

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TIARON GERMAINE ROSS,
Petitioner.

No. 2 CA-CR 2013-0542-PR
Filed April 22, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20090383001
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Tiaron Germaine Ross, San Luis
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Following a jury trial, petitioner Tiaron Ross was convicted of second-degree murder, and the trial court sentenced him to sixteen years in prison. We affirmed Ross’s conviction and sentence on appeal. *State v. Ross*, No. 2 CA-CR 2011-0123, ¶ 15 (memorandum decision filed Mar. 19, 2012). Ross now seeks review of the court’s dismissal of what appears to be his second petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.¹ “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In June 2013, Ross filed a pro se Rule 32 proceeding asserting: (1) the attached affidavit of a witness to the underlying murder constituted newly discovered evidence casting doubt on his guilt; (2) “ineffective counsel failed at every critical stage”; (3) the trial court abused its discretion by denying his motion for new trial “based on prosecut[orial] misconduct”; and (4) by allowing the admission of evidence related to his prior bad acts. Ross attached to his petition an affidavit by a witness to the murder avowing, inter alia, that he “didn’t testify in court, because [he] didn’t want

¹Although Ross entitled his twelve-page pleading a notice of post-conviction relief, the trial court treated it as a petition for post-conviction relief, a ruling Ross did not challenge. In addition, although the record does not contain Ross’s first Rule 32 petition, he has included a copy of it in the exhibits attached to his petition for review, indicating the trial court had rejected it “due to length.”

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anything to do with what went on.” The affidavit was dated January 14, 2013.

¶3 In a November 2013 ruling, the trial court summarily dismissed all of Ross’s claims, as explained below. On review, Ross first asserts the affidavit was newly discovered evidence pursuant to Rule 32.1(e). A defendant presents a colorable claim of newly discovered evidence if the following requirements are met:

- (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) the [petition] must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court’s attention;
- (3) the evidence must not simply be cumulative or impeaching;
- (4) the evidence must be relevant to the case;
- (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶4 Here, Ross asserted in his petition below that the 2013 affidavit, which he contended was “newly discovered evidence,” existed at the time of the 2011 trial, and asserts on review that “through due diligence” he presented the affidavit as newly discovered evidence. He further maintains that although he was aware of the importance of the witness’s testimony at the time of trial, he should not be punished for the witness’s “[choice] not to testify at trial.”

¶5 In its order dismissing this claim, the trial court found that, because the affidavit “does not appear on its face to have existed at the time of trial,” the first prong of *Bilke*, that the newly discovered material facts existed at the time of trial but were

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discovered after trial, was not satisfied. *See id.* The court also concluded that, even if the information in the affidavit had been known at the time of trial, Ross nonetheless failed to present any facts showing he was diligent in discovering that information and bringing it to the court's attention. *See id.* Ross claims the witness's knowledge and potential testimony existed at the time of trial. But he concedes he "[cannot] state with certainty, the private investigator or counsel's efforts to locate or interview" the witness. Accordingly, because the court correctly determined that Ross had failed to satisfy the second required element of a newly discovered evidence claim, it properly dismissed his claim. *See State v. Andersen*, 177 Ariz. 381, 387, 868 P.2d 964, 970 (App. 1993) (all elements must be satisfied to establish claim of newly discovered evidence).

¶6 Ross next argues, at length, that trial, appellate and Rule 32 counsel were ineffective. Correctly finding that Ross did not provide any support for his claim of ineffective assistance of counsel in his petition below, the trial court dismissed it.² Moreover, because Ross did not raise the specific arguments he presents on review in his petition below, thereby asking us to consider arguments raised for the first time on review, we will not address them. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review any issue on which trial court did not have opportunity to rule); *see also* Ariz. R. Crim. P. 32.9(c) (petition for review shall contain issues decided by trial court).

¶7 Ross next argues the trial court erroneously dismissed his motion for new trial based on allegations of prosecutorial misconduct. However, because Ross could have and did raise these claims on appeal, the court properly found them precluded. *See*

²The trial court relied on Rule 32.8(c), Ariz. R. Crim. P., as support for the notion that Ross had "the burden of proving the allegations of fact by a preponderance of the evidence." We note, however, that this rule applies in the context of an evidentiary hearing, which did not take place here.

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Ariz. R. Crim. P. 32.2(a)(1), (2). Nor did Ross assert his claims fell within any of the exceptions to preclusion. *See* Ariz. R. Crim. P. 32.2(b). And, as the court also found, Ross failed to provide any argument in support of his claims.

¶8 Finally, Ross contends the trial court erred by precluding his argument regarding the admission of evidence of his prior bad acts. However, because Ross could have but did not raise this claim on appeal, he is precluded from doing so now. *See* Ariz. R. Crim. P. 32.2(a)(1). And, as the trial court again found, Ross did not provide any argument to support this claim.

¶9 Accordingly, we grant review but deny relief.