IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARSHALL NEAL RAY,
Petitioner.

No. 2 CA-CR 2021-0026-PR
Filed May 26, 2021

Petition for Review from the Superior Court in Pima County
No. CR20134796001
The Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Samantha Dumond, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Marshall Ray seeks review of the trial court's ruling denying 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 abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Ray has not met his burden of establishing such abuse here.

¶2 After a jury trial, Ray was convicted of three counts of continuous sexual abuse of a child and two counts of molestation of a child, all dangerous crimes against children. The trial court sentenced him to enhanced, consecutive and concurrent prison terms totaling seventy-seven years. This court affirmed his convictions and sentences on appeal. *State v. Ray*, No. 2 CA-CR 2016-0402, ¶ 1 (Ariz. App. Feb. 6, 2018) (mem. decision).

¶3 Ray thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but was "unable to find any arguably meritorious legal issues to raise." In February 2020, Ray filed a pro se petition, but he then retained new counsel, who filed a separate petition in July 2020. The trial court "substituted" the petition filed by counsel for the pro se one.

¶4 In that petition, Ray argued he had received ineffective assistance of counsel based on counsel's "failure to investigate" and "unpreparedness at trial." Specifically, he asserted counsel had failed to

[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." *Id.*

"consult and acquire . . . Ray's consent to waive [his] right to testify on his own behalf." Ray also maintained the trial court had erred by failing to continue the trial to hold a hearing pursuant to Rule 404(c), Ariz. R. Evid., and by "failing to remove" the prosecutors "for being necessary witnesses." Lastly, Ray maintained that House Bill (H.B.) 2283[2] constituted a significant change in the law applicable to his case and that the dangerous crimes against children (DCAC) statute, A.R.S. § 13-705, was unconstitutional and "[c]ounsel was ineffective for failing to recognize the law and object to the imposition of enhanced penalties." Ray provided an affidavit in which he avowed he had "wanted to testify" and, despite meeting with counsel several times before trial, they "never discussed the allegations" against him.

¶5 In December 2020, the trial court issued an under-advisement ruling denying the petition for post-conviction relief. At the outset, the court noted that it would "only address [Ray's] claims as to ineffective assistance of counsel" because "his other claims have been precluded, as they were previously addressed or could have been raised on appeal but were not." The court then went on to reject Ray's claims of ineffective assistance of counsel, explaining, in part, the record did not support his assertions that counsel was unprepared for trial and had failed to consult with him regarding the right to testify. The court additionally noted that Ray had failed to show that "counsel's tactics were unreasonable or ineffective." This petition for review followed.

¶6 On review, Ray first argues the trial court erred by failing to address his claims that H.B. 2283 constitutes a significant change in the law applicable to his case and that the DCAC statute is unconstitutional and counsel was ineffective for failing to challenge it. In its under-advisement ruling, the court concluded that Ray's claims—other than those of ineffective assistance of counsel—were precluded. Presumably, the court included Ray's claims regarding H.B. 2283 and the DCAC statute in that group of precluded claims. However, even if the court did not, we are required to affirm the ruling if it is legally correct for any reason. *See Roseberry*, 237 Ariz. 507, ¶ 7.

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[2] H.B. 2283 removed the defense that "the defendant was not motivated by sexual interest" from prosecutions for sexual abuse and child molestation. 2018 Ariz. Sess. Laws, ch. 266, § 2. It also modified the definition of sexual contact to exclude "direct or indirect touching or manipulating" in certain circumstances. 2018 Ariz. Sess. Laws, ch. 266, § 1.

¶7 Ray's claim challenging the constitutionality of the DCAC statute is precluded. *See* Ariz. R. Crim. P. 32.1(a), 32.2(a)(3). However, his claim that counsel was ineffective for failing to challenge the DCAC statute as unconstitutional is not. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002) (ineffective assistance of counsel claims must be brought in post-conviction proceedings). Nevertheless, Ray failed to meaningfully develop this argument below—perhaps explaining why the trial court did not address it—and on review. We therefore do not address it further. *See* Ariz. R. Crim. P. 32.16(c)(2)(D) (petition for review shall contain reasons why we should grant relief, including citations to legal authority); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to cite relevant authority and meaningfully develop argument waives claim on review).

¶8 Ray's claim that H.B. 2283 constitutes a significant change in the law is likewise not subject to preclusion. *See* Ariz. R. Crim. P. 32.1(g), 32.2(b). As he did below, Ray contends, under H.B. 2283, the state "may no longer place the burden on the defendant to disprove his lack of sexual intent" and, instead, the state "bears the burden of production and proof in the first instance."[3] And he asserts that at the time of his trial, "the law placed the burden on the defense" to establish that his acts were not motivated by sexual interest. Relying on *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *State v. Slemmer*, 170 Ariz. 174 (1991), Ray further maintains that the change under H.B. 2283 applies retroactively to his case.

¶9 Those cases, however, are inapplicable here because they addressed the retroactivity of other cases and procedural rules. *See Griffith*, 479 U.S. at 320-22; *Slemmer*, 170 Ariz. at 179-80. Here, we are concerned with a statutory amendment, which is not "retroactive unless expressly declared therein." A.R.S. § 1-244. Thus, absent a clear statement of retroactivity, a newly enacted substantive law only applies prospectively. *State v. Gum*, 214 Ariz. 397, ¶¶ 22-25 (App. 2007). H.B. 2283 contains no statement of retroactivity. *See* 2018 Ariz. Sess. Laws, ch. 266, §§ 1-3. The statutory changes therefore do not apply to Ray.[4]

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[3] To the extent Ray attempts to incorporate by reference his arguments below, such action is not permissible. *See* Ariz. R. Crim. P. 32.16(d) (petition must not incorporate any document by reference, except appendix).

[4]Ray also summarily contends that his counsel "failed to recognize the constitutional question and failed to raise an objection . . . arguing the affirmative defense scheme violated Due Process." However, neither below nor on review did he meaningfully develop this argument, separate

¶10 Ray next contends the trial court erred in rejecting his claims of ineffective assistance of counsel without an evidentiary hearing. A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if the claim is colorable. *State v. Bennett*, 213 Ariz. 562, ¶ 17 (2006). To establish such a claim, "a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Id.* ¶ 21; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the defendant fails to establish either prong, the claim fails. *Strickland*, 466 U.S. at 697; *Bennett*, 213 Ariz. 562, ¶ 21.

¶11 In considering whether counsel's performance fell below objectively reasonable standards, the trial court "must indulge a strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. And to demonstrate prejudice, the 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.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶12 With regard to his claim that counsel inadequately prepared for trial, Ray maintains that the trial court "only considered key points in the record," while dismissing Ray's assertions in his affidavit. He further contends that his "affidavit, standing alone, establishes a colorable claim."

¶13 Our supreme court has explained in *State v. Krum*, 183 Ariz. 288, 294-95 (1995), that the trial court is entitled to make a threshold assessment of the credibility of assertions in an affidavit based on the nature of those assertions and the record. Thus, a court may summarily reject without an evidentiary hearing claims based on an affidavit that is lacking in "reliable factual foundation" and "some substantial evidence." *Id.* The trial court did just that here.

¶14 Despite Ray's allegations in his affidavit, the trial court concluded, "The record plainly shows that trial counsel was prepared, as he was able to lead several cross-examinations of the witnesses and victims during a lengthy trial." Indeed, as the court also noted, Ray admits that he

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and apart from his claim of a significant change in the law. We therefore do not address it further. *See* Ariz. R. Crim. P. 32.16(c)(2)(D); *Stefanovich*, 232 Ariz. 154, ¶ 16.

met with his counsel on several occasions before trial to discuss the case. Accordingly, the court did not err in finding this claim not colorable. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998) (to state colorable claim, defendant must do more than contradict what record plainly shows).

¶15 Moreover, Ray has failed to meet his burden of establishing prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21. Despite presenting what he contends are "numerous instances of defense counsel's unpreparedness," Ray does not argue that but for those purported errors the result of the trial would have been different. *See Strickland*, 466 U.S. at 694. Nor did he do so below. The trial court therefore did not abuse its discretion in dismissing this claim. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶16 With regard to his claim that counsel had failed to adequately consult with him before waiving his right to testify, Ray contends the trial court "misapplied the law." Citing *Wiggins v. Smith*, 539 U.S. 510 (2003), he argues that the court's "principal concern is not whether counsel should have put [him] on the stand, but whether the investigation itself supporting the decision not to put [him] on the stand was reasonable." And he contends "[t]here is nothing" in the court's ruling addressing "whether the investigation conducted by defense counsel was reasonable."

¶17 *Wiggins* is distinguishable insofar as it addressed a claim that counsel had rendered ineffective assistance by "limit[ing] the scope of their investigation into potential mitigating evidence." 539 U.S. at 521. It does not address the issue here—whether counsel was ineffective for failing "to consult with . . . Ray regarding his potential testimony at trial" before the right to testify was waived. In any event, *Wiggins* reiterates the long-established standard that reasonableness is the proper measure of attorney performance. *See Wiggins*, 539 U.S. at 521-23. And, contrary to Ray's assertions, the trial court here considered counsel's reasonableness, noting that counsel had stated on the record that he was going to discuss with Ray one last time whether he would be testifying before confirming the following day that they had decided against it.

¶18 Additionally, although he contends that "[t]he jury was deprived of assessing [his] credibility and hearing his explanation as to possible motives," he does not meaningfully elaborate on that explanation or those motives and he does not argue that such testimony would have changed the outcome of the case. *See Strickland*, 466 U.S. at 694. Nor did he

establish such prejudice below. The trial court therefore did not abuse its discretion in rejecting this claim.[5] *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶19 Accordingly, we grant review but deny relief.

[5]Any claims that Ray raised below but does not re-assert on review are waived. *See* Ariz. R. Crim. P. 32.16(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.").