

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

RICARDO RAMIREZ,  
*Petitioner.*

No. 2 CA-CR 2014-0425-PR  
Filed January 30, 2015

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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NOT FOR PUBLICATION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.*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2008155341001DT  
The Honorable Paul J. McMurdie, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By Robert E. Prather, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Ricardo Ramirez, Florence  
*In Propria Persona*

STATE v. RAMIREZ  
Decision of the Court

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**MEMORANDUM DECISION**

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

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ESPINOSA, Judge:

¶1 Ricardo Ramirez seeks review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Ramirez has not met his burden of demonstrating such abuse here.

¶2 Ramirez was convicted of five counts of child molestation, three counts of sexual conduct with a minor under the age of fifteen, and three counts of sexual conduct with a minor fifteen years of age or older. The victim in all counts was Ramirez's adopted daughter, and his offenses spanned from 2005 to 2008. The trial court sentenced him to consecutive prison terms, including a life term without the possibility of release until he had served thirty-five years. This court affirmed his convictions and sentences on appeal.

¶3 Ramirez sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no "colorable claims for relief to raise in post-conviction relief proceedings." Ramirez then filed a pro se petition raising numerous claims, specifically that (1) the state had failed to disclose exculpatory evidence; (2) he was prejudiced by the court's denial of his motion to sever; (3) structural error occurred during his trial; (4) he suffered prejudicial pre-indictment delay; (5) his speedy trial rights were violated; (6) a witness was improperly permitted to remain in the courtroom before being recalled for additional testimony; (7) juror misconduct; and (8) he was entitled to impeach a witness by presenting evidence of a reprimand she had received.

STATE v. RAMIREZ  
Decision of the Court

Ramirez also asserted his retained trial counsel had been ineffective by replacing appointed co-counsel and, purportedly in retaliation for a fee dispute, by failing to adequately prepare and present his defense and make certain motions requested by Ramirez. The trial court rejected his various claims of trial error as precluded and determined his claims of ineffective assistance were not colorable. This petition for review followed.

¶4 On review, Ramirez argues the trial court erred in finding his claims of trial error precluded. He first suggests several are not subject to preclusion because he “discovered [them] after trial and appeal.” But Ramirez did not raise this argument below or suggest that his claims were based on newly discovered evidence and therefore not subject to preclusion. *See* Ariz. R. Crim. P. 32.1(e), 32.2(b); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review). And, in any event, he has not identified any evidence that would qualify as newly discovered. *See generally* Ariz. R. Crim. P. 32.1(e); *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000).

¶5 Ramirez also argues his claim regarding severance is not subject to preclusion because the error is structural and requires automatic reversal. *See State v. Ring*, 204 Ariz. 534, ¶¶ 45-46, 65 P.3d 915, 933 (2003). On appeal, Ramirez had asserted the trial court erred in denying his severance motion. We agreed, but found any error was not fundamental or prejudicial. Thus, his claim that his counts should have been severed clearly is precluded because it was raised and rejected on appeal. *See* Ariz. R. Crim. P. 32.2(a)(2). And, in any event, error that is not fundamental is necessarily not structural. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 12, 18-19, 115 P.3d 601, 606-07 (2005) (distinguishing structural error requiring automatic reversal from trial error, which is reviewed for fundamental or harmless error).

STATE v. RAMIREZ  
Decision of the Court

¶6 Ramirez asserts he raised a claim of actual innocence that “cannot be waived.” Although Ramirez is correct that a claim raised pursuant to Rule 32.1(h) is not subject to preclusion, *see* Ariz. R. Crim. P. 32.2(b), he did not raise this argument in his petition below, and we thus do not address it further, *see* Ariz. R. Crim. P. 32.9(c)(1)(ii); *Ramirez*, 126 Ariz. at 468, 616 P.2d at 928.

¶7 Ramirez also asserts his trial counsel was ineffective in failing to have certain witnesses testify, “preserve the severance issue” by renewing it at the close of evidence, or file a motion for new trial. Ramirez did not raise the latter two complaints in his petition below, and we therefore do not address them on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii); *Ramirez*, 126 Ariz. at 468, 616 P.2d at 928. And we agree with the trial court that Ramirez’s remaining claim is not colorable. “To state a colorable claim of ineffective assistance of counsel,” Ramirez was required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). But, in his petition below, Ramirez did not explain the content of the witnesses’ proposed testimony, much less establish it could have changed the result of his trial.

¶8 Ramirez further contends that counsel’s conduct was motivated by a conflict of interest caused by a fee dispute. Thus, he argues, we must presume he was prejudiced by counsel’s actions. In the event counsel has an actual conflict of interest, a defendant must show that the conflict “actually affected the adequacy of his representation” before we will presume prejudice. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980); *see also State v. Jenkins*, 148 Ariz. 463, 466-67, 715 P.2d 716, 719-20 (1986). “Although a ‘defendant’s failure to pay fees may cause some divisiveness between attorney and client,’ courts generally presume that counsel will subordinate his or her pecuniary interests and honor his or her professional responsibility to a client.” *United States v. Taylor*, 139 F.3d 924, 932 (D.C. Cir. 1998), *quoting United States v. O’Neil*, 118 F.3d 65, 71 (2d Cir. 1997). Thus, a defendant “must establish that an actual financial conflict existed by showing that his counsel actively represented his own financial interest during [the defendant]’s trial, rather than showing [only] the

STATE v. RAMIREZ  
Decision of the Court

possibility of an actual financial conflict.” *Caderno v. United States*, 256 F.3d 1213, 1218 (11th Cir. 2001). Ramirez did not meet this burden—his claim that counsel determined what witnesses to call based on Ramirez’s failure to timely pay his fee is entirely speculative. *See State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance of counsel and “[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation”); *see also 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 Ramirez also asserts his appellate counsel was ineffective. Although he cursorily mentioned appellate counsel in his petition below, he did not explain what issues counsel should have raised, much less establish that counsel fell below prevailing professional norms by declining to raise those arguments or that they would have warranted appellate relief. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Nor does he adequately develop these issues on review. Thus, we do not further address this claim. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶10 Last, Ramirez relies on his assertion of evidentiary and other errors to support a claim of judicial bias. We summarily reject this argument. “A trial judge is presumed to be free of bias and prejudice.” *State v. Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d 756, 768 (App. 2005), *quoting State v. Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d 455, 459 (App. 2000). Judicial bias or prejudice ordinarily must “arise from an extra-judicial source and not from what the judge has done in his participation in the case.” *State v. Emanuel*, 159 Ariz. 464, 469, 768 P.2d 196, 201 (App. 1989), *quoting State v. Thompson*, 150 Ariz. 554, 557, 724 P.2d 1223, 1227 (App. 1986). Thus, “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.” *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also State v. Ellison*, 213 Ariz. 116, ¶ 40, 140 P.3d 899, 912 (2006).

¶11 For all of the foregoing reasons, although the petition for review is granted, relief is denied.