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.

FILED BY CLERK
DEC 19 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2008-0219-PR
Respondent,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
PEDRO IMPERIAL VEGA	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20010242

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

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

Law Office of Patricia A. Taylor
By Patricia A. Taylor — Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Pedro Vega seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. In that petition, he alleged trial and appellate counsel had been ineffective for failing to raise numerous issues during pretrial proceedings, at trial, and on appeal. He also argued he was entitled to relief because he had discovered new evidence and his constitutional rights had been violated during trial. Although we grant review, we deny relief.

¶2 In 2002, Vega was convicted of one count of contributing to the delinquency of a minor, three counts of sexual abuse of a minor under the age of fifteen, and one count of molestation of a child. The trial court sentenced him to time served plus twenty-two years in prison. This court affirmed his convictions and sentences on appeal. *State v. Vega*, No. 2 CA-CR 2002-0487 (memorandum decision filed Sept. 12, 2005). Vega filed a petition for post-conviction relief, which the trial court denied after an evidentiary hearing. This petition for review followed.

¶3 On review, Vega contends the trial court erred in denying relief because both trial and appellate counsel rendered ineffective assistance and he was denied due process of law. *See State v. Jackson*, 209 Ariz. 13, ¶ 3, 97 P.3d 113, 114-15 (App. 2004) (ineffective assistance of counsel claims cognizable in Rule 32 petitions). He asserts counsel were ineffective in the following respects: (1) trial counsel failed to appropriately argue that evidence the victim had been molested prior to the alleged incidents was admissible; (2) trial counsel failed to adequately investigate an expert witness's background, conduct appropriate cross-examination, hire or consult with its own expert to rebut her testimony, and appellate

counsel should have raised these issues on appeal; (3) trial counsel either failed to investigate or properly present evidence about the victim's prior recantations of the abuse allegations, particularly her recantation to a priest; (4) appellate counsel failed to raise the issue of a witness's comment on Vega's right to remain silent; and (5) trial counsel failed to object to an amendment to the indictment changing the dates of the alleged offenses. He also argues he has discovered new evidence about the state's expert witness that casts doubt on the propriety of her testimony as an expert, *see* Rule 32.1(e), and that his due process rights were violated by the admission of hearsay at trial, *see* Rule 32.1(a).

¶4 We review the trial court's decision granting or denying post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). When the trial court's order denying a petition for post-conviction relief "clearly identif[ies] the issues raised[, and e]ach issue raised is correctly ruled upon in a fashion that will allow any court in the future to understand the resolution[, then n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision." *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Here, in a detailed minute entry, the trial court clearly and correctly addressed the merits of Vega's first three claims of ineffective assistance of trial counsel and his claim of newly discovered evidence about the expert witness. Seeing no reason to repeat the trial court's analysis here, we adopt its ruling on these issues. *See id*. However, we address the remaining issues below.

¶5 As we noted above, the trial court addressed and correctly resolved Vega's claims against trial counsel regarding the expert testimony of Wendy Dutton, but it did not

explicitly address his claim that appellate counsel had rendered ineffective assistance. Vega contends appellate counsel failed to argue that Dutton's testimony about the general characteristics and behaviors of child abuse victims was irrelevant and prejudicial because the victim in this case did not fit the general case. To show ineffective assistance of appellate counsel, the petitioner must demonstrate that the attorney's representation "'fell below the prevailing objective standards . . .'" and "offer evidence of a reasonable probability that but for counsel's unprofessional errors, the outcome of the appeal would have been different." *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995), *quoting State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985).

¶6 Testimony about general social and behavioral science principles is admissible to "assist the jury in deciding a contested issue, including issues pertaining to accuracy or credibility of a witness' recollection or testimony." *State v. Lindsey*, 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986). In this case, the victim's credibility was a central issue based on evidence of her recantation of the allegations to her mother, and Dutton explained issues beyond the jury's personal experience so that it could put the credibility issue in context. Dutton's testimony concerned only general behaviors and did not go into the specific facts of this case. It was therefore admissible. *See id.*; *see also State v. Curry*, 187 Ariz. 623, 628-29, 931 P.2d 1133, 1138-39 (App. 1996) (considering similar expert testimony by Dutton; finding testimony relevant and not unfairly prejudicial). And appellate counsel could reasonably have concluded that any circumstances unique to the victim in this case went to the weight, rather than the admissibility, of Dutton's testimony and thus

appropriately declined to raise the issue. Because the testimony was admissible, Vega cannot show his appellate counsel's performance was deficient or that the outcome of the appeal would have been different had the issue been raised.

¶7 Vega contends his appellate counsel rendered ineffective assistance by failing to argue that Detective Neilsen, who had interrogated Vega before his arrest, improperly commented on his right to remain silent by testifying at trial that Vega did not deny the allegations against him during the investigatory interview. Vega raised this issue in his petition for post-conviction relief, but it appears the trial court, while acknowledging the issue had been raised with respect to trial counsel, failed to explicitly discuss it as it applied to both trial and appellate counsel.

¶8 To prove ineffective assistance of counsel at trial, a petitioner must demonstrate both that counsel's performance was deficient and that this deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Vega can show neither. "Comment by the prosecution upon an accused's assertion of his Fifth Amendment [to the United States Constitution] right to remain silent is improper." *State v. Robinson*, 127 Ariz. 324, 327, 620 P.2d 703, 706 (App. 1980). However, Vega never asserted his right to remain silent. Vega received *Miranda* warnings[1] prior to the interview, but he waived them and agreed to answer Nielsen's questions. Thus, the issue is not one of constitutional import, but of state evidentiary law. *See State v. Henry*, 176 Ariz. 569, 580, 863 P.2d 861, 872 (1993) ("When

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

a defendant is not induced into silence by *Miranda* warnings, however, or waives his rights by answering questions after such warnings are given, due process is not implicated."). And, under our Rules of Evidence, Vega's failure to deny the allegations against him during questioning is admissible as the admission of a party opponent. *See* Ariz. R. Evid. 801(d)(2) (statement by party offered against that party not hearsay); *State v. Maturana*, 180 Ariz. 126, 130, 882 P.2d 933, 937 (1994) (where defendant did not invoke right to remain silent, evidence that defendant did not respond to some questions admissible). Thus, Neilsen's testimony was admissible, and trial counsel's failure to raise this issue was neither deficient nor prejudicial. And, because no error occurred, he also cannot show ineffective assistance of appellate counsel. *See Herrera*, 183 Ariz. at 647, 905 P.2d at 1382.

¶9 Vega next asserts that statements the victim made to Neilsen concerning the abuse constituted hearsay and the trial court's admission of these statements deprived him of due process and violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. We agree with the trial court that "this issue is properly raised on appeal rather than in post-conviction relief proceedings." Therefore, because Vega could have raised this claim on appeal and failed to do so, he has forfeited the claim and is precluded from raising it now.[2] *See* Ariz. R. Crim. P. 32.1(a), 32.2(a)(1).

¶10 Finally, Vega argues that his trial counsel was ineffective for failing to object to an amendment to the indictment that changed the dates of one of the alleged offenses.

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[2]Because we find this claim precluded, we do not address the propriety of the court's admission of these statements as excited utterances or present sense impressions.

However, in neither his petition for post-conviction relief nor his petition for review has he provided any citation to the record or to authority in support of his argument. *See* Ariz. R. Crim. P. 32.5 ("Legal and record citations . . . are required."); Ariz. R. Crim. P. 32.9 (stating contents required of petition for review); *see also State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims not complying with rules governing form and content of petitions for review), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). In the absence of any proper argument on this issue, Vega has failed to demonstrate his counsel's representation was deficient and caused him prejudice.[3] *See Strickland*, 466 U.S. at 691; *Nash*, 143 Ariz. at 397, 694 P.2d at 227.

¶11 For the reasons stated above, although we grant review, we deny relief.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge

[3]In any event, it appears from the record that Vega's counsel did object to amending the indictment and the trial court overruled that objection.