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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. GERARDO ROBERTO ZEPEDA, Appellant/Petitioner.	2 CA-CR 2007-0351 2 CA-CR 2008-0266-PR (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063374

Honorable Howard Hantman, Judge

AFFIRMED
REVIEW GRANTED; RELIEF DENIED

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B R A M M E R, Judge.

¶1 In this consolidated appeal and petition for review, appellant Gerardo Zepeda appeals his convictions for second-degree murder and unlawful imprisonment. He asserts the trial court erred in refusing his request to instruct the jury on superseding cause and in instructing the jury that second-degree murder, manslaughter, and negligent homicide were lesser-included offenses of first-degree murder, the crime with which he was charged. Zepeda also contends the court erred in failing to declare a mistrial or excuse a juror after the juror read parts of a transcript that had not been admitted into evidence. He further asserts the court erred in denying his motion for a mistrial or, in the alternative, for preclusion of a witness's testimony after the state untimely disclosed phone records that, he claims, prove the witness gave perjured testimony. Last, Zepeda argues the court abused its discretion in denying his petition for post-conviction relief without holding an evidentiary hearing on his claim that one of the state's expert witnesses was not qualified to testify.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Zepeda's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the night of Saturday, August 26, 2006, I. and his friend T. went to a local bar. After drinking at the bar until 2:00 a.m. on Sunday, August 27, I. and T. went to T.'s house to smoke crack cocaine, accompanied by the bartender, H. Shortly thereafter, Zepeda telephoned T., saying he had seen T.'s truck at the bar earlier and asking

whether T. had any drugs. When T. told Zepeda that I. had drugs and money, Zepeda responded he would "be right over." Upon arriving at T.'s house, Zepeda accosted I., who had been smoking alone in a different room than T. and H. Hearing a "thump" and "rustling noise[s]," T. followed the noises to discover Zepeda restraining I. and holding a gun while another man was leaving with something in his hand. When T. asked what was going on, Zepeda pointed the gun at him and demanded he leave the room. As T. left the room, he heard Zepeda yelling, "[G]et me the tape."

¶3 Several minutes later, when T. confronted Zepeda as he was leaving, Zepeda angrily declared, "[I.] didn't have shit on him, this is on you, now you owe me." T. then returned to his bedroom and continued smoking with H. until both fell asleep. Zepeda returned to his house, where he told one of his roommates that "[h]e had just beaten the shit out of somebody and . . . didn't know if he had killed him or not." When T. awoke later that day and checked on I., he found I. lying on his stomach on the floor under a mattress, his hands and feet bound with pipe tape and an electrical cord. T. moved the mattress, touched I.'s feet, and concluded I. was dead. T. and H. left the house.

¶4 Later that day, T. again spoke with Zepeda by telephone. Zepeda "screamed" at T., asking him whether he had "[gotten] the body out of there" and "clean[ed] up the mess." T. returned to his house but did not disturb I.'s body. On Tuesday, Zepeda returned to T.'s house and asked T. whether he had disposed of I.'s body. Zepeda then began throwing things at T., telling T. to pack, and collecting items to load into Zepeda's truck.

After Zepeda left, T. called his mother and told her there was a dead body at his house. T.'s mother called law enforcement authorities. An autopsy of I.'s body revealed a laceration on his head resulting from a blunt-force trauma that may have rendered him unconscious but had not caused his death. The medical examiner determined I. had ultimately died by asphyxiation. Although he could not identify the exact cause of asphyxiation, the medical examiner opined that, because I. had drugs in his system, had received a blow to the head, and "was found face down into carpeting," "he was in a position whereby if [he] were . . . unconscious, . . . [he would not] be able to breathe properly and [would] asphyxiate up against the carpeting."

¶5 A grand jury returned an indictment charging Zepeda with first-degree murder and kidnapping. After a thirteen-day trial, a jury found him guilty of the lesser-included offenses of second-degree murder and unlawful imprisonment. Having found Zepeda's prior felony convictions and the emotional harm to I.'s family as aggravating factors, the trial court sentenced Zepeda to a combination of aggravated and presumptive, concurrent terms of imprisonment, the longer of which was twenty-two years. This appeal followed.

Discussion

Superseding cause instruction

¶6 Zepeda first contends the trial court erred in declining to instruct the jury on "super[s]eding cause." He asserts the court's refusal to give his requested instruction "deprived [him] of his opportunity to present his theory of defense, erroneously withdrew an

element of the crime [(causation)] from the jury and denied [him] his right to a fair trial in violation of both the State and Federal Constitutions." We will not disturb the trial court's refusal to give a jury instruction absent an abuse of discretion. *See State v. Cox*, 214 Ariz. 518, ¶ 16, 155 P.3d 357, 360 (App.), *aff'd*, 217 Ariz. 353 (2007).

¶7 A defendant "is entitled to a jury instruction on any theory reasonably supported by the evidence." *State v. Tschilar*, 200 Ariz. 427, ¶ 36, 27 P.3d 331, 340 (App. 2001). A defendant is not liable for harm to a victim when the harm resulted from a "superseding cause." *State v. Bass*, 198 Ariz. 571, ¶¶ 11, 14, 12 P.3d 796, 800-01 (2000). A superseding cause exists when an abnormal and unforeseeable event occurs after the defendant's actions, causing the victim's ultimate harm. *See id.*; *State v. Slover*, No. 2 CA-CR 2007-0379, ¶ 11, 2009 WL 295027 (Ariz. Ct. App. Feb. 9, 2009). However, an intervening event is not a superseding cause if the defendant's actions created the very risk of harm that ultimately ensued. *See Slover*, 2009 WL 295027, ¶ 11. Similarly, when the defendant's conduct "'increases the foreseeable risk of a particular harm occurring through [the conduct of] a second actor,'" the other person's conduct is not a superseding cause. *Id.*, *quoting Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983). Therefore, for Zepeda to have been entitled to a superseding cause instruction, the evidence must have supported the conclusion that an unforeseeable and extraordinary intervening event occurred, such that Zepeda's actions did not create the risk of harm that caused I.'s death.

¶8 Zepeda asserts that, because T. "had unfettered access to [I.] after [he] left" T.'s home, T. likely "affirmatively did things which actually prompted and caused [I.'s] death." But no evidence was presented at trial reasonably supporting an inference that T. did anything to cause I.'s death. *See Tschilar*, 200 Ariz. 427, ¶ 36, 27 P.3d at 340. In fact, T. testified he did not see I. following Zepeda's attack until he awoke later on Sunday, when he touched I.'s foot and determined he was dead. T. also averred he never disturbed I.'s body after that. Nonetheless, Zepeda asserts the jury should have been instructed on superseding cause because "[T.] did absolutely nothing to check on [I.'s] welfare or provide any sort of medical intervention." But Zepeda cites, and we find, no authority supporting his apparent assertion that a third party's failure to render assistance to an injured victim could constitute a superseding cause permitting a jury to conclude that failure, not the defendant's conduct, created the risk that caused the victim's death.

¶9 Zepeda next asserts a superseding cause instruction was warranted because "[s]o many unforeseeable and extraordinary things might have happened between the alleged assault and [I.'s] death." But, again, mere speculation, unsupported by evidence in the record, will not support giving a jury instruction. *See Tschilar*, 200 Ariz. 427, ¶ 36, 27 P.3d at 340. Zepeda also argues the court should have instructed the jury on superseding cause because "the drugs and alcohol in [I.'s] system [might have] cause[d] his death." He further insists I.'s death "was not foreseeable . . . , was both abnormal and extraordinary," and, therefore, "was not within the risk [his actions] created."

¶10 Although the medical examiner testified I. had alcohol and drugs in his system when he died, he noted it was "unclear" whether the alcohol was "a product of decomposition" and concluded I. had died by asphyxiation. No evidence was presented that I. had in fact died of a drug overdose or alcohol poisoning. And, insofar as Zepeda is asserting I.'s intoxication could have been a superseding cause of his death by rendering him unable to move or causing him improvidently to turn his head into the carpet, further restricting his breathing after Zepeda had left him, injured, lying on his stomach under a mattress, we disagree. As we have explained, an intervening event is not a superseding cause when the defendant's conduct has increased the risk that another's conduct would result in death or when the defendant's conduct itself created the risk that resulted in the victim's death. *See Slover*, 2009 WL 295027, ¶ 11. Here, Zepeda accosted I., who was intoxicated; hit him on the head hard enough to render him unconscious; placed him on his stomach on the carpet; bound his feet and hands to restrict his movement; and put a mattress on top of him. That I. asphyxiated after being left in this state was neither unforeseeable or extraordinary; rather, Zepeda's actions created the foreseeable risk of I.'s death or at least increased the foreseeable risk that I.'s intoxication could contribute to his death. *See Slover*, 2009 WL 295027, ¶ 14 (evidence victim may have drowned in creek because too intoxicated to move not superseding cause when defendant's driving caused victim's ejection from car "near or in a creek, intoxicated, with head injuries," creating "foreseeable risk that the victim would

die in the accident"). The trial court therefore did not abuse its discretion in declining to instruct the jury on superseding cause.

