

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LOREN WILLIAMSON,
Petitioner.

No. 2 CA-CR 2014-0046-PR
Filed May 14, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2007136314001DT
The Honorable Stephen P. Lynch, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Shaheen P. Torgoley, Deputy County Attorney, Phoenix
Counsel for Respondent

Loren Williamson, Florence
In Propria Persona

STATE v. WILLIAMSON
Decision of the Court

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Loren Williamson was convicted after a jury trial of six counts of sexual conduct with a minor, his biological daughter. This court affirmed the convictions and sentences imposed on appeal. *State v. Williamson*, No. 1 CA-CR 09-0476 (memorandum decision filed Dec. 9, 2010). In his petition for review, he challenges the trial court's order denying relief summarily on one of the claims of ineffective assistance of counsel he raised in the pro se petition he filed after counsel filed a notice, in which he stated he had reviewed the record and had found no issue to raise in a post-conviction proceeding under Rule 32, Ariz. R. Crim. P. We will not disturb the trial court's ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 In his pro se petition, Williamson challenged his sentences on various grounds and raised claims of trial error. In addition, he raised claims of ineffective assistance of trial counsel, including the only claim he raises on review: trial counsel was ineffective for failing to move for a mistrial based on jury misconduct that violated his right to a fair trial and resulted in fundamental error. The trial court denied relief summarily, finding Williamson had failed to raise a colorable claim for relief. Williamson only challenges that finding as it relates to his claim that trial counsel was ineffective in failing to move for a mistrial in connection with alleged juror misconduct. He has not sustained his burden of establishing the court abused its discretion.

¶3 The alleged claim of jury misconduct related to notes the jurors passed to the sheriff's deputy under the door while the

STATE v. WILLIAMSON
Decision of the Court

trial was delayed and they were waiting in a room. The notes included the following question: "Is it lunchtime yet?" Another message was: "Need toilet paper! Pizza, soda, plus beer; want to settle out of court." And another was: "We have reached a verdict." The trial court explained to the jury that it learned about the notes and stressed it had to assure the defendant was receiving a fair trial and that the jurors had not, in fact, deliberated. The court asked each juror if the notes had been sent "in fun"; each replied they had been.

¶4 To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996) ("[t]o avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," colorable claim must be raised on both parts of *Strickland* test). And to warrant an evidentiary hearing, a claim of ineffective assistance of counsel "must consist of more than conclusory assertions." *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000).

¶5 On this record, Williamson has not established counsel's performance was deficient, nor has he established it prejudiced him. Based on the nature of the conduct at issue and the trial court's discussion of the matter with the jurors, Williamson has not shown counsel fell below prevailing professional norms by not seeking a mistrial, and he has not shown he was deprived of a trial by a fair and unbiased jury. And even if we were to agree the jurors were guilty of some form of misconduct, a new trial is only warranted if the defendant shows he was actually prejudiced or such prejudice can be presumed from the record. *See State v. Dann*, 220 Ariz. 351, ¶ 115, 207 P.2d 604, 624 (2009); *see also State v. Doerr*,

STATE v. WILLIAMSON
Decision of the Court

193 Ariz. 56, ¶ 40, 969 P.2d 1168, 1177 (1998) (Sixth Amendment guarantees criminal defendants fair and impartial jury); *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983) (“[M]istrial is the most dramatic remedy . . . and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.”). It would not have been warranted here.

¶6 Williamson has expanded on review the arguments he raised below, suggesting counsel should have objected when the court addressed the jury because the court was either coercing the jury or suggesting the correct answer to the questions. We do not consider arguments raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). But even assuming arguendo these arguments may be characterized as fair extensions of the issue raised below, Williamson has not established counsel’s performance was deficient and prejudicial.

¶7 We grant the petition for review but deny relief.