IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JASON EARL TIBBETTS,
Petitioner.

No. 2 CA-CR 2017-0020-PR
Filed April 5, 2017

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201401109
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Mark Mendoza, Deputy County Attorney, Florence
Counsel for Respondent

Jason Tibbetts, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 Jason Tibbetts seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Tibbets has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Tibbetts was convicted of luring a minor for sexual exploitation and sexual exploitation of a minor. He was sentenced to concurrent prison terms, the longer of which is twelve years. This court affirmed his convictions and sentences on appeal. *State v. Tibbetts*, No. 2 CA-CR 2015-0216 (Ariz. App. May 6, 2016) (mem. decision).

¶3 Tibbetts then sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no colorable claims to raise in a Rule 32 proceeding. In a pro se petition, Tibbetts raised claims of ineffective assistance of trial and appellate counsel, as well as numerous claims of trial error. The trial court summarily denied relief, and this petition for review followed.

¶4 On review, Tibbetts repeats the arguments he made in his petition below.[1] We first observe that his various claims of trial

[1]Tibbetts filed an "addendum" to his petition for review in which he claimed his sentence was unlawful. The sentencing claim

error are precluded because they could have been raised on appeal but were not. Ariz. R. Crim. P. 32.2(a)(3). Thus, we address those arguments only in the context of Tibbetts's claims of ineffective assistance of trial and appellate counsel.

¶5 "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); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "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 would have been different.'" *Id.*, *quoting Hinton*, ___ U.S. at ___, 134 S. Ct. at 1089.

¶6 The bulk of Tibbetts's claims of ineffective assistance of trial counsel concern counsel's purported failure to adequately investigate and prepare the case and conduct trial. These claims warrant summary rejection because Tibbetts has not provided supporting evidence or citations to the record, nor has he shown that, had counsel acted as Tibbetts believed he should have, the result of the case would have been different. *See id.*; *see also* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must contain "reasons why the petition should be granted" and either appendix or "specific references to the record"); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

¶7 For example, Tibbetts claims counsel "failed to investigate any witness or hire an investigator," and "failed to acquire

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was not raised in his petition below and, accordingly, we do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii).

an expert witness," but identifies no relevant evidence that would have been discovered had counsel done so. And, although he complains counsel should have presented other defenses and asked for a mitigation hearing, he has not identified any relevant defense or any mitigating evidence counsel should have presented. Tibbetts also asserts his counsel should have sought suppression based on the allegedly warrantless search of his cellular phone. But he has identified no evidence suggesting his phone was, in fact, searched without a warrant. Nor has he established the grant of a motion to suppress was reasonably likely to alter the outcome of his trial. *See Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64.

¶8 Tibbets has identified eight arguments he asserts his appellate counsel should have raised on appeal. Because he has not established that any of these arguments would warrant relief on appeal, he has demonstrated neither that counsel fell below prevailing professional norms or that he was prejudiced thereby. *See id*.

¶9 First, he asserts appellate counsel should have argued the trial court erred by failing to preclude his confession as involuntary because he was highly intoxicated during that interview, having had a blood alcohol concentration of .265. But he has cited no evidence supporting this claim and, in any event, intoxication alone does not render a confession involuntary. *See State v. Londo*, 215 Ariz. 72, ¶ 13, 158 P.3d 201, 205 (App. 2006) ("The fact that Defendant was ill or possibly intoxicated at the time he confessed may be relevant to whether he was susceptible to coercive police conduct, but it does not by itself render the confession involuntary."); *see also* Ariz. R. Crim. P. 32.9(c); *Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d at 683.

¶10 Next, Tibbetts asserts counsel should have raised on appeal a claim that jurisdiction was improper because there is no evidence he possessed the photograph of the naked victim while in Pinal County and thus no evidence he committed sexual exploitation of a minor in Pinal County. His argument conflates venue with jurisdiction; the court's subject-matter jurisdiction over him is not implicated if the case is brought in an improper county. *See State v. Willoughby*, 181 Ariz. 530, 537 n.7, 543, 892 P.2d 1319, 1326 n.7, 1332

(1995) ("jurisdiction is the power of a court to try a case," and cannot be waived, while "venue concerns the locale where the power may be exercised" and is subject to waiver). Even assuming Tibbetts is correct there is no evidence he possessed the photograph while in Pinal County, he nonetheless possessed it while in Arizona.[2] Tibbetts has not shown appellate counsel should have raised this issue on appeal.[3]

¶11 Tibbetts also asserts appellate counsel should have argued the prosecutor committed misconduct by "hid[ing]" the victim "behind the Rape Shield Law," *see* A.R.S. § 13-1421, thereby violating his confrontation rights.[4] Counsel argued on appeal that the trial court improperly determined the rape shield law precluded

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[2] Tibbetts claims he was in Maricopa County "at all times relevant to this case." Trial testimony established that, using an electronic device, the victim sent Tibbetts a photograph with "her breasts exposed." Thus, we also reject Tibbetts's claim that appellate counsel should have argued the evidence was insufficient to support his conviction of sexual exploitation of a minor. *See* A.R.S. § 13-3553(A)(2).

[3] Tibbetts asserts he asked his trial counsel "to have the venue moved to the appropriate county" and that counsel was ineffective for failing to raise the jurisdiction issue. Even assuming a motion to change venue would have succeeded, Tibbetts has not overcome the presumption that counsel's conduct was reasonable by demonstrating that "counsel's decisions were not tactical in nature, but were instead the result of 'ineptitude, inexperience or lack of preparation.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

[4] Tibbetts also asserts the state committed misconduct by presenting the victim's allegedly perjured testimony and by permitting witnesses to testify about "events after the commission of the alleged crimes." He fails to support this argument with evidence, and we therefore decline to address it. *See* Ariz. R. Crim. P. 32.9(c); *Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d at 683.

statements the victim had made about a previous sexual relationship. We concluded that, even if preclusion were improper, the error was harmless. Thus, Tibbetts cannot establish that a claim based on his confrontation right or some misconduct by the state with regards to the same evidence would have changed the result of his appeal, and his claim of ineffective assistance of appellate counsel necessarily fails. *See Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64.

¶12 Finally, Tibbetts contends appellate counsel was ineffective in failing to argue that his right to be present at several bench conferences was violated, that his speedy trial rights were violated, and that the jury was improperly shown a photograph not admitted into evidence. Tibbetts has not supported these claims with citation to the record, and thus has not shown the trial court erred in summarily rejecting them. *See* Ariz. R. Crim. P. 32.9(c); *Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d at 683.

¶13 We grant review but deny relief.