

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

NICHOLAUS CRAIG SCHREIBER,  
*Petitioner.*

No. 2 CA-CR 2019-0210-PR  
Filed March 9, 2020

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Petition for Review from the Superior Court in Pima County  
No. CR20135223001  
The Honorable Greg Sakall, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Nicholaus Schreiber, Florence  
*In Propria Persona*

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

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BREARCLIFFE, Judge:

¶1 Petitioner Nicholas Schreiber seeks review of the trial court’s ruling summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that ruling absent a clear abuse of discretion. *See State v. Gutierrez*, 229 Ariz. 573, ¶ 19 (2012). Schreiber has not demonstrated such abuse in this case.

¶2 After a jury trial, Schreiber was convicted of four counts of sexual conduct with a minor, one count of furnishing harmful items to a minor, and one count of public sexual indecency. The convictions were based on several incidents in which Schreiber engaged in sexual acts with his minor stepdaughter, C.A. The trial court sentenced him to concurrent and consecutive prison terms totaling ten years, to be followed by four years’ supervised probation. We affirmed Schreiber’s convictions and sentences on appeal. *State v. Schreiber*, No. 2 CA-CR 2016-0287 (Ariz. App. Aug. 30, 2017) (mem. decision).

¶3 Thereafter, Schreiber filed a notice of post-conviction relief, and appointed counsel filed a petition alleging ineffective assistance of trial counsel.<sup>2</sup> Specifically, the petition alleged counsel had been ineffective in

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<sup>1</sup>Rule 32 was amended effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). Because application of the new rule is neither infeasible nor works an injustice, we apply it here. *See id.*; *see also State v. Botello-Rangel*, No. 1 CA-CR 19-0332 PRPC, n.1, 2020 WL 896477 (Ariz. Ct. App. Feb. 25, 2020).

<sup>2</sup>Schreiber’s notice of post-conviction relief was untimely. *See* Ariz. R. Crim. P. 32.4(b)(3)(A) (“A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.”). However, “[t]he court must excuse an untimely notice requesting post-conviction relief filed under [Rule 32.1(a)] if the defendant adequately explains why the failure to timely file a notice was not the

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“failing to object to [C.A.’s mother] being given the rights of a victim representative when C.A. was 20 years old at the time of the trial and sentencing.” Because C.A.’s mother as the victim representative was allowed “to remain in the courtroom for the testimony of . . . the other witnesses,” Schreiber maintained she was able to “tailor her answers when she was recalled” as a witness.<sup>3</sup> And without her testimony, Schreiber reasoned that he “had a real possibility of being acquitted.” Schreiber similarly asserted that without the mother’s “lengthy impact statement,” he had “a real possibility of a lesser sentence.”

¶4 The trial court concluded that Schreiber failed to present a colorable claim warranting an evidentiary hearing. It determined that trial counsel’s failure to object to C.A.’s mother remaining in the courtroom did not fall below prevailing objective standards, analogizing this case to *J.D. v. Hegyi*, 236 Ariz. 39 (2014). In *J.D.*, our supreme court held that “a parent who exercises victims’ rights on behalf of a minor child is entitled to refuse a defense interview through the final disposition of the charges, even if the child earlier turns eighteen.” *Id.* ¶ 22. In addition, the court cited *State v. Salcido*, No. 1 CA-CR 15-0566, ¶¶ 38-43 (Ariz. App. Oct. 18, 2016) (mem. decision), where this court extended *J.D.* to apply to a victim’s parents remaining in the courtroom when enforcing the victim’s rights, even though the victim had turned eighteen before trial.<sup>4</sup> The court also

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defendant’s fault.” Ariz. R. Crim. P. 32.4(b)(3)(D). Here, appellate counsel filed Schreiber’s notice, explaining that he was doing so “as a courtesy” because Schreiber was “impaired and indigent and, therefore could not understand the filing process from [the Department of Corrections].” We thus conclude the untimely notice was not Schreiber’s fault and address the merits of his claim. See A.R.S. § 13-4234(G) (“The time limits are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice.”).

<sup>3</sup>C.A.’s mother was the first witness at trial, but the state reserved the right to recall her and did so the next day. Only one witness, C.A., testified after the mother’s original testimony and before she was recalled.

<sup>4</sup>The trial court explained that the state had cited *Salcido* for persuasive value only, consistent with Rule 111(c)(1)(C), Ariz. R. Sup. Ct., in its response to Schreiber’s petition for post-conviction relief. We only cite *Salcido* to the extent necessary to address Schreiber’s arguments on review and to assist us in deciding whether to grant this petition. See Ariz. R. Sup. Ct. 111(c)(1)(B).

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determined that Schreiber “failed to present an adequate showing” of prejudice because he did not “identify any instance in which [C.A.’s mother] is suspected of testifying falsely or tailoring her testimony” and he “fail[ed] to expand on the alleged connection between the alleged failure of his trial counsel” and his sentences. The court thus summarily denied relief. This petition for review followed.

¶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 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). “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 (App. 2004) (quoting *State v. Runningeagle*, 176 Ariz. 59, 63 (1993)); *see also State v. Fillmore*, 187 Ariz. 174, 180 (App. 1996) (to avoid summary dismissal on claim of ineffective assistance of counsel, defendant must make showing of colorable claim on both prongs of test). In addition, to warrant an evidentiary hearing, a claim of ineffective assistance of counsel “must consist of more than conclusory assertions.” *State v. Donald*, 198 Ariz. 406, ¶ 21 (App. 2000).

¶6 On review, Schreiber contends the trial court erred in relying on *J.D.* and *Salcido* without “distinguishing facts between the present case and [those] two decisions.” We disagree. The court discussed the facts and holdings of those two cases and ultimately concluded “Schreiber’s attempts to distinguish *J.D.* and *Salcido* are not persuasive.” Contrary to Schreiber’s suggestion, the court did not “ignore” his argument that the victim “was an adult for the majority of the time this case was pending and able to present her own victim rights.” Rather, the court found that fact immaterial in light of *J.D.* and *State v. Uriarte*, 194 Ariz. 275, ¶ 19 (App. 1998), where this court determined that “a parent is permitted to attend trial proceedings with and on behalf of a victim who is a minor, even if the parent’s testimony is required.” As we stated in *Salcido*, No. 1 CA-CR 15-0566, ¶ 43:

To find that a parent’s ability to enforce a minor victim’s rights and be present at trial expires upon the minor victim’s eighteenth birthday, possibly in the middle of trial after months if not years of being present to support the minor victim and enforce the minor victim’s rights at every other proceeding, would not only be the antithesis of providing respect and protection to

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those who were minors when they became victims of crime, but the antithesis of aiding in their healing.

¶7 Schreiber also argues that the trial court erred in deciding the issue of prejudice without holding an evidentiary hearing. He reasons that “this case is a credibility contest” and that the court needed “an opportunity to observe witness memory while testifying.” Although the jury’s determinations of guilt may have involved a “credibility contest” as Schreiber suggests, that is not the case in this Rule 32 proceeding, where the issue for the trial court was whether Schreiber had alleged more than “conclusory assertions,” *Donald*, 198 Ariz. 406, ¶ 21, that, if true, “might have changed the outcome,” *Jackson*, 209 Ariz. 13, ¶ 2. We fail to see how that question as presented here involved an issue of credibility for which an evidentiary hearing was necessary.

¶8 In its ruling, the trial court clearly identified, addressed, and correctly resolved Schreiber’s claim of ineffective assistance of trial counsel. We therefore adopt that ruling. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has correctly ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court’s correct ruling in a written decision”).

¶9 Accordingly, although we grant the petition for review, we deny relief.