Lesser-included offense instructions

¶11 During trial, the state attempted to prove Zepeda had committed first-degree murder of I., either because Zepeda's actions were premeditated or because he had killed I. while committing a felony. Zepeda moved for judgment of acquittal on the charge of premeditated, first-degree murder, arguing "there ha[d] been absolutely no proof offered up by the State as to any type of premeditation." The trial court granted Zepeda's motion but concluded the evidence supported instructing the jury on the lesser-included offenses of second-degree murder, manslaughter, and negligent homicide, as well as on the state's alternative theory of felony murder. Zepeda contends the court erred in instructing the jury on second-degree murder, manslaughter, and negligent homicide over his objection.

¶12 In finding Zepeda guilty of second-degree murder, the jury "necessarily rejected [the] lesser-included crimes" of manslaughter and negligent homicide and, therefore, "any error as to instructions on [those] offenses is necessarily harmless." *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990). Accordingly we only address those portions of Zepeda's argument directed to the second-degree murder instruction.

¶13 Rule 23.3, Ariz. R. Crim. P., requires a trial court to instruct the jury on all offenses "necessarily included in the offense charged." "[A]n offense is 'necessarily included,' and so requires that a jury instruction be given, only when it is lesser included *and*

the evidence is sufficient to support giving the instruction." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006); *see also State v. Miranda*, 198 Ariz. 426, ¶ 9, 10 P.3d 1213, 1215 (App. 2000). "In other words, if the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved, [either party] is entitled to have the judge instruct the jury on the lesser-included offense." *Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150; *see also State v. Hurley*, 197 Ariz. 400, ¶ 13, 4 P.3d 455, 458 (App. 2001) ("Both the defendant and the prosecutor are entitled to instructions on any lesser-included offense for which there is evidentiary support.").

¶14 Zepeda does not dispute that second-degree murder is a lesser-included offense of premeditated, first-degree murder. Rather, he suggests that, because the trial court acquitted him of premeditated, first-degree murder and because "there are no lesser offenses with respect to felony murder," the court could not properly instruct the jury on second-degree murder. But, when a court grants a judgment of acquittal on a charged offense, instructions on its "lesser included offense would still be applicable" if supported by the evidence. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, n.7, 165 P.3d 238, 243 n.7 (App. 2007); *see also State v. Lamb*, 142 Ariz. 463, 472, 690 P.2d 764, 773 (1984) ("[W]hen supported by the evidence, instructions for second-degree murder . . . are required in first-degree murder trials.").

¶15 A person commits second-degree murder if, without premeditation, he causes the death of another either: (1) intentionally; (2) knowing his conduct would cause death or

serious injury; or (3) by consciously disregarding a substantial and unjustifiable risk that his actions would create a grave risk of death, under circumstances manifesting extreme indifference to human life. *See* A.R.S. §§ 13-1104, 13-105(9)(c).[1] Zepeda contends the evidence did not support a second-degree murder instruction because, he asserts, the state presented no evidence that he intended to kill I. or knew his conduct would kill or seriously injure I. He further claims no evidence supported a conclusion that his actions created a substantial risk of I.'s death or that he consciously disregarded such a risk.

¶16 As previously noted, T.'s testimony showed Zepeda had gone to T.'s home armed, looking for drugs, believing I. had some, and having reason to believe T. and I. were both intoxicated. T.'s and the medical examiner's testimony further indicated Zepeda had attacked I., struck him on the head with enough force to render him unconscious, restricted his ability to move by binding his hands and feet, limited his ability to breathe by placing him on his stomach on the carpet and placing a mattress on top of him, and left him for dead. After the attack, Zepeda told his roommate he had just beaten someone so severely that his victim might have died. Zepeda also repeatedly told T., without T.'s having informed him that I. had died, to dispose of I.'s body. This evidence allowed the jury to infer, at minimum, that Zepeda had attacked I. in a manner demonstrating an extreme indifference for I.'s life, consciously disregarding the risk that his conduct could—as it in fact did—result in I.'s death. *See* §§ 13-1104, 13-105(9)(c). Because the evidence supported the second-degree murder

[1]This section has since been renumbered. 2008 Ariz. Sess. Laws, ch. 301, § 10.

instruction, the trial court did not abuse its discretion in giving it. *See Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150.

Juror misconduct

¶17 During jury deliberations, the jury notified the court that, together with the admitted exhibits, it had mistakenly been given a transcript that had not been introduced in evidence and that one of the jurors, A., had read part of the transcript. The transcript documented the prosecutor's interview of one of the state's witnesses and included testimony that had not been presented at trial. Zepeda moved for a mistrial or, in the alternative, to excuse A. from the jury.

¶18 The trial court and counsel for both parties questioned A. at length regarding what he had read of the transcript. A. testified he had seen the transcript among the other exhibits given to the jury, had read the first half of the "front page," had "thumbed through" but had not read the remainder, and then had realized the transcript had not been admitted into evidence. A. acknowledged he had read the prosecutor's and witness's name on the transcript but stated he did not read any "factual information about th[e] case." A. further avowed that the jurors did not discuss the transcript and that, after he realized they should not have it, he told the foreperson, who immediately notified the bailiff. The court also questioned the other jurors regarding whether they had seen, "had contact with," discussed, or heard others discussing the transcript. Some responded affirmatively. The court and counsel then questioned each of them, and each confirmed having neither read nor discussed the substance

of the transcript. All of those jurors, as well as A., further testified the exposure would not affect their ability to decide the case fairly and impartially. The court then denied Zepeda's motion for a mistrial and alternative motion to remove A. as a juror.

¶19 Zepeda contends the trial court erred in denying his motions. When a jury receives information not in evidence, a trial court must grant a new trial unless it finds beyond a reasonable doubt that the extrinsic evidence would not contribute to the verdict. *State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996), *see also State v. Hansen*, 156 Ariz. 291, 295, 751 P.2d 951, 955 (1988); *State v. Turrentine*, 122 Ariz. 39, 41, 592 P.2d 1305, 1307 (App. 1979) (when jury receives items not in evidence, court grants mistrial "if there is the slightest possibility that harm could have resulted"). And, even when the entire jury has not been tainted, the court must excuse any juror it has "reasonable ground to believe . . . cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). We review the court's denial of Zepeda's motions for an abuse of discretion. *See State v. Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997); *State v. Rodriguez-Rosario*, 219 Ariz. 113, ¶ 7, 193 P.3d 807, 809 (App. 2008).

¶20 Zepeda first asserts the trial court "never made the required finding that the [jury's having received the transcript] . . . could not contribute to the verdict." But the court explicitly found that, "based upon the [jurors'] testimony," they "c[ould] all be fair and impartial." From that statement, together with the court's ultimate denial of Zepeda's

motions, we may infer the court found that the jurors' having mistakenly received the transcript would not improperly affect their verdict.

¶21 Nonetheless, Zepeda insists that, "[a]lthough each [juror] professed not to have read the transcript, the prejudice is manifest" because the transcripts contained statements that were "extremely prejudicial" to him. But, merely because the jury improperly had prejudicial evidence in its possession does not alone warrant a mistrial or the dismissal of a juror. *See Turrentine*, 122 Ariz. at 41, 592 P.2d at 1307. Rather, the record must show that "the jury actually made use of the improper document," compromising the jury's or a juror's ability to fairly and impartially render the verdict. *Id.*; *see also* Ariz. R. Crim. P. 18.4(b).

¶22 We find nothing in the record suggesting the jury actually used the transcript during deliberations or that its temporary possession of the transcript could have otherwise contributed to the verdict by affecting its ability to fairly decide the case. *See Spears*, 184 Ariz. at 289, 908 P.2d at 1074; *Turrentine*, 122 Ariz. at 41, 592 P.2d at 1307; Ariz. R. Crim. P. 18.4(b). Nor will we indulge Zepeda's suggestion that, despite the record, we should conclude the jurors' testimony was untruthful. *See Stave v. Lavers*, 168 Ariz. 376, 390-91, 814 P.2d 333, 347-48 (1991) (trial court in best position to assess credibility when examining jurors to determine if they could be fair and impartial). We therefore cannot say the trial court abused its discretion in denying Zepeda's motions to declare a mistrial or to excuse A.

Telephone records

¶23 On the fourth day of trial, Tucson Police Department (TPD) detective Ralph Taylor testified that, while searching T.'s home pursuant to a search warrant, he had searched the "call log" on T.'s telephone and had recorded the telephone numbers of every call T. had received between Saturday, August 26 and Tuesday, August 29, 2006. Zepeda moved to preclude the state from offering any evidence regarding Taylor's notes, arguing the state had not timely disclosed the information Taylor had collected from T.'s telephone and therefore he "d[id]n't know if [his] phone number [wa]s on there." The trial court granted Zepeda's motion "[f]or the time being." The next day, Zepeda moved to preclude T. from testifying, arguing the call log proved Zepeda had not called T. in the early morning hours of August 27 and, therefore, T.'s intended testimony that Zepeda had called him would constitute perjury. Zepeda alternatively moved for a mistrial as a sanction for the state's untimely disclosure of the call log. The court denied both motions.

¶24 Zepeda obtained a subpoena later that day requiring T.'s telephone service provider to produce T.'s phone records. Before Zepeda received the records, T. testified Zepeda had called him between approximately 3:00 and 3:30 a.m. on August 27, asking if T. had drugs and, in response to T.'s telling him I. had drugs, saying he would "be right over." While cross-examining T., Zepeda moved to introduce Detective Taylor's notes into evidence. The notes showed T. had received calls between 3:00 and 3:30 a.m. from only one number, which belonged to an acquaintance of T.'s, M. The court denied Zepeda's motion, finding

he had failed to lay proper foundation to admit Taylor's notes, but it allowed Zepeda to "ask [T.] specifically about the call log." During his cross-examination, T. maintained Zepeda had called him the morning of I.'s death, despite admitting he did not recognize the telephone number in Taylor's notes. T.'s testimony that Zepeda had called him was corroborated by H.

¶25 When Zepeda received the telephone company's records several days later, he introduced them into evidence through the testimony of private investigator Joseph Godoy, who testified the records showed T. had not received a call from Zepeda's telephone on the morning of I.'s death. Godoy also compared Taylor's notes, which had apparently been admitted into evidence, and the telephone records, concluding that, although the telephone company's records showed T. had received a call from an unknown number at approximately 2:15 a.m. on August 27, the only calls T. had received during the time he claimed Zepeda had called him were from M.'s telephone number.

¶26 Zepeda now contends the trial court abused its discretion in denying his motions to declare a mistrial or to preclude T.'s testimony regarding his receiving the telephone call from Zepeda. We review the court's denial of Zepeda's motions for an abuse of discretion. *See State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004); *State v. Marshall*, 197 Ariz. 496, ¶ 10, 4 P.3d 1039, 1043 (App. 2003). Zepeda asserts the court should have granted his motions for mistrial and to preclude T.'s testimony because the untimely disclosed evidence—Taylor's notes from T.'s call log—proved Zepeda had not called T. and, thus, that T.'s intended testimony was perjured. He also claims that, had Taylor's notes been timely

disclosed, Zepeda "would have obtained [the phone company's] records [earlier] and been able to prevent [T.] from tainting jury deliberations with his perjured testimony."

¶27 The flaw in Zepeda's argument is that neither Taylor's notes from T.'s call log nor the telephone company's records disprove T.'s testimony that Zepeda had called him. Although neither showed a call from Zepeda's telephone number, both showed T. had received several calls from M.'s number during the time T. claimed Zepeda had called him, as well as a call from an unidentified number a short while earlier. Zepeda claims that, because M. testified she did not know Zepeda, the jury could not reasonably conclude he had used her telephone to call T. But, even if we agreed with Zepeda, he fails to explain why the jury could not have concluded he had called T. from the unknown number shown on the phone records, approximately forty-five minutes earlier than the time T.—who admitted having smoked crack cocaine shortly beforehand—estimated Zepeda had called him.

¶28 Nor did the state's untimely disclosure of Talyor's notes prevent Zepeda from timely obtaining the telephone company's records. Even assuming the state was required to disclose Taylor's notes, the relevance of the phone company's records was not dependent on the existence of those notes. Rather, as Zepeda admits, he knew based on pretrial interviews that T. would likely testify Zepeda had called him shortly before coming to his house and attacking I.; therefore, Zepeda independently had reason to obtain the records for his defense before the state's disclosure of Taylor's notes. Zepeda offers no other reasons supporting his

argument that the trial court abused its discretion in denying his motions, and we cannot conclude it abused its discretion on the bases he asserts.[2]

Expert testimony

¶29 At trial, fingerprint examiner Steven Skowron testified that no fingerprints related to Zepeda's case had been processed by the TPD crime laboratory. Rather, he stated, the evidence collected at T.'s house had instead been tested for DNA[3] evidence, a process that destroyed any fingerprint evidence that may have existed. To establish he was qualified to testify about these matters, Skowron stated he was a supervisor of the "latent [finger]print examining division" of the TPD crime lab and had been employed as a fingerprint examiner for twenty years. He testified he had been trained "in the field of fingerprint identification and evidence processing" by various laboratories and agencies, including "senior members of [TPD]" and the Federal Bureau of Investigation. Skowron also noted he had attended state and federal seminars "on fingerprint examination" and had participated in forty hours of continuing-education training per year.

