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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THE STATE OF ARIZONA, Respondent, v. DANNY RODRIGUEZ, Petitioner.	2 CA-CR 2013-0175-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2008124116001DT

Honorable Colleen L. French, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche — Phoenix
Attorneys for Respondent

Danny Rodriguez — Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Danny Rodriguez seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he had received ineffective assistance of counsel. "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). For the reasons stated below, we grant the petition for review and grant relief on two of Rodriguez's claims of ineffective assistance of counsel.

¶2 After a jury trial, Rodriguez was convicted of sexual conduct with a minor under the age of fifteen, based on his having engaged in sexual intercourse with a thirteen-year-old girl. The trial court imposed a presumptive twenty-year sentence. Rodriguez's conviction and sentence were affirmed on appeal. *State v. Rodriguez*, No. 1 CA-CR 08-0969 (memorandum decision filed Feb. 9, 2010). Rodriguez thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was "unable to find any claims for relief to raise in post-conviction proceedings."

¶3 In a pro se petition, however, Rodriguez raised claims of ineffective assistance of trial and appellate counsel. He maintained trial counsel had been ineffective in (1) "interfering with his right to testify at trial," (2) failing to object to certain questions during cross-examination and statements in the state's closing argument, (3) inadequately investigating the case in several regards, (4) not impeaching the victim with prior inconsistent statements, and (5) not objecting to the restitution ordered or requesting a restitution hearing. He also claimed appellate counsel had been ineffective because she failed to challenge the trial court's denial of Rodriguez's motion to contest the victim's statements pursuant to Rule 608, Ariz. R. Evid. The court summarily denied relief.

¶4 On review Rodriguez repeats his arguments made below and contends the trial court abused its discretion in determining he had not presented a colorable claim of

ineffective assistance of counsel. To present such a claim, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶5 We first address Rodriguez's claim that counsel interfered with his right to testify at trial. Although "disagreements in trial strategy will not support a claim of ineffective assistance of counsel, . . . certain basic decisions transcend the label 'trial strategy' and are exclusively the province of the accused: namely, the ultimate decisions on whether to plead guilty, whether to waive a jury trial, and whether to testify." *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987), *quoting State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). "Counsel is encouraged to provide guidance and to urge the client to follow professional advice." *Lee*, 142 Ariz. at 215, 689 P.2d at 158. A problem arises, however, when "the defendant unretreatingly demands that he be given the opportunity to testify but his counsel in direct contradiction to the defendant's wishes refuses to put him on the stand." *State v. Martin*, 102 Ariz. 142, 147, 426 P.2d 639, 644

(1967). A defendant must, however, "make his objection known at trial; not as an afterthought." *Id.*

¶6 Although Rodriguez now claims he wished to testify, he points to nothing in the record to suggest he asserted that desire at trial. Indeed, during a discussion on a motion in limine, the court and counsel discussed whether testimony about Rodriguez's belief about the victim's sexual history would be admitted; counsel asserted that Rodriguez likely would not be testifying and Rodriguez did not suggest otherwise. Because Rodriguez has not established that he asserted his desire to testify at trial, we cannot say the trial court abused its discretion in concluding he did not establish a colorable claim of ineffective assistance on this point.

¶7 Rodriguez also maintains counsel's performance was deficient because he failed to object when the prosecutor asked the manager of the gas station where Rodriguez worked whether it was possible for someone else to enter Rodriguez's code in the station's time clock, making it appear he was at work when he was not. And he maintains counsel should have objected when the prosecutor argued in closing that this was the case. He contends this line of questioning and argument was "speculative" because his manager "had no personal knowledge, nor any other facts, which showed that Rodriguez did, indeed, have anyone else clock him in or out during his workshift."

