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
NOV 18 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0209-PR
	)	DEPARTMENT B
Respondent,	)	
	)	MEMORANDUM DECISION
v.	)	Not for Publication
	)	Rule 111, Rules of
HUBERT WASHINGTON JR.,	)	the Supreme Court
	)	
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080469

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery — Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Hubert Washington Jr. petitions this court for review of the trial court's denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R.

Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Washington was convicted after a jury trial of two counts of sexual assault and sentenced to consecutive prison terms totaling twelve years and three months. We affirmed his convictions and sentences on appeal. *State v. Washington*, No. 2 CA-CR 2009-0098, ¶ 17 (memorandum decision filed Feb. 5, 2010). He then filed a notice and petition for post-conviction relief asserting that his trial and appellate counsel had been ineffective for failing to argue the jury instruction given for sexual assault did not correctly reflect that the defendant must know the victim did not consent to the sexual contact and that trial counsel had been ineffective for failing to object when the prosecutor purportedly engaged in improper vouching during closing argument. The trial court summarily denied relief, concluding the claims were precluded because the underlying arguments had not been raised on appeal and, in any event, counsel had not been ineffective because the jury instruction properly stated the law and no improper vouching occurred. As to Washington's claims regarding the jury instruction, the court also concluded that Washington had not demonstrated resulting prejudice because "there [wa]s no factual issue that the contact was without the consent of the victim."

¶3 On review, Washington first asserts the trial court erred by finding his claims precluded because the underlying arguments were not raised on appeal. We agree. Relevant here, a post-conviction relief claim is precluded when it has been "waived at trial, on appeal, or in any previous collateral proceeding." Ariz. R. Crim. P. 32.2(a)(3). Although the arguments he asserts his trial and appellate counsel should have made plainly were raisable on appeal,[1] the claims he raised in post-conviction relief were based

[1]As Washington points out regarding his claim of ineffective assistance of appellate counsel, the trial court's reasoning clearly was circular and, if correct, would

on the alleged deprivation of his right to effective trial and appellate counsel—claims that cannot properly be raised on appeal, *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), and that are based on the Sixth Amendment, *see Strickland v. Washington*, 466 U.S. 668, 684-85 (1984).

¶4 "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). To prevail on such a claim, Washington must demonstrate counsel's conduct fell below prevailing professional norms and that the conduct prejudiced him. *Strickland*, 466 U.S. at 687-88. And, to establish prejudice, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The underlying bases for Washington's ineffective-assistance claims—the failure to raise certain arguments—are only an "element of proof" of his Sixth Amendment claims. *Kimmelman*, 477 U.S. at 374-75. Thus, the fact those claims had not previously been waived does not subject Washington's ineffective-assistance claims to preclusion. *See id.*

¶5 Washington next asserts the trial court erred in rejecting his ineffective-assistance claims based on his trial and appellate counsel's failure to argue that the jury instruction on sexual assault was defective. He contends the court incorrectly concluded that the instruction correctly stated the law and that, in any event, Washington had not demonstrated prejudice. The jury was instructed:

> The crime of sexual assault requires proof of the following:

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bar any claim of ineffective assistance of appellate counsel based on counsel having failed to raise a meritorious claim.

1. The defendant intentionally or knowingly engaged in either sexual intercourse or oral sexual contact with any person; and

2. The sexual intercourse or oral sexual contact was without the consent of such person.

¶6 That instruction is nearly identical to the instruction contained in the Revised Arizona Jury Instruction (Criminal) ("RAJI") 14.06.01 (2008). The instruction, however, does not make it clear that the mens rea requirement contained in the governing statute, A.R.S. § 13-1406, applies to both elements—that is, the defendant's conduct must be intentional or knowing, and he or she must also know or intend that the victim did not consent. *See* A.R.S. § 13-202(A); *State v. Kemper*, 227 Ariz. 452, ¶¶ 3-6, 258 P.3d 270, 270 (App. 2011) (concluding substantially identical instruction fundamental error); *see also State v. Witwer*, 175 Ariz. 305, 308, 856 P.2d 1183, 1186 (App. 1993) (concluding sexual-abuse statute requires defendant knew conduct was without victim's consent). Thus, Washington's trial and appellate counsel had available an apparently meritorious claim that the jury instruction incorrectly stated the law.

¶7 But the mere fact that counsel forgoes a meritorious claim does not establish that counsel's conduct fell below prevailing professional norms. The Sixth Amendment does not entitle a defendant to mistake-free representation. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006); *see also State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (defendants "not guaranteed perfect counsel, only competent counsel"), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). A defendant must overcome "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), by providing evidence that counsel's conduct fell below prevailing

professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶8 As we noted above, the instruction given was identical to the instruction set forth in the RAJI. Although the RAJI instructions are not approved by the Arizona Supreme Court, they are created by the Arizona State Bar, *see State v. Logan*, 200 Ariz. 564, ¶ 12, 30 P.3d 631, 633 (2001), and are widely used in both criminal and civil trials in this state. Washington provided no affidavit or other evidence in the trial court suggesting that counsel's failure to object to, or raise on appeal an argument related to, a standard RAJI instruction that is clearly applicable to the case falls below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). And he cites no authority on review, nor did he below, concluding comparable conduct constituted ineffective assistance of counsel. Washington's unsupported assertion that counsel had made an error is insufficient to meet his burden of demonstrating the first *Strickland* requirement. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶9 Moreover, counsel's conduct is evaluated based on "counsel's perspective at the time." *Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d at 636. At the time of trial and during his appeal, Washington's counsel did not have the benefit of *Kemper*'s direct holding that an identical instruction was fundamental error. *Cf. id.* ¶ 24 ("There is a difference between ignorance of controlling authority and 'the failure of an attorney to foresee future developments in the law.'"), *quoting United States v. Gonzales-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995). Instead, counsel had to evaluate that potential claim based

only on the authority available at that time. Notably, the court in *Witwer*, although it determined the defendant must know the victim of sexual abuse did not consent, rejected an argument that a jury instruction arguably similar to the one given here was defective in part because the jury also was instructed that "knowingly" applies to the "conduct or circumstances constituting an offense." 175 Ariz. at 309, 856 P.2d at 1187. The jury was given an identical instruction here. Thus, counsel might have determined that an objection or appellate argument based on the jury instruction would not have been successful. *See Febles*, 210 Ariz. 589, ¶ 19, 115 P.3d at 636 (strategic decision to "'winnow[] out weaker arguments on appeal and focus[] on' those more likely to prevail is an acceptable exercise of professional judgment"), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (alterations in *Febles*).

¶10 In these circumstances, Washington did not establish a colorable claim that his counsels' conduct fell below prevailing professional norms, and the trial court did not err in summarily denying that claim. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling if result legally correct for any reason). Accordingly, we need not address Washington's related argument that the court erred in determining he had not been prejudiced by counsels' conduct. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant makes insufficient showing on one part of *Strickland* test, court need not address other part).

¶11 Washington next asserts the trial court erred in concluding the prosecutor had not engaged in improper vouching during closing argument, and thereby erred in rejecting his claim that trial counsel had been ineffective for failing to object. The prosecutor stated twice during closing argument that the victim had given details of Washington's sexual assaults of him during a 9-1-1 call. Washington asserts these

statements constituted improper vouching because the 9-1-1 call was not admitted into evidence, and no other evidence supported the prosecutor's claim that the victim had provided details of the assaults during that call. Improper vouching occurs when a prosecutor "places the prestige of the government behind its witness" or "suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989); *see also State v. Palmer*, 219 Ariz. 451, ¶ 6, 199 P.3d 706, 708 (App. 2008).

¶12 But, even assuming the prosecutor's statements were improper, Washington has not demonstrated that his trial counsel's performance fell below prevailing professional norms when he failed to object. As the state pointed out in its answering memorandum filed below, there are strategic reasons why trial counsel may not have objected. For example, counsel may have believed interrupting the state's closing argument would distract the jury or draw attention to the prosecutor's purportedly improper comments. "Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). We find unconvincing Washington's assertion made below that such reasons are merely "speculation," and his unsupported—and plainly incorrect—claim that "[t]here is no possible rational strategy" to be served by declining to object. We must presume counsel's conduct was grounded in trial strategy, and it is Washington's burden to demonstrate otherwise. *See id*. Washington has provided no evidence in support of his claim, nor cited any relevant authority suggesting counsel's failure to object in these circumstances falls below prevailing professional norms. Again, it is not enough to demonstrate that a viable argument could have been raised. Accordingly, the trial court did not err in summarily

denying Washington's claim. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945; *Perez*, 141 Ariz. at 464, 687 P.2d at 1219.

¶13 For the reasons stated, although we grant review, relief is denied.

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

CONCURRING:

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

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