IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ADAM GONZALES,
Petitioner.

No. 2 CA-CR 2020-0075-PR
Filed September 8, 2020

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NOT FOR PUBLICATION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).

Petition for Review from the Superior Court in Pima County
No. CR20153668001
The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jeffrey G. Buchella, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Petitioner Adam Gonzales seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Gonzales has not met his burden of establishing such abuse here.

¶2 In 2015, Gonzales was charged with two counts each of sexual assault and sexual conduct with a minor. After a first trial, the jury found Gonzales guilty of one count of sexual conduct but could not reach a verdict on the remaining charges. Pursuant to the state's request, the trial court dismissed with prejudice the second sexual conduct charge, and, after a second trial, Gonzales was convicted of the two sexual assault counts. The convictions were based on incidents involving Gonzales and sixteen-year-old P.M. during the summer of 2010, while they were both staying in the living room of a townhouse belonging to Gonzales's brother and P.M.'s aunt. The trial court imposed consecutive and concurrent prison terms totaling 31.5 years. This court affirmed Gonzales's convictions and sentences on appeal. *State v. Gonzales*, No. 2 CA-CR 2016-0277 (Ariz. App. May 10, 2017) (mem. decision).

¶3 Gonzales initiated a proceeding for post-conviction relief, and the trial court appointed Rule 32 counsel. In his petition, Gonzales asserted

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

claims of ineffective assistance of trial counsel, requesting that the court set aside his convictions and sentences for sexual assault from his second trial. Specifically, Gonzales argued that his counsel had failed to adequately investigate his case by not interviewing or calling as witnesses several individuals, had failed to provide Gonzales with disclosure, and had failed to adequately advise him regarding, and to provide sufficient time to consider, a plea agreement offered before the second trial. Gonzales attached to his petition affidavits from his sister, his mother, his brother, and his former girlfriend. The proposed testimony from these individuals fell into three general categories: P.M.'s purported "crush" on Gonzales, including "flirting" and an attempted kiss; the timeline for the second assault; and the lack of noise heard by anyone in the house at the time of the assaults. Gonzales also provided an affidavit, avowing, in part, that he had told his counsel "it was important that he contact these witnesses" but his counsel "never contacted them or interviewed them."

¶4 As part of its response, the state provided an affidavit from Gonzales's trial counsel. His counsel avowed that he had met with Gonzales "frequently and discussed all aspects of his case" and that Gonzales had not, at any time before either trial, "talk[ed] to [him] about the witnesses" or their proposed statements. The state also provided an audio recording of Gonzales while he was in jail, during which he mentioned the plea agreement offered shortly before his second trial. Gonzales apparently stated that the plea agreement had a sentencing range of 2.5 to eight years, that he likely would have received a 3.5-year sentence under the plea, and that he did not want to sign a plea agreement "for something [he] didn't do."[2]

¶5 In reply, Gonzales provided a supplemental affidavit, stating that he did not recall the jail conversation but acknowledging that he knew the sentencing range for the plea agreement.[3] Gonzales again avowed that

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[2]The audio recording is not part of our record on review. We requested a copy of it, and, although one was provided, it was unreadable. In any event, Gonzales does not challenge the recording—portions of which were quoted in the trial court's ruling—instead suggesting that he does not recall the conversation.

[3]Although the supplemental affidavit attached to the reply was unsigned, the trial court nonetheless considered it when ruling on Gonzales's Rule 32 petition and accepted an identical signed version for purposes of this petition for review.

he had "insufficient time to consider" the plea, reasoning that "[i]t was presented in a hurried fashion, just as [his] second trial was beginning," after he had "just been changed into some ill-fitting clothing" and the judge was asking if Gonzalez was ready to begin.

¶6 The trial court summarily dismissed Gonzales's petition. The court explained that Gonzales's trial counsel had not been ineffective for failing to investigate because Gonzales never provided him the names of the potential witnesses. "[E]ven assuming that [Gonzales] had told [counsel] about potential witnesses," the court noted that "the vast majority of the things the witnesses would testify to are inadmissible, irrelevant and/or cumulative." The court also rejected Gonzales's claim that his counsel had failed to provide him with disclosure, reasoning that the avowal in his affidavit that "he was not aware of the specifics of the victim's allegations as to the dates and times of the incidents until he heard her trial testimony" was "demonstrably false." The court pointed out that Gonzales had two trials, that his Rule 32 petition only challenged the convictions from his second trial, and that Gonzales had been present during the first trial. Finally, the court determined that Gonzales's counsel had not provided ineffective assistance regarding the plea agreement because Gonzales's assertions that "he did not understand it, did not have enough time to consider it, that it was not sufficiently explained, or that he was inhibited by tight-fitting clothing" were "demonstrably false" in light of the jail recording and Gonzales's modified statements in his supplemental affidavit. The court found that the recording made it "overwhelmingly clear" that Gonzales "was not going to accept any plea." This petition for review followed.

¶7 In a proceeding for post-conviction relief, a defendant is entitled to an evidentiary hearing if he establishes a colorable claim—that is, one that, if the allegations are true, might have changed the verdict or sentence. *State v. Speers*, 238 Ariz. 423, ¶ 9 (App. 2015). "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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* Under the first prong of *Strickland*, "we must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice under the second prong of *Strickland*, a

defendant cannot meet his burden by "mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

¶8 On review, Gonzales contends the trial court erred in concluding that trial counsel had not provided ineffective assistance by failing to call the proposed witnesses because the decision was "tactical." In light of the "competing affidavits" from him and his counsel, Gonzales maintains there were "material disputes of fact [that] should have been resolved in an evidentiary hearing." But Gonzales misapprehends the court's ruling.

¶9 First, the trial court did not conclude that trial counsel's decision not to call the witnesses was "tactical." Rather, the court explained that counsel had not been aware of Gonzales's proposed witnesses and that, even if he were, their proposed testimony would have been largely "inadmissible, irrelevant and/or cumulative." Although the court quoted *State v. Lee*, 142 Ariz. 210, 215 (1984), for the proposition that "the decision as to what witnesses to call is a tactical, strategic decision," it did so in its recitation of the law and did not directly apply that principal in its analysis.

¶10 Second, the trial court recognized that there were "competing affidavits" from Gonzales and his trial counsel. The court, however, found Gonzales's claim in his affidavit that he had told counsel about the witnesses incredible based on "other areas of [his] affidavits that strain the truth." When affidavits "lack any reliable factual foundation, the trial court [may] properly discount the[m]," without the need for an evidentiary hearing. *State v. Krum*, 183 Ariz. 288, 294 (1995). Based on the record before us, we cannot say the court abused its discretion.

¶11 Third, the trial court determined, even accepting as true Gonzales's assertion that he had informed his trial counsel of the witnesses, *see Speers*, 238 Ariz. 423, ¶ 9, Gonzales was not entitled to an evidentiary hearing because he failed to establish prejudice, *see Bennett*, 213 Ariz. 562, ¶ 21. By its very nature, irrelevant, cumulative, or otherwise inadmissible evidence could not have affected the outcome of the case. *Cf. State v. Royalty*, 236 Ariz. 125, ¶ 17 (App. 2014) (where defendant failed to show why court's conclusion that evidence was cumulative or irrelevant was wrong, he failed to establish outcome at trial would have been different had trial counsel conducted more thorough pretrial investigation).

¶12 Gonzales, nevertheless, disputes the trial court's determinations regarding the admissibility of the proposed testimony. We,

however, agree with that court that the proposed testimony of Gonzales's mother, based on statements that his sister had made to her, was inadmissible hearsay. *See* Ariz. R. Evid. 801, 802; *cf. State v. Weatherbee*, 158 Ariz. 303, 305 (App. 1988) (detective's testimony recounting what defendant's daughter had told him inadmissible hearsay). Gonzales's argument that his mother's testimony repeating what his sister had told her would have been admissible as a prior consistent statement necessarily assumes that the sister's testimony or credibility would have been attacked in the first place. *See* Ariz. R. Evid. 801(d)(1)(B); *see also Rosario*, 195 Ariz. 264, ¶ 23.

¶13 The proposed testimony regarding the timeline for the second assault—specifically, that it could not have occurred late on July 4 or early on July 5, as P.M. purportedly suggested at trial—was cumulative or otherwise unnecessary. Although her trial testimony was somewhat unclear, P.M. testified that the second assault had occurred "some time after" July 4, and her aunt clarified that it could not have been that night. As the trial court pointed out, the indictment alleged that the second assault occurred between January 1, 2010 and December 31, 2010, and the prosecutor argued in closing that the second assault occurred "in July," sometime after July 4.

