IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RUBEN BOLIVAR,
Petitioner.

No. 2 CA-CR 2023-0060-PR
Filed June 9, 2023

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NOT FOR PUBLICATION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 Santa Cruz County
No. S1200CR201700121
The Honorable Thomas Fink, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Robert A. Kerry, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Sklar authored the decision of the Court, in which Vice Chief Judge Staring and Judge O'Neil concurred.

S K L A R, Judge:

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

Factual and Procedural Background

¶2 Following a jury trial, Bolivar was convicted of sexual conduct with a minor under fifteen, molestation of a child, and three counts each of sexual assault and sexual abuse. The victim was Bolivar's stepdaughter, Becca, who was between the ages of four and fifteen at the time of the offenses.[1] The trial court sentenced Bolivar to life imprisonment without the possibility of release for thirty-five years, to be served consecutively to a combination of concurrent and consecutive prison terms totaling 68.5 years. This court affirmed his convictions and sentences on appeal. *State v. Bolivar*, 250 Ariz. 213, ¶ 1 (App. 2020).

¶3 In July 2021, Bolivar initiated a proceeding for post-conviction relief, and the trial court appointed counsel. In his Rule 32 petition, Bolivar argued his trial counsel had rendered ineffective assistance by failing to object to profile testimony by the state's expert witness, Dr. Wendy Dutton. He compared her testimony in this case to that offered in *State v. Starks*, 251 Ariz. 383 (App. 2021),[2] and reasoned that it "impermissibly suggested to the jury he was guilty because of what others did." Bolivar also argued his trial counsel had rendered ineffective assistance by failing to request a mental health evaluation pursuant to Rule 11, Ariz. R. Crim. P. He asserted he had been "unable to assist his counsel at times during the trial" because

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[1]We use the pseudonym "Becca" to protect the victim's privacy.

[2]As Bolivar later recognized, our supreme court ordered *Starks* depublished. *State v. Starks*, 253 Ariz. 1 (2022).

he was "unable to get adequate sleep at the jail and his diabetes and high blood pressure were not being properly treated." Last, Bolivar maintained he had been "denied due process of law" because "the trial court did not recuse itself after hearing the one-sided testimony about" an attack on Becca's mother and her mother's boyfriend the morning Becca and her mother were supposed to testify.

¶4 In February 2023, the trial court summarily dismissed Bolivar's petition. First, the court rejected Bolivar's claim of ineffective assistance due to counsel's failure to object to Dutton's testimony, explaining that her "testimony was limited and circumscribed both by [trial] counsel's objections . . . and the court's *sua sponte* intervention." The court concluded the "resulting profile testimony . . . was limited and non-prejudicial." Second, the court determined that trial counsel could not have been deficient for failing to request a Rule 11 evaluation because "[t]here is nothing in the record to establish that trial . . . counsel was aware of [Bolivar]'s alleged physical challenges during the trial." The court further observed that trial counsel had requested a post-trial evaluation, "telling the court that [Bolivar] informed counsel after trial that his problems with sleep and medications had affected his state of mind." Third, the court rejected Bolivar's due process claim, explaining in part that Bolivar had cited "no persuasive authority for the relief requested." This petition for review followed.

¶5 On review, Bolivar repeats his claims of ineffective assistance of trial counsel and maintains the trial court erred in not granting him an evidentiary hearing. "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.*

Profiling Testimony

¶6 First, Bolivar again contends his trial counsel's "representation was deficient because he allowed profiling testimony of Dr. Dutton to come into evidence unchallenged." Recognizing that *Starks* is no longer good law, Bolivar maintains that "[t]he state elicited the kind of profiling testimony that was deemed inadmissible" by *State v. Ketchner*, 236 Ariz. 262 (2014). And he argues he "was clearly prejudiced by being profiled as an offender" because the testimony "had the effect of convicting [him] for what others had done."

¶7 As a preliminary matter, we disagree with Bolivar's characterization of his trial counsel's conduct during Dr. Dutton's testimony. Her testimony was not "unchallenged." Before trial, counsel filed a motion in limine to limit Dutton's testimony. At trial, counsel objected several times, including an objection that the prosecutor was "getting outside of the scope of the intended testimony," which the trial court sustained after pointing out that Dutton was supposed to be testifying to "general characteristics of child victims of sex crimes." We thus question whether counsel's performance could be deemed ineffective on this basis alone. *See State v. Bigger*, 251 Ariz. 402, ¶ 10 (2021) (we presume counsel acted properly unless defendant can show counsel's decision revealed ineptitude, inexperience, or lack of preparation).

¶8 Nevertheless, in *Ketchner*, our supreme court explained that "[p]rofile evidence tends to show that a defendant possesses one or more of an 'informal compilation of characteristics or an abstract of characteristics typically displayed by persons' engaged in a particular kind of activity." 236 Ariz. 262, ¶ 15 (quoting *State v. Lee*, 191 Ariz. 542, ¶ 10 (1998)). It continued, "[a]lthough there may be legitimate uses for profile evidence," it "may not be used as substantive proof of guilt because of the 'risk that a defendant will be convicted not for what he did but for what others are doing.'" *Id.* (quoting *Lee*, 191 Ariz. 542, ¶¶ 11-12). In that case, the court determined that the trial court had erred by permitting testimony about "separation violence, lethality factors, and any characteristics common to domestic abusers" because it "did not explain behavior by [the victim] that otherwise might be misunderstood by a jury." *Id.* ¶ 19.

¶9 By contrast, in *State v. Haskie*, our supreme court determined that "expert testimony about victim behavior that also describes or refers to a perpetrator's characteristics has the potential to be 'profile' evidence" but "is not categorically inadmissible." 242 Ariz. 582, ¶ 16 (2017). "Rather, its admissibility is determined by the rules of evidence." *Id.* "The more 'general' the proffered testimony, the more likely it will be admissible," while "the more the testimony is tied to the defendant's characteristics, rather than to those of the victim, the more likely the admission of such testimony will be impermissibly prejudicial." *Id.* ¶ 18. In that case, the court determined that the trial court had not erred in admitting the challenged profile testimony because "each statement primarily served the purpose of explaining victim behavior," despite some references to "an abuser's characteristics." *Id.* ¶¶ 20, 22.

¶10 This case is more akin to *Haskie*. For example, Bolivar challenges Dr. Dutton's statement that offenders "might imply that a child

is responsible in some way, like this is our secret." He maintains, "This clearly profiles one as an offender because something he said was similar to what Dr. Dutton says that perpetrators usually say." But Dutton was explaining why victims may delay reporting abuse, as happened here. Bolivar also takes issue with Dutton's statement that "it's not uncommon" for children to report being "abused with somebody else in the same house, sometimes even the same room, or even the same bed." He maintains that this testimony "conveniently dovetails with the testimony" by Becca "that some of the alleged abuse [had] occurred while others were home." But the point of this discussion was the "impact" it would "have on a victim for these acts to happen" in the presence of others—Dutton explained that children "might mistakenly believe that this is normal, if it's happening with other people around."

¶11 As mentioned above, after the prosecutor started to ask Dr. Dutton more directed questions about abusers rather than victims, trial counsel objected, and the trial court ultimately sustained the objection. As the court pointed out, any profile testimony admitted before the sustained objection was "limited" and "relatively non-specific." Notably, Dutton seemingly limited the testimony by focusing on children rather than perpetrators, despite the prosecutor's imprecise questions.[3] The court thus did not abuse its discretion in concluding Bolivar had failed to establish a colorable claim. *See Martinez*, 226 Ariz. 464, ¶ 6.

Rule 11 Evaluation

¶12 Second, Bolivar argues his trial counsel was deficient in failing to request a Rule 11 evaluation during trial because "he was unable to participate and assist counsel due to health issues caused by his incarceration and denial of medications." Bolivar again maintains that "he did not get adequate sleep at the jail and his diabetes, anxiety, and high blood pressure were not being properly treated." Citing his affidavit attached to his Rule 32 petition, Bolivar maintains that "[h]e repeatedly told his counsel about these problems, but defense counsel did not address the issue during trial."

¶13 The trial court correctly pointed out that the record does not establish trial counsel was aware of Bolivar's "alleged physical challenges

[3]For example, the prosecutor asked, "Now, are there ways that an offender might go about selecting a victim?" Dr. Dutton responded by discussing the "characteristics of children that can make them more vulnerable to an abuser."

during the trial." Bolivar's affidavit—despite detailing his purported health conditions and their effects—does not avow that he had informed his counsel. At best, as his counsel stated at the sentencing hearing, "[Bolivar] stopped being able to take his medication and he was not sleeping well. He was not in the same state of mind during trial. He has reported that to me since our trial."

¶14 But even if counsel was aware of these issues during trial— not just "since [the] trial"—they do not suggest that Bolivar met the definition of "incompetence" under Rule 11.1(a)(2). Under that definition, a defendant is incompetent only if "unable to understand the nature and objective of the proceedings or to assist in his or her defense because of a mental illness, defect, or disability." *Id.* The issues raised in Bolivar's affidavit do not rise to that level. Moreover, the court noted at sentencing that during the trial, Bolivar "always seemed articulate and lucid." Counsel could not have rendered ineffective assistance by failing to request a Rule 11 evaluation if he had no reason to know one was needed. *See Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."); *see also Bigger*, 251 Ariz. 402, ¶¶ 10-11 (describing standard for deficiency).

¶15 To establish a colorable claim of ineffective assistance, Bolivar was required to "present more than a conclusory assertion." *State v. Donald*, 198 Ariz. 406, ¶ 17 (App. 2000); *see also State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999) ("The burden is on the petitioner and the showing must be that of a provable reality, not mere speculation."). Because he failed to do so, the trial court did not abuse its discretion in summarily rejecting this claim. *See Martinez*, 226 Ariz. 464, ¶ 6.

Due Process

¶16 Last, Bolivar reurges his claim that he "was denied due process of law" because "the trial court did not recuse itself after making prejudicial rulings and statements" about the attack on Becca's mother and her mother's boyfriend. This is presumably a constitutional claim under Rule 32.1(a). As such, it is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3); *see also State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015) ("We will affirm a trial court's decision if it is legally correct for any reason."). Even assuming the claim were not precluded, however, the court did not err.

¶17 "A trial judge is presumed to be free of bias and prejudice." *State v. Granados*, 235 Ariz. 321, ¶ 14 (App. 2014) (quoting *State v. Ramsey*, 211 Ariz. 529, ¶ 38 (App. 2005)). "Judicial bias or prejudice ordinarily must

'arise from an extrajudicial source and not from what the judge has done in his participation in the case.'" *Id.* (quoting *State v. Emanuel*, 159 Ariz. 464, 469 (App. 1989)). "Thus, 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'" *Id.* (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

¶18 In addressing the attack, the trial court confined its comments to the matters at hand. We cannot say that those comments or rulings indicated bias. Nor has Bolivar alleged a bias from an extrajudicial source. Notably, Bolivar maintains that "the trial court should have recused itself to avoid the appearance of bias," but he points to no later incidents of bias. Accordingly, Bolivar has failed to establish that he was denied due process of law, *see Granados*, 235 Ariz. 321, ¶¶ 11-15, and the court did not abuse its discretion in summarily rejecting this claim, *see Martinez*, 226 Ariz. 464, ¶ 6.

Conclusion

¶19 We therefore grant review but deny relief.