

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAVID WALTER SWAN,
Petitioner.

No. 2 CA-CR 2016-0236-PR
Filed August 17, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2008007518001DT
The Honorable Joseph C. Welty, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Susan L. Luder, Deputy County Attorney, Phoenix
Counsel for Respondent

David W. Swan, Florence
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 David Swan seeks review of the trial court’s dismissal of 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 abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Swan has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Swan was convicted of five counts of child molestation, two counts of sexual conduct with a minor, and one count of sexual abuse. The trial court sentenced him to concurrent and consecutive prison terms consisting of an aggregate seventy-one-year prison term to be followed by life imprisonment without the possibility of release for thirty-five years. We affirmed his convictions and sentences on appeal. *State v. Swan*, No. 1 CA-CR 10-0423 (Ariz. App. May 26, 2011) (mem. decision).

¶3 Swan then sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no claims to raise pursuant to Rule 32. Swan filed a pro se petition raising, inter alia, claims of ineffective assistance of trial and appellate counsel and asserting that recordings of victim statements had been improperly played at trial. The trial court found the bulk of Swan’s claims were not colorable but determined it needed “additional briefing” to “address the admissibility of the prior recorded statements” and any claims of ineffective assistance arising from admission of those statements. The court directed that Swan’s appointed counsel “take over preparation of the additional briefing.”

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¶4 Counsel filed a supplement stating she had reviewed the issue and again found no claims to raise in post-conviction proceedings, and provided a memorandum detailing the events at trial related to the statements. Swan filed a pro se response to the state’s supplement and, after hearing oral argument, the trial court denied relief, dismissing Swan’s petition. This petition for review followed.

¶5 On review, Swan first argues the trial court erred by finding precluded his claim the recorded victim statements should not have been played for the jury. We disagree. Counsel did not raise this issue on appeal; Rule 32.2(a)(3) precludes relief for any claim waived on appeal by appellate counsel’s failure to raise it.¹ *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009) (“The right to confrontation may, of course, be waived, including by failure to object to the offending evidence . . .”). Accordingly, we review this issue only as it relates to Swan’s claims of ineffective assistance of counsel.

¶6 “To 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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016). “To establish deficient performance, a defendant must show that his counsel’s assistance was not reasonable under prevailing professional norms, ‘considering all the circumstances.’” *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088 (2014). “To establish prejudice, a defendant must ‘show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding

¹Swan suggests his claim is nonetheless reviewable pursuant to Rule 32.1(h) as a claim of actual innocence. Even if he were correct, he did not raise this argument below, and we therefore do not address it further. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

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would have been different.”² *Id.*, quoting *Hinton*, ___ U.S. at ___, 134 S. Ct. at 1089.

¶7 Swan asserts appellate counsel was ineffective for failing to argue on appeal that the victim statements having been played to the jury violated the prohibition against hearsay and his right to confront witnesses, and contends trial counsel was ineffective for failing to adequately argue this issue at trial. The trial court determined the statements were properly presented to the jury pursuant to Rule 803(5), Ariz. R. Evid., which exempts from the general rule against hearsay “a record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and (C) accurately reflects the witness’s knowledge.”

¶8 Swan claims the third requirement was not met, asserting the recorded statements were inadmissible because neither witness had avowed their statements were true. The record does not support Swan’s argument—both witnesses testified they had been truthful in their recorded interviews. This obviously meets the requirement that the evidence “accurately reflect[] the witness’s knowledge” under Rule 803(5). *See State v. Martin*, 225 Ariz. 162, ¶ 12, 235 P.3d 1045, 1048 (App. 2010); *see also State v. Smith*, 215 Ariz. 221, ¶ 29, 159 P.3d 531, 539 (2007) (listing foundation requirements for recorded recollection).

¶9 Swan has not established that the recorded statements were erroneously published to the jury³ and, thus, has not made a

²Swan contends he is entitled to relief on his claim of ineffective assistance of appellate counsel if he demonstrates the issue was “meritorious” enough to “qualify[]” for appellate review and he therefore need not demonstrate “the evidence was improperly admitted.” This argument is contrary to established law requiring him to show the result of the proceeding would have been different.

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colorable claim of ineffective assistance of appellate counsel. *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64. For the same reason, we agree with the trial court that his related claim of ineffective assistance of trial counsel is not colorable. *See id.*

¶10 Swan also identifies several other claims of ineffective assistance of trial counsel. First, he details what he argues are mistakes by counsel during counsel's examination of a defense witness, the eight-year-old brother of two of the victims. Trial counsel is presumed to have acted properly unless a petitioner can show the attorney's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). The manner in which to cross-examine a witness is a matter of trial strategy. *State v. Tison*, 129 Ariz. 546, 556, 633 P.2d 355, 365 (1981). "Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988).

¶11 Swan's argument centers on the following exchange between counsel and the witness:

Q. Okay. Have you heard any talk about [Swan] touching your sisters in bad places?

A. Not for a while.

Q. Not for a while. When did you hear about [Swan] touching your sister in bad places, who did you hear that from?

A. I saw it.

³ Swan further contends some of the recordings were improperly redacted, causing improper "duplicate testimony." This claim is precluded and, to the extent Swan asserts trial and appellate counsel were ineffective in failing to raise this issue, he has not demonstrated resulting prejudice.

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....

Q. How come you never told me during the phone call that you saw something happen to your older sister?

A. You never asked me.

¶12 Swan first contends counsel should have asked the witness to describe the person he had seen touching his sister because the witness failed to identify Swan earlier in his testimony. But counsel's decision not to further plumb what appears to be surprising and unsolicited testimony is plainly a tactical decision that cannot support a claim of ineffective assistance. *See Beaty*, 158 Ariz. at 250, 762 P.2d at 537; *Tison*, 129 Ariz. at 556, 633 P.2d at 365.

¶13 Swan further asserts the witness's response that he had not been asked about seeing Swan touch his sister demonstrates his counsel was not properly prepared for trial. Even assuming the witness's claim was true, however, it appears counsel had no intention of eliciting testimony whether the witness had seen any incidents. And counsel may have had a valid tactical reason for not pursuing that line of questioning in an interview. *See Beaty*, 158 Ariz. at 250, 762 P.2d at 537. Swan has identified no evidence or authority suggesting that competent counsel necessarily would have done so. *See Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64. Accordingly, the trial court did not err in summarily rejecting this claim of ineffective assistance.

¶14 Swan also asserts his counsel failed to object to improper testimony by the state's expert. Because he did not raise this claim in his petition below, we do not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). He further argues counsel should have retained a "neutral" expert. But he has not identified on review any relevant testimony such an expert could have offered, much less identified any expert who would have offered such testimony. Thus, even assuming counsel should have consulted with an expert but failed to do so, Swan has

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not made a colorable claim of resulting prejudice. *See Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64.

¶15 For similar reasons, we reject Swan's claim that trial counsel was ineffective for failing to interview and call at trial four witnesses who Swan claims would have supported his defense. As Swan acknowledges, however, he has not obtained affidavits from these witnesses, nor does he describe on review what the substance of their testimony would have been. Swan therefore has not made a colorable claim that counsel's decision not to interview or call these witnesses would have changed the jury's verdicts. *See id.*

¶16 We grant review but deny relief.