¶14 As to the proposed testimony concerning the lack of noise heard by anyone in the house at the time of the assaults, the trial court correctly determined that the evidence was cumulative. P.M.'s aunt described the two-bedroom, two-bathroom townhome at trial, explaining that a single wall separated her bedroom from the living room, where the assaults, during which P.M. acknowledged making noise, had occurred. Gonzales suggests the proposed testimony was "of a different kind" because his brother, who lived in the townhouse, and his sister, who was also staying there at the time of the incidents, could have offered "specific descriptions of the construction" or their own "personal experiences" with hearing noise in the house. But the court did not abuse its discretion in concluding that Gonzales suffered no prejudice from his trial counsel's failure to call these two potential witnesses. As the court pointed out, Gonzales's brother and sister "could be viewed by the jury as biased in favor of [Gonzales]." P.M.'s aunt's testimony, however, had given Gonzales the benefit of "the testimony of someone that could be viewed to be supportive of [P.M.] testifying that she heard nothing, the house was small, and [Gonzales and P.M.] were six steps away from where she slept." *See Strickland*, 466 U.S. at 695 (under prejudice prong, court must consider totality of evidence; some factual findings may be unaffected by error).

¶15 Regarding P.M.'s purported "crush" on Gonzales, the trial court concluded that evidence of "flirting" or an attempted kiss would have merely served to impeach P.M.'s testimony to the contrary. But Gonzales is correct that, because he stipulated he was the father of P.M.'s child, the only real issue was whether P.M. had consented.[4] *See* A.R.S. § 13-1406(A) ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person."). And he correctly suggests that this proposed testimony would also have been circumstantial evidence of P.M.'s consent. *See State v. Mills*, 196 Ariz. 269, ¶ 21 (App. 1999) (evidence can be both impeachment and substantive).

¶16 Even assuming the evidence would have been substantive, we cannot say the trial court abused its discretion in concluding that the proposed testimony by Gonzales's brother, sister, and mother of flirting and kissing between Gonzales and P.M. would not have resulted in a different outcome at trial. This was a fact which P.M., her aunt, and Gonzales himself all denied at trial.

¶17 Gonzales also argues the trial court erred in failing to address his due process claim. However, such a claim—separate and apart from his claims of ineffective assistance of trial counsel—was not clearly raised below. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (petition for review must contain issues decided by trial court that defendant is presenting for review); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (court of appeals does not address issues raised for first time in petition for review). And, in any event, he fails to offer meaningful argument or authority supporting it on review. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (claim waived where defendant cites no relevant authority and fails to develop argument in meaningful way). We therefore do not address it further.

¶18 Gonzales last argues the trial court erred in rejecting his claim that his trial counsel was ineffective in explaining the final plea agreement to him and in affording him sufficient time to consider it.[5] Gonzales

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[4]Gonzales contends that the jury in his first trial "acquit[ted]" him of the sexual assault charges. He is mistaken. The jury could not reach a verdict, it did not acquit him.

[5]On review, Gonzales does not re-assert his claim that his trial counsel was ineffective in providing Gonzales with disclosure. We therefore do not address it.

suggests that the court did not adequately consider his affidavit on this issue. But the court did consider his affidavit and found his claims therein "not very believable or well taken" in light of the jail recording and Gonzales's modified statements about the plea agreement after learning of the recording.

¶19 In his initial affidavit, Gonzales asserted that he "did not fully understand" the last plea offer and that he "had no time to consider [it]." In his supplemental affidavit, after receiving the jail recording as part of the state's response, Gonzales acknowledged having known the sentencing range for the plea agreement but asserted it had been "presented in a hurried fashion" and he had "insufficient time to consider it." On the other hand, Gonzales's trial counsel avowed in his affidavit that he had "explained the plea" to Gonzales and that Gonzales had "fully understood the plea" and "rejected it," even though counsel "urged him to take [it]." His counsel's avowals appear consistent with Gonzales's statements on the recording that he was not going to accept the plea "for something [he] didn't do" and that his counsel was "upset [Gonzales] didn't take the plea." Based on the record before us, we cannot say the trial court abused its discretion in discrediting Gonzales's affidavit, *see Krum*, 183 Ariz. at 294, or in concluding that he failed to present a colorable claim, *see Speers*, 238 Ariz. 423, ¶ 9.

¶20 For the reasons stated above, we grant review but deny relief.