IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JERROLD DEAN BROMAN,
Petitioner.

No. 2 CA-CR 2014-0378-PR
Filed January 23, 2015

Petition for Review from the Superior Court in Cochise County
No. CR201000784
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

Jerrold Dean Broman, Florence
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Jerrold Broman 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). Broman has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Broman was convicted of eleven counts of sexual exploitation of a minor and sentenced to consecutive prison terms totaling 187 years. We affirmed his convictions and sentences on appeal. *State v. Broman*, No. 2 CA-CR 2011-0192 (memorandum decision filed Mar. 21, 2012). Broman sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but had found no "claims for relief to raise in this post-conviction proceeding."

¶3 Broman then filed a pro se petition claiming trial counsel had been ineffective because he did not retain an expert witness to examine his computer's hard drive and testify at trial and did not adequately explain to him issues related to the sentences for lesser-included offenses. As to his first claim, Broman theorized that the images had been placed on his computer by a "remote hacker" seeking "to service [his] own sexual appetites," and that an expert could have investigated that possibility. He also suggested counsel should have subpoenaed his computer lease contracts, which he claimed would have shown he did not possess his desktop computer at the time the "image files were created."

¶4 The trial court summarily dismissed Broman's petition. It determined that Broman had not identified how he had been prejudiced by any advice given to him related to sentencing and that he had not demonstrated any reason counsel would have hired an expert in light of the fact that "the same offending images" had been found on "both his personal computer and his laptop," and thus a "'remote hacker' or prior owner of either computer could not have created the same images in both computers." This petition for review followed.

¶5 On review, Broman argues the trial court erred in summarily rejecting his claims that counsel had been ineffective in failing to adequately investigate and present his defense by retaining an expert witness and obtaining a subpoena of computer lease documents.[1] "To state a colorable claim of ineffective assistance of counsel," Broman was required to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 Broman asserts the trial court erred in concluding child pornography images existed on both his desktop and laptop computers. But, even if Broman is correct that the evidence presented at trial does not show the same images existed on both of his computers, his claim of ineffective assistance still fails. There was ample evidence presented at trial that images of child pornography existed on both computers. In light of that evidence, Broman has not made a colorable claim that it was unreasonable for

[1]Broman further claims, for the first time in his petition for review, that appellate counsel was ineffective. We do not address claims raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

trial counsel to conclude that it would have been fruitless to investigate a defense that the images had been placed on one of the computers by a third party. *See State v. Denz*, 232 Ariz. 441, ¶¶ 7, 11, 306 P.3d 98, 101-02 (App. 2013) (counsel presumed to have provided competent representation and "may opt not to pursue a particular investigative path based on his or her reasoned conclusion that it would not yield useful information").

¶7 Broman also asserts, as we understand his argument, that the trial court was not permitted to rely on any evidence found on the laptop computer in rejecting his claim because such evidence is inadmissible pursuant to Rule 404, Ariz. R. Evid. But, even assuming the rules of evidence must be considered when a trial court evaluates whether a claim is colorable, the court here did not consider the images as evidence of Broman's guilt. It instead considered the evidence in the context of his claim of ineffective assistance of counsel—that is, whether counsel had any basis to investigate whether the child pornography images had been placed on Broman's desktop computer by a third party. As we have explained, whether both of Broman's computers contained images of child pornography is relevant to that issue.

¶8 Insofar as Broman separately argues counsel was ineffective by failing to obtain the lease documents for his computer, that claim also fails. He argues those documents would have demonstrated he was not in possession of the computer when the images were "placed there." But, below and on review, he has failed to cite to the record or provide any evidence as to what the access or creation times are for any of the files. Thus, we are unable to evaluate whether any viable defense existed based on the lease documents, and therefore we do not address this argument further. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must "contain specific references to the record"); *cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶9 Although we grant review, we deny relief.