¶8 But the manager did not testify that someone else *had* entered Rodriguez's code into the clock, merely that it was possible. And Rodriguez does not explain on what grounds an objection to that evidence, which was clearly within the witness's knowledge as manager of the station, would have been successful. Likewise, because a "prosecutor

has wide latitude in actual discussion of the evidence," *State v. Hannon*, 104 Ariz. 273, 275, 451 P.2d 602, 604 (1969), Rodriguez has not established that an objection to the prosecutor's reference to this evidence would have been successful. Nor did he provide the trial court with any evidence to support a claim that failure to object to this line of questioning or argument constituted deficient performance. *See State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984) (counsel presumed to have acted properly unless petitioner can show counsel's decisions not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation"); *see also* Ariz. R. Crim. P. 32.5; *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶¶ 17, 21, 10 P.3d 1193, 1200, 1201 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements).

¶9 Rodriguez next contends counsel was ineffective in failing "to investigate and procure potentially exculpatory evidence," specifically surveillance video of the gas station in which he worked and the testimony of a co-worker who had worked with Rodriguez on the night the crime took place. But, Rodriguez provided no evidence that it would have been possible for counsel to have obtained the video or to locate the co-worker, nor did he present any evidence demonstrating what the co-worker's testimony would have been had she been found. Indeed, on the record before us, Rodriguez's claim that this evidence would have been beneficial to his defense is purely speculative. *See*

Ariz. R. Crim. P. 32.5; *Borbon*, 146 Ariz. at 399, 706 P.2d at 725; *Donald*, 198 Ariz. 406, ¶¶ 17, 21, 10 P.3d at 1200, 1201.

¶10 Rodriguez also asserts that counsel should have impeached as inconsistent the victim's testimony about when and where she and Rodriguez had engaged in sexual intercourse. In a statement to a police officer, she stated she had gone to Rodriguez's apartment on March 29 at around 9:30 p.m. and in a later statement she said that she had left home at about 3:00 a.m. to meet Rodriguez in a park. But, in the later police report, the officer indicated the victim had stated she had seen Rodriguez "last night" at 3:00 a.m. and the report indicated the interview took place on April 14. Thus, the reports suggest that the victim was referring to two different occasions upon which she had met with Rodriguez; they do not establish that the victim's testimony about when and where the intercourse had taken place was inconsistent. In any event, Rodriguez provides no evidence to support his claim that failure to undertake this particular line of impeachment was not simply a matter of trial strategy or that it fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5; *Borbon*, 146 Ariz. at 399, 706 P.2d at 725; *Donald*, 198 Ariz. 406, ¶¶ 17, 21, 10 P.3d at 1200, 1201.

¶11 Rodriguez further contends counsel provided ineffective assistance in failing to investigate his claims that he suffered from erectile dysfunction. In his affidavit, Rodriguez averred that he had suffered from erectile dysfunction since 2007 and, as a result, "it would have been impossible" for him to have committed the charged offense. He further claimed he had seen a doctor and discussed his condition, which had arisen from the use of a prescribed medication. He also told an investigating police

officer that he suffered from this condition, and the officer recorded that information in his report. Thus, although Rodriguez did not aver that he had directly informed counsel of his condition, the record shows this information was available to counsel and supports Rodriguez's argument that he did inform counsel.

¶12 Taking Rodriguez's claims as true, *see State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990), and in the absence of anything in the record to show that counsel did investigate and reject this claim for strategic reasons, we conclude the trial court abused its discretion in determining this claim was not colorable. "Counsel . . . has a duty to investigate and 'explore all avenues leading to facts relevant to the merits of the case.'" *State v. Schultz*, 140 Ariz. 222, 224, 681 P.2d 374, 376 (1984), *quoting* A.B.A. Standards for Criminal Justice 4-4.1. And, if proven to be true, Rodriguez's erectile dysfunction, although not a complete defense based on the state's having charged that Rodriguez had engaged in "sexual intercourse or oral sexual contact" with a minor, could have cast doubt on the victim's claim Rodriguez had engaged in sexual intercourse with her. Such doubt might have changed the outcome of the proceeding, and Rodriguez has therefore stated a colorable claim and is entitled to an evidentiary hearing on this claim. *See Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173 ("The defendant is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome.").

¶13 Rodriguez also maintains counsel should have objected to the trial court's order that he pay $1,872.00 in restitution to the victim's mother or should have requested a restitution hearing. We agree. "A loss is recoverable as restitution if it meets three

requirements: (1) the loss must be economic, (2) the loss must be one that the victim would not have incurred but for the criminal conduct, and (3) the criminal conduct must directly cause the economic loss." *State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). Thus, "[r]ecoverable economic losses are those that flow directly from or are a direct result of the crime committed. This contrasts with 'consequential damages,' which are those that do not flow directly from the defendant's criminal activity. Consequential damages instead are produced by the concurrence of some other causal event." *State v. Lindsley*, 191 Ariz. 195, 198, 953 P.2d 1248, 1251 (App. 1997) (citations omitted).

¶14 In this case, based on the presentence report, the award of restitution apparently consisted of $172.00 for medication for the victim and $1,700.00 for money the victim's mother asserted Rodriguez had taken from the victim. The evidence at trial established that the victim had taken $1,800.00 from her mother's purse sometime before the night she and Rodriguez engaged in sexual intercourse. Rodriguez deposited the money in his bank account and used part of it to pay his rent. But, the victim also used some of the money to pay for a cellular telephone and to buy things for herself the day after she and Rodriguez had intercourse, and her testimony suggested Rodriguez had returned $1,000.00 of the money to her mother. The victim also testified she had taken the money "[b]ecause I was tired of my mom getting all . . . into my business . . . I wanted it my way, so, I decided to [run away to] my grandma. I needed the money. That's why I took the money." And she testified she had given Rodriguez the money "to

put in the bank," because she did not want to keep it at her house because she did not want her mother to find it.

¶15 The parents of a minor victim may be awarded restitution for losses incurred as a result of a crime against their child. *See e.g. In re Erika V.*, 194 Ariz. 399, ¶ 8, 983 P.2d 768, 770 (App. 1999). And restitution can be ordered for an uncharged offense. *See Lindsley*, 191 Ariz. at 197, 953 P.2d at 1250. But the state must prove by a preponderance of the evidence that the defendant's actions caused the victim's loss, and on the evidence before us, we cannot say the state did so. *See id.*; *In re Stephanie B.*, 204 Ariz. 466, 470, ¶¶ 15, 17, 65 P.3d 114, 118 (App. 2003) (upholding award of restitution for medical expenses where juvenile found not delinquent on a charged offense as long as juvenile found delinquent of another criminal offense that properly supports the award). Counsel thus had an obligation, at a minimum, to object to the restitution or to ask for a hearing. *Cf. State v. Glassel*, 211 Ariz. 33, ¶ 62, 116 P.3d 1193, 1211 (2005) ("'[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.'"), *quoting United States v. Cronic*, 466 U.S. 648, 659 (1984). Rodriguez's claim that counsel was ineffective because he failed to do so is therefore colorable and he is entitled to an evidentiary hearing on this claim. *See Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173.

¶16 Finally, Rodriguez contends appellate counsel was ineffective in failing to raise on appeal a claim that the trial court had erred in denying his motion pursuant to Rule 608, Ariz. R. Evid., to question the victim about her initial statement to an

investigating officer that she had not had sexual intercourse with anyone before Rodriguez and her subsequent admission, apparently during the same interview, that she had engaged in intercourse with one other person. "A strong presumption exists that appellate counsel provided effective assistance. Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal. As a general rule, '[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.'" *State v. Bennett*, 213 Ariz. 562, ¶ 22, 146 P.3d 63, 68 (2006) (citations omitted; alteration in *Bennett*), *quoting State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). Rodriguez has not established that this claim was "clearly stronger" than that selected by counsel, *id.*, and has not otherwise overcome the presumption of effective assistance.

¶17 For these reasons, we grant the petition for review and grant relief. We remand the matter to the trial court for further proceedings consistent with this decision.

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

CONCURRING:

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

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