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[2]In passing, Zepeda also asserts the state's late disclosure of Taylor's notes denied him his "right to confront and fully cross-examine [T.]" regarding the phone company's records, which, he claims, he would have obtained before T. testified had the state timely disclosed Taylor's notes. Insofar as this argument is based on Zepeda's assertion that the state was at fault for his failure to request the phone company's records earlier, we disagree, as explained above. In any event, because Zepeda does not develop this argument in any meaningful way, we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

[3]Deoxyribonucleic acid.

¶30 In April 2008, nine months after Zepeda's trial had concluded, the state filed a "supplemental disclosure," informing Zepeda that Skowron recently had resigned from his crime lab employment as the result of an investigation in February 2008. That investigation revealed Skowron had sent inappropriate emails to two women, had failed to apply for recertification as a fingerprint examiner before his certification expired in 2006, and had taken for his personal use drugs and paraphernalia from evidence packages in six different criminal cases. After receiving the state's disclosure, Zepeda filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing that the newly discovered evidence disclosed by the state showed Skowron was unqualified to testify and that, had he not testified, the outcome of Zepeda's trial might have been different. *See* Ariz. R. Crim. P. 32.1(e). The trial court summarily denied relief.

¶31 In his petition for review of the trial court's decision, Zepeda asserts Skowron's drug use and expired certification "establish[] a *prima facie* case that [his] qualifications as an expert . . . did not rise to the level of acceptance pursuant to Rule 702[, Ariz. R. Evid.]." Apparently arguing in the alternative, Zepeda also suggests that, had he been able to impeach Skowron with the information the state disclosed, "the weight given [by the jury to] his testimony would have been significantly diminished." Zepeda contends Skowron's testimony likely prejudiced him and claims he therefore raised a colorable claim of newly discovered evidence, entitling him to an evidentiary hearing. *See* Ariz. R. Crim. P. 32.8.

¶32 A defendant is entitled to a hearing pursuant to Rule 32.8 only when he presents a colorable claim, one "which[,] if his allegations are true[,] might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). A trial court may dismiss a petition for post-conviction relief without first conducting an evidentiary hearing if the defendant has failed to present any "material issue of fact or law which would entitle [him] to relief." Ariz. R. Crim. P. 32.6(c). We review the court's summary dismissal of Zepeda's petition for an abuse of discretion. *See State v. Rosales*, 205 Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2003).

¶33 Zepeda's argument fails for numerous reasons. First, as the state noted below, Skowron's testimony was not necessary to support Zepeda's convictions. Further, even were we to assume his testimony affected the outcome of Zepeda's case, the evidence in the state's disclosure does not support Zepeda's assertion that Skowron was unqualified to testify as an expert on fingerprint examination. Zepeda cites, and we find, no authority for the proposition that a witness's drug use or lack of professional certification necessarily renders him unqualified to testify as an expert. Rather, Rule 702 requires that an expert must have specialized "knowledge, skill, experience, training, or education" regarding the matter about which he intends to testify. Skowron's testimony satisfied this requirement. *See State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004) ("The test of whether a person is an expert is whether a jury can receive help on a particular subject from a witness."). Although the subsequently disclosed evidence on which Zepeda relies is relevant to the degree to which

Skowron was qualified to testify, "[t]he degree of qualification goes to the weight given the testimony, not its admissibility." *Id.* Thus, the evidence the state disclosed would have been useful to Zepeda only as a means to impeach Skowron, undermining the degree of his qualification and his credibility. But a defendant is not entitled to post-conviction relief based on newly discovered evidence when that evidence is "solely . . . impeach[ing]." Ariz. R. Crim. P. 32.1(e)(3). Because Zepeda failed to raise a colorable claim for post-conviction relief, the trial court did not abuse its discretion in summarily dismissing his petition seeking that relief without holding an evidentiary hearing. *See Schrock*, 149 Ariz. at 441, 719 P.2d at 1057; Ariz. R. Crim. P. 32.6(c).

Disposition

¶34 We affirm Zepeda's convictions and sentences. We grant his petition for review but deny post-conviction relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge