IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JESSE DEAN BUTCHER,
Petitioner.

No. 2 CA-CR 2021-0009-PR
Filed April 1, 2021

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NOT FOR PUBLICATION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. CR20152282001
The Honorable Scott McDonald, Judge

REVIEW GRANTED; RELIEF DENIED

Jesse Dean Butcher, Florence
In Propria Persona

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Jesse Butcher seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.[1] We review a court's denial of post-conviction relief for an abuse of discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Butcher has not shown such abuse here.

¶2 Butcher pled guilty in 2016 to molestation of a child and sexual conduct with a minor in the second degree and was sentenced to a seventeen-year prison term, to be followed by a fifteen-year term of probation. In October 2019, more than three years after he was sentenced, Butcher filed a notice of and petition for post-conviction relief, seeking DNA testing of "vaginal samples and those from clothing and all buccal swabs for epithelial contact," and asserting a claim of actual innocence "contingent upon favorable outcome" from the tests.[2] The trial court

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[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "The 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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules," except where otherwise noted. *Id.*

[2] The victim, Butcher's nine-year-old step-granddaughter, reported he had digitally penetrated her vagina and anus. Butcher admitted to deputies that he had placed his finger in the victim's anus, but could not recall if he had digitally penetrated her vagina. At his change-of-plea hearing, Butcher agreed with the factual basis his attorney had provided, acknowledged he had read and understood the plea agreement, and affirmed he had understood the rights he was waiving by pleading guilty, including the right to present evidence at trial. Before sentencing, Butcher told a probation officer, "I'm very sorry. I'm very ashamed. I shouldn't

appointed counsel, who filed a notice in March 2020, stating he had reviewed the record and was "unaware of any claims for post-conviction relief." Counsel sought leave for Butcher to file a pro se Rule 33 petition, and asked the court to rule on Butcher's request for DNA testing.

¶3 In May 2020, the trial court denied Butcher's request for DNA testing. The court reasoned:

> Here, the Court cannot reasonably conclude Petitioner would not have been prosecuted if DNA testing would produce exculpatory evidence because Petitioner *was* prosecuted without any DNA testing. Instead, prosecution in this case was perpetuated, through sentencing, by the victim's statements and Petitioner's own admissions. Furthermore, at his change of plea, Petitioner acknowledged his waiver of constitutional rights including a jury trial where evidence could be presented. Despite Petitioner's admissions and acceptance of the plea, he requests DNA testing from the victim's vaginal samples and clothing to prove his "absolute innocence." Petitioner fails to provide, and the Court is unable to discern any reasonable basis for granting the Request.

¶4 The trial court, however, granted Butcher leave, and several extensions, to file a pro se Rule 33 petition. He did so in July 2020, reasserting his request for DNA testing pursuant to A.R.S. § 13-4240, and arguing such evidence would establish his innocence under Rule 33.1(h). He also asserted he had confessed to officers because they had falsely represented that they had inculpatory DNA evidence against him. Butcher further alleged he had received ineffective assistance of trial and Rule 33 counsel.[3] At the end of his petition, Butcher seemed to challenge A.R.S.

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have done what I did. I've given myself over to Christ and changed completely. I was under the control of Satan."

[3]Notably, several of Butcher's arguments regarding trial counsel related to conduct that would have occurred at trial, despite the fact that Butcher pled guilty. In a single reference at the conclusion of his lengthy recitation of claims of ineffective assistance, Butcher stated that if he had known DNA evidence existed and that it "would prove his actual

§ 13-1410, the child molestation statute, asserting it improperly shifts the burden of proof to the defendant.

¶5 The trial court summarily dismissed Butcher's petition, concluding he was barred from again seeking DNA testing, a claim it nonetheless addressed on the merits; his claims of ineffective assistance of counsel were not only untimely but were also without merit; and, his challenge to the constitutionality of § 13-1410 was also without merit, regardless of whether it was an independent claim or part of his claim of ineffective assistance of counsel. This petition for review followed.

¶6 On review, Butcher reasserts that he is entitled to DNA testing pursuant to § 13-4240(B), arguing such tests would have yielded exculpatory evidence that would have rendered the victim's accusations unreliable at trial. As the trial court noted in its ruling below, it had previously denied Butcher's request for DNA testing, a fact Butcher not only failed to mention in his petition below, but which he notably fails to address on review. Because Butcher had previously sought and been denied the same request for DNA testing, the court could have ended its analysis once it correctly found his claim barred. *See Crosby-Garbotz v. Fell*, 246 Ariz. 54, ¶ 11 (2019) (issue preclusion applies in criminal cases). However, as previously noted, the court addressed Butcher's request on the merits.

¶7 Section 13-4240(B) and Rule 33.17 permit a defendant to request DNA testing. They give the trial court discretion to order DNA testing in certain situations and require such testing in others. Specifically, for testing to be required, § 13-4240(B)(1) provides there must be a reasonable probability "the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing," while the recent amendments to Rule 33.17(d)(1)(A) modified the mandatory testing requirement to include those situations where the "sentence would have been more favorable." Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019); *see* Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017).

¶8 However, as the trial court noted, Butcher not only admitted he had digitally penetrated the victim's anus, a fact the victim corroborated in addition to stating Butcher had digitally penetrated her vagina, but at the

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innocence he would not have accepted a plea deal," an assertion he does not repeat on review.

change-of-plea hearing, he admitted he had touched the victim's vulva and had placed his finger in her vagina. Accordingly, the court correctly concluded that given Butcher's admissions to law enforcement and the victim's statements, "there is no reasonable probability that Butcher would not have been prosecuted or convicted" even if DNA testing had yielded exculpatory results. Based on this record, we cannot say the court abused its discretion in denying Butcher's request for DNA testing. *See State v. Gutierrez*, 229 Ariz. 573, ¶ 19 (2012) (we review denial of post-conviction relief, including rulings related to DNA testing, for abuse of discretion).

¶9 Butcher also briefly reasserts his claims of ineffective assistance of counsel, which the trial court found untimely and without merit. A claim of ineffective assistance cannot be raised in an untimely post-conviction proceeding. *See* Ariz. R. Crim. P. 33.1(a), 33.2(b)(2), 33.4(b)(3)(A); *State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010) (ineffective assistance of counsel claim "cognizable under Rule 32.1(a)"). And, although the court did not expressly say so, we infer it implicitly concluded that Butcher had failed to adequately explain why his failure to file a timely notice of post-conviction relief was not his fault, as required by Rule 33.4(b)(3)(D) (court must excuse untimely notice requesting relief under Rule 33.1(a) if defendant "adequately explains why the failure to timely file a notice was not the defendant's fault").

¶10 Notably, Butcher does not argue on review that he is entitled to raise his claims of ineffective assistance of trial counsel in an untimely proceeding like this one, much less identify any error with the trial court's accurate analysis that they are untimely. We therefore deem any such argument waived and do not address it further. *See* Ariz. R. Crim. P. 33.16(c)(4) ("A party's failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue."). Moreover, although a pleading defendant like Butcher is entitled to effective assistance of counsel in his first Rule 33 proceeding, he may not challenge his current Rule 33 counsel's conduct in this proceeding; rather he must do so in a timely filed, successive Rule 33 proceeding. *See State v. Mendoza*, 249 Ariz. 180, ¶¶ 7, 10-12 (App. 2020); Ariz. R. Crim. P. 33.2(b)(2). Finally, because Butcher apparently does not challenge that portion of the court's order regarding § 13-1410, we do not address it. *See State v. Rodriguez*, 227 Ariz. 58, n.4 (App. 2010) (declining to address argument not raised in petition for review).

¶11 Accordingly, we grant review but deny relief.