "condem[ed]" to guilt in the minds of the jurors. Stating his belief that a limiting instruction would not "cure" this defect, counsel suggested two "appropriate" remedies: "One would be to allow me through my direct examination of my client to explain [to the jury] the plea bargaining process; or, in the alternative, I would be requesting a mistrial." The court "overruled" counsel's request and explained that it would instead explain the state's burden of proof to the jury.

¶5 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and also that the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Even assuming, without deciding, that the trial court did not consider counsel's "request" as a motion for a mistrial and that counsel's failure to so move constituted deficient conduct, Bowman has failed to explain how he was prejudiced thereby. Here, the court assured the parties it would explain the state's burden of proof to the jury to eliminate any possible prejudice resulting from the juror's comment. Nor does Bowman claim the court failed to provide those instructions or that they were in some way deficient. Because Bowman has failed to establish how counsel's conduct, even if deficient, caused him prejudice, the court did not abuse its discretion by finding, albeit for a different reason, that he failed to sustain a claim of ineffective assistance of counsel.

See State v. Oakely, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court will affirm when trial court reaches correct result even if not for correct reason).

¶6 Accordingly, although the petition for review is granted, relief is denied.

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

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding 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 December 12, 2012.