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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STANFORD LAMAR FERRELL, Appellant.	2 CA-CR 2009-0313-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700791

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Stanford L. Ferrell — Florence
In Propria Persona

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

¶1 After a jury trial, Stanford Ferrell was found guilty of two counts of child molestation, each involving a different victim. The trial court sentenced him to consecutive, somewhat mitigated terms of fifteen years' imprisonment for each count. In this appeal of the court's denial of his motion to vacate the judgment pursuant to Rule 24.2, Ariz. R. Crim. P., Ferrell contends the court's decision was "arbitrary," "biased,"

and not based on the facts presented at the hearing. He also argues the court improperly employed its "own statutory interpretation" and considered the state's insufficient response to his motion. For the following reasons, we affirm.[1]

Factual and Procedural Background

¶2 Ferrell was sentenced in December 2008 and filed his Rule 24.2 motion in February 2009. His motion contended the judgment should be vacated based on newly discovered evidence that the state had used perjured testimony against him. After a three-day hearing, the trial court denied the motion in July 2009, setting forth its reasons in an extensive minute entry. After being granted leave by the trial court, Ferrell filed in April 2010 what this court has deemed a notice of delayed appeal.[2]

Discussion

¶3 We review the denial of a motion to vacate judgment under Rule 24.2 for an abuse of discretion. *State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001).

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[1]Although Ferrell entitled his pleading in this court a "petition for review," the denial of a motion to vacate judgment under Rule 24.2 is reviewable only on direct appeal. *See State v. Wynn*, 114 Ariz. 561, 563, 562 P.2d 734, 736 (App. 1977); *see also* A.R.S. § 13-4033(A)(3). We also note Ferrell's separate appeal of his convictions and sentences was recently decided by this court. *See State v. Ferrell*, No. 2 CA-CR 2008-0411 (memorandum decision filed May 14, 2010). In an apparent oversight, the two appeals were not consolidated. *See* Ariz. R. Crim. P. 31.4(b)(2).

[2]We recognize the state has not received notice that we deem this to be a delayed appeal rather than a petition for review and, therefore, has had no opportunity to file a responsive brief. Because we are affirming the trial court as to all of Ferrell's claims, we decline to order the state to engage in the unnecessary exercise of filing a responsive brief.

"Motions [to vacate judgment] based on newly discovered evidence are disfavored, and we grant them cautiously." *State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991). Ferrell contends the trial court abused its discretion when it added a materiality requirement to A.R.S. § 13-2705, the statute governing perjury by inconsistent statements.

¶4 Regardless of whether the trial court wrongly assessed the elements of perjury, the record reflects that it appropriately considered the evidence under the standard for newly discovered evidence, which clearly requires the evidence be material. *See Nordstrom*, 200 Ariz. 229, ¶ 89, 25 P.3d at 743 (under Rule 24.2(a)(2), evidence must be newly discovered, material, not merely cumulative or impeaching, and likely to change verdict if introduced at trial). We will rarely reverse a trial court's decision on a motion to vacate a judgment based on newly discovered evidence, because that court is in a superior position to determine the weight to be given potential evidence and to determine whether that evidence would likely change the result in a new trial. *See Serna*, 167 Ariz. at 374-75, 807 P.2d at 1110-11. We find no abuse of discretion in the trial court's denial of the motion to vacate the judgment.[3]

[3]To the extent Ferrell argues the state's use of the alleged perjury is unconstitutional and requires his conviction be reversed without a showing it likely affected the verdicts, he has provided no authority for this contention. And, to the contrary, we generally will not reverse a conviction, even in the presence of constitutional error, without a showing that the error affected the outcome of the case. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶5 Ferrell argues for the first time on appeal that the court erred by considering a response from the state that "lacked Affidavits, Records or other evidence available to the State contradicting the allegations of the Rule 24.2 Petition." Because Ferrell could have raised the claim in the trial court but did not, we review the issue for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Ferrell relies on *State v. Gonzalez*, 216 Ariz. 11, ¶ 4, 162 P.3d 650, 651-52 (App. 2007), to support his argument. There, we assumed that the state agreed with a defendant on a factual question because it "did not submit '[a]ffidavits, records or other evidence available to [it] contradicting the allegations of the petition' . . . as Rule 32.6(a), Ariz. R. Crim. P., requires it to do." *Gonzalez*, 216 Ariz. 11, ¶ 4, 162 P.3d at 651 (alterations in *Gonzalez*).

¶6 But in *Gonzalez* we were reviewing a trial court's denial of post-conviction relief under Rule 32. Ferrell has provided no authority for the proposition that the requirements of Rule 32.6 apply to a Rule 24.2 motion. Furthermore, even assuming it applied, Ferrell has pointed to no case in which the state's mere failure to provide affidavits or other records in support of its response was deemed a confession of error. Nor has he explained what materials the state should have attached to its response in contradiction of his allegations. Accordingly, he has not met his burden to show fundamental error and prejudice. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶7 Ferrell has failed to fully develop several of his issues on appeal. He has provided no authority for his contention that the language of the trial court's order shows the court was biased and thus his right to due process was violated; accordingly, we do not consider the argument further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004). Moreover, to the extent he asserts the court did not consider the evidence he presented at the hearings, the record does not support that assertion, and we presume otherwise. *Cf. State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991) (presuming trial court considers all relevant factors in sentencing).

Disposition

¶8 Affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge