

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN VICTOR MELCHER,
Petitioner.

No. 2 CA-CR 2014-0405-PR
Filed February 6, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20094196001

The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Petitioner

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner John Melcher seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "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). Melcher has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Melcher was convicted of sexual conduct with a minor and two counts of molestation of a child. The trial court sentenced him to life imprisonment without the possibility of release for thirty-five years and two consecutive fourteen-year prison sentences. This court affirmed his convictions and sentences on appeal. *State v. Melcher*, No. 2 CA-CR 2012-0158 (memorandum decision filed May 29, 2013).

¶3 Melcher thereafter initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel based on counsel's having failed to make an offer of proof in relation to his claim that one of Melcher's victims had been molested by someone else, or to object to the state's expert using the word "disclose" to describe his victims' statements. The trial court summarily denied relief.

¶4 On review, Melcher repeats his claims made below and argues the trial court abused its discretion in summarily denying relief.¹ "To state a colorable claim of ineffective assistance of

¹In his petition for post-conviction relief, Melcher briefly argued that counsel was ineffective in not making a motion

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counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We agree with the trial court that Melcher has failed to show prejudice resulting from any purported deficient performance.

¶5 Melcher first claims trial counsel was ineffective in failing to make an offer of proof as to other acts evidence that he sought to admit, specifically that one of the victims had been molested by someone else. This court rejected on appeal his claim that such evidence should have been admitted at trial pursuant to our supreme court's decision in *State v. Oliver*, 158 Ariz. 22, 760 P.2d 1071 (1988), in part due to counsel's failure to make an offer of proof so that this court could evaluate the claim, *Melcher*, No. 2 CA-CR 2012-0158, ¶¶ 6-7. In its ruling dismissing Melcher's Rule 32 petition, the court found that the other evidence related to an act that "occurred after the events [Melcher] was [on] trial for" and therefore could not have been admissible under *Oliver*, as such, Melcher did not show prejudice resulting from counsel's failure to make an offer of proof. Melcher did not include in his petition for post-conviction relief any further evidence relating to this purported other act. The record before us, as at the time of appeal, contains no evidence from which we could conclude the trial court abused its discretion in determining Melcher was not prejudiced by counsel's

pursuant to Rule 24.3, Ariz. R. Crim. P. He does not, however, discuss that claim on review, and we therefore do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "the reasons why the petition should be granted" and "specific references to the record"); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

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failure, even assuming *arguendo* it constituted deficient performance.

¶6 Likewise, we agree with the trial court that Melcher has failed to establish prejudice arising from counsel's failure to timely object to or move for a mistrial on the use of the word "disclosure" by the state's witnesses. As the trial court pointed out, in our decision on appeal, we determined that in this case the word was used in a manner synonymous with "say" or "tell." In view of our ruling on appeal, and Melcher's failure to cite any authority to support his argument that an expert witness should be precluded from using the word "disclosure" in this context, we cannot say the court abused its discretion in concluding he was not prejudiced by counsel's failure to timely object. *See* Ariz. R. Crim. P. 32.9(c)(1); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements).

¶7 For these reasons, although we grant the petition for review, we deny relief.