

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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JUL -2 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0105-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RENÉ TIBUCIO VALENZUELA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20050781

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

René Tibucio Valenzuela

Florence
In Propria Persona

K E L L Y, Judge.

¶1 René Valenzuela petitions this court for review of the trial court's order denying, in part, his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., as well as its orders denying his subsequent motions for

reconsideration of that ruling and for a new trial. For the following reasons, we grant review but deny relief.

¶2 Valenzuela was convicted after a jury trial of two counts of child molestation, four counts of sexual conduct with a minor under fifteen, and one count each of kidnapping, child abuse, continuous sexual abuse of a child, furnishing obscene or harmful items to a minor, and sexual abuse of a minor under fifteen. The trial court sentenced him to slightly mitigated prison terms, some consecutive and some concurrent, totaling 101 years. We affirmed his convictions and sentences on appeal. *State v. Valenzuela*, No. 2 CA-CR 2006-0238 (memorandum decision filed Aug. 21, 2008). Valenzuela then filed his first notice of post-conviction relief, and appointed counsel filed a petition asserting claims of ineffective assistance of trial and appellate counsel. The trial court denied relief, and this court denied relief after review of that ruling. *State v. Valenzuela*, No. 2 CA-CR 2010-0258-PR (memorandum decision filed Nov. 29, 2010).

¶3 Valenzuela filed his second notice of post-conviction relief in March 2011. After appointed counsel notified the trial court that she had reviewed the record and found no claims to raise in post-conviction relief proceedings, Valenzuela filed a pro se petition. He alleged multiple claims, including ineffective assistance of trial counsel and first Rule 32 counsel; error in the admission of evidence; the existence of “[n]ewly discovered material facts” that “probably would have changed the verdict or sentence,” Ariz. R. Crim. P. 32.1(e); error in certain counts of the indictment that allegedly rendered charges either multiplicitous or ambiguous; insufficient evidence to support his convictions for continuous sexual abuse (Count Two), one count of sexual conduct with a

minor (Count Six), and one count of molestation (Count Seven); and the erroneous imposition of consecutive sentences.

¶4 The trial court found Valenzuela had stated a non-precluded, colorable claim that “the facts underlying” his claim that he had been wrongly convicted of Count Seven “would be sufficient to establish that no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt.” Ariz. R. Crim. P. 32.1(h). The court also found colorable his related claim that his first Rule 32 counsel had been ineffective in failing to raise this claim in Valenzuela’s first Rule 32 petition. The court found Valenzuela had failed to make such a showing with respect to his conviction for Count Six, however, and denied relief with respect to that claim, as well as the associated claim that Rule 32 counsel had been ineffective in failing to raise this claim previously. The court denied relief on all other claims. Subsequently, the state conceded error with respect to Valenzuela’s conviction for Count Seven, and the court vacated the conviction and sentence for that count.

¶5 On review, Valenzuela challenges only the trial court’s denial of relief with respect to Count Six of the indictment, which alleged he had engaged in sexual intercourse with the victim on December 24, 2004.¹ Count Seven of the indictment had charged molestation, allegedly committed “by having the victim touch the defendant’s penis” on that same date. The trial court granted relief on Valenzuela’s claim with respect to Count Seven because it agreed his conviction for that count was unsupported

¹Valenzuela has therefore waived appellate review of all other aspects of the trial court’s ruling. Ariz. R. Crim. P. 32.9(c)(1), 32.9.

by evidence in the record; although the victim had testified she sometimes put vaseline or lotion “on [Valenzuela’s] private before he put it in [her] private,” and it was used “[a]ll of the time” when Valenzuela had vaginal intercourse with her, she stated that on Christmas Eve 2004, “[h]e put it on his private part.” Accordingly, the court correctly concluded the evidence had not supported the specific allegation that, on that date, the victim had “touch[ed] the defendant’s penis,” presumably by applying lotion to it; thus, “no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt,” Ariz. R. Crim. P. 32.1(h).

¶6 According to Valenzuela, the trial court “erred in denying [him] post-conviction relief on Count 6” because the jury had been “unfairly contaminated and/or influenced” by the state’s questioning of the victim about events on December 24, 2004, and improper closing argument about “the inaccurate facts . . . alleged in Count 7.”² Specifically, he maintains the state improperly “used leading questions” to elicit testimony that he had engaged in vaginal intercourse with her on Christmas Eve, because she had testified earlier “that only oral sex occurred” that day. Generally, he asserts the state’s prosecution on Count Seven “unfairly bolstered the victim’s credibility and prejudiced [him]” because the state had presented expert testimony that, although the victim’s medical examination had shown no abnormalities, the use of lubrication could reduce the amount of trauma from sexual abuse.

²This was also the basis of Valenzuela’s motion for a new trial, which the trial court correctly denied as untimely.

¶7 We will not disturb a trial court’s denial of post-conviction relief unless we find the court abused its discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). As clearly set forth in the court’s ruling, this evidence was insufficient to establish the victim had been molested on Christmas Eve 2004 on the basis that she had applied lotion to Valenzuela’s penis, and thereby touched it, as alleged in the indictment, and no reasonable jury could have so found. Valenzuela therefore had established a non-precluded, colorable claim, pursuant to Rule 32.1(h), with respect to his conviction for Count Seven. The court’s ruling also clearly analyzed and correctly resolved Valenzuela’s claim with respect to Count Six, and found he had not stated a colorable claim that no reasonable fact-finder would have convicted him on that charge, as required by the rule. We need not repeat that analysis here; instead, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 The trial court did not abuse its discretion in denying Valenzuela relief from his conviction and sentence for sexual conduct with a minor under fifteen, as alleged in Count Six of the indictment. Accordingly, we grant review, but deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

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