NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RENE TIBUCIO VALENZUELA, Petitioner.	2 CA-CR 2010-0258-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20050781

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

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By John William Lovell
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Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Rene Valenzuela petitions this court for review of the trial court's July 2010 order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has

abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Valenzuela was convicted after a jury trial of two counts of child molestation, four counts of sexual conduct with a minor under fifteen, and one count each of kidnapping, child abuse, continuous sexual abuse of a child, furnishing obscene or harmful items to a minor, and sexual abuse of a minor under fifteen. The trial court sentenced him to slightly mitigated, consecutive and concurrent prison terms totaling 101 years. We affirmed his convictions and sentences on appeal. *State v. Valenzuela*, No. 2 CA-CR 2006-0238 (memorandum decision filed Aug. 21, 2008).

¶3 Valenzuela filed a petition for post-conviction relief, asserting his trial counsel was ineffective for failing to object to the trial court's questioning, in open court, of a potential juror who had made statements indicating she likely would believe the victim, in failing to request that the court question the jury to determine whether those statements had tainted the jury, and in failing to move for a mistrial. Related to that claim, he also argued that the statements constituted structural error, that his appellate counsel was ineffective for failing to raise that argument, and that the statements violated his confrontation rights. He additionally contended his trial counsel was ineffective in failing to make an offer of proof concerning purportedly false allegations the victim previously had made. The court summarily denied relief.

¶4 The potential juror in question had worked for Child Protective Services and had participated in sex abuse investigations. After she stated she "believe[d] children tell the truth about [sexual abuse] . . . most of the time" the trial court excused her. In denying Valenzuela's petition for post-conviction relief, the court concluded trial counsel's decision not to object, request that the court question the jury regarding the

juror's statements, or move for a mistrial were strategic decisions that would not support a claim of ineffective assistance of counsel. *See State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988) ("Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel.). The court stated it was reasonable for Valenzuela's counsel not to challenge the prospective juror's statements because "additional focus on the remarks may have amplified the potential for prejudice by underscoring them or lending to them a significance and credibility that they otherwise lacked."

¶5 Valenzuela argues on review that the trial court "had no basis" for that finding. We disagree. First, Valenzuela apparently overlooks that "[t]he accused must . . . overcome a 'strong' presumption that the challenged action was sound trial strategy under the circumstances." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). Valenzuela submitted no affidavit or other evidence suggesting counsel's decisions had not been based on a reasonable trial strategy. *See* Ariz. R. Crim. P. 32.5. "Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." *Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700. And Valenzuela cites no authority, nor are we aware of any, suggesting a trial court may not rely on its own experience in assessing whether counsel's trial decisions were reasonable. *Cf. State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994) ("Because [claims of ineffective assistance of counsel] are fact-intensive and often involve matters of trial tactics and strategy, trial courts are far better-situated to address these issues.").

¶6 Valenzuela also reiterates on review his argument that the prospective juror's statements constituted structural error.[1] He does not explain, however, how the trial court erred in rejecting this argument. In a thorough and well-reasoned minute entry, the court correctly determined it was Valenzuela's burden to demonstrate the jury had been tainted by the prospective juror's comments and that he had failed to do so.[2] *See State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 235 (2009) (biased trier of fact structural error); *State v. Soliz*, 223 Ariz. 116, ¶ 12, 219 P.3d 1045, 1048 (2009) ("The prerequisite to [structural] error is that error indeed occurred."); *State v. Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d 1168, 1173 (1998) (defendant bears burden of demonstrating jury bias). We therefore adopt that portion of the court's order. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly identifies and rules on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶7 Accordingly, Valenzuela's claim of ineffective assistance of appellate counsel necessarily fails because he cannot demonstrate counsel was deficient in failing to raise a meritless claim of structural error, or that he was prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of

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[1]We assume, without deciding, that Valenzuela's claim of structural error is not precluded pursuant to Rule 32.2(a). *See State v. Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d 1259, 1262 (App. 2009) (structural error "cannot be waived").

[2]In both his petition for post-conviction relief and petition for review, Valenzuela relies on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997). The trial court correctly found that case factually distinguishable. We additionally observe that, to the extent *Mach* suggests a reviewing court may presume a jury was tainted, 137 F.3d at 633, it is inconsistent with Arizona law. *See State v. Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d 1168, 1173 (1998).

counsel warranting relief, defendant must show counsel's performance both deficient and prejudicial). Valenzuela also reiterates his related claim that his confrontation right was violated by the potential juror's statements. The trial court correctly found that claim precluded because it was raisable on appeal. Ariz. R. Crim. P. 32.2(a)(1).

¶8 Finally, Valenzuela asserts the trial court erred in rejecting his ineffective assistance of counsel claim premised on his counsel's failure to "make an offer of proof" regarding the admission of evidence that the victim previously might have made false allegations of molestation. *See* A.R.S. § 13-1421(A), (B) ("[e]vidence of false allegations of sexual misconduct made by the victim against others" admissible only if defendant presents clear and convincing evidence allegation was false). Valenzuela argued on appeal that the court had erred in precluding evidence of an "'unsubstantiated allegation of sexual misconduct'" the victim had made against Valenzuela's brother in 1995. *Valenzuela*, No. 2 CA-CR 2006-0238, ¶ 5. We disagreed, concluding Valenzuela had not established by clear and convincing evidence that the victim's previous accusation was false. *Id.* ¶ 11. We noted that, although a physician had found no physical evidence of molestation, that examination had occurred more than six weeks after the alleged abuse and another physician had testified the vast majority of victims did not show physical signs of sexual abuse on examination. *Id.* ¶ 12. We determined "the lack of physical proof of molestation does not constitute clear and convincing evidence that [the victim] falsely accused [Valenzuela's brother] . . . particularly in the absence of any sworn statements by [the brother] that he had never abused [the victim] or any evidence that she ever recanted her allegations against him." *Id.*

¶9 Valenzuela attached to his petition for post-conviction relief an affidavit by his brother which claimed the victim's allegations were false, and also asserted the victim had again falsely accused him of sexual misconduct in 2005. Valenzuela asserted that, had his trial counsel produced such an affidavit or obtained his brother's testimony, that evidence, coupled with the lack of physical evidence of abuse, would have been clear and convincing evidence the victim's previous allegations were false.[3] The trial court rejected this argument, concluding Valenzuela "would have been in no better position than he was when the trial court granted the State's motion to preclude the evidence" because he still would not have been able to meet his burden of proving the victim's previous allegations were false.

¶10 On review, Valenzuela makes the same argument—that the affidavits combined with the lack of physical evidence would be sufficient under § 13-1421(B). We find no error in the trial court's rejection of that argument. As we noted in our memorandum decision, the lack of physical evidence alone is insufficient to meet the required burden of proof. *Valenzuela*, No. 2 CA-CR 2006-0238, ¶ 12. We further observed that Valenzuela's brother had denied the allegations when interviewed by a detective in 1995 and that "an alleged offender's denials do not constitute clear and convincing evidence that the prior accusations were false." *Id.* n.5. The affidavit adds nothing to the claim we rejected on appeal; it contains only a blanket and cursory denial without providing any explanation of the circumstances of the accusations or any factual basis to conclude the accusations were untrue. Thus, even assuming Valenzuela's

[3]Valenzuela also contends the victim made false allegations of sexual misconduct against another of Valenzuela's brothers. There was no specific mention of these allegations in the trial court, and Valenzuela provides no evidence any such allegations had been made, asserting that brother died in 2009.

counsel should have made an offer of proof at trial, Valenzuela has not demonstrated his counsel's failure to do so probably would have changed the result of that trial. *See Strickland*, 466 U.S. at 687. Nor do we find the court abused its discretion in denying this claim without conducting an evidentiary hearing. As we have explained, a cursory denial is insufficient, and Valenzuela does not identify what additional information his brother could have presented that would have provided a basis for the court to find him credible. *Cf. State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 600-01 (1995) (no abuse of discretion in finding no colorable claim arose from third-party affidavits attesting to victim's recantation).

¶11 For the reasons stated, although we grant Valenzuela's petition for review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge