

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KEVIN NORRIS MITCHELL,
Petitioner.

No. 2 CA-CR 2016-0140-PR
Filed June 6, 2016

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NOT FOR PUBLICATION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 Maricopa County
No. CR2010142884001DT
The Honorable Arthur T. Anderson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Kevin Mitchell, Florence
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Petitioner Kevin Mitchell 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). Mitchell has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Mitchell was convicted of sexual abuse, six counts of class two sexual conduct with a minor, three counts of class six sexual conduct with a minor, and two counts of sexual abuse of a minor, nine of which were dangerous crimes against children. The trial court sentenced him to consecutive fifteen-year terms of imprisonment on six of the counts; concurrent one-year terms on two counts, which are to be served consecutive to the last of the fifteen-year terms and concurrent to two five-year terms imposed on two other counts; and ordered concurrent terms of lifetime probation on the remaining two counts. The convictions and sentences were affirmed on appeal. *State v. Mitchell*, No. 1 CA-CR 11-0202 (memorandum decision filed July 10, 2012).

¶3 Mitchell thereafter sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was "unable to raise any viable issues under Rule 32." In a pro se supplemental petition, however, Mitchell claimed that the recordings of a confrontation call had been altered when recorded to a compact disc from the original digital recording device. He contended he had received ineffective assistance of counsel because counsel had failed to obtain an expert analysis of the disc and

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stipulated to admission of the copy. And he argued counsel was ineffective in failing to “impeach” one of the investigating officers about calls Mitchell made while in custody “with available recordings” which were not admitted into evidence. The trial court summarily denied relief. The court likewise denied Mitchell’s motion for rehearing.

¶4 On review, Mitchell argues the trial court abused its discretion in failing “to provide [him] the ability to have a digital device analyzed to authenticate the duplicate compact disc,” in denying “access” to certain in-custody calls “and violating [his] anti-marital fact privilege,” and in rejecting his claims of ineffective assistance of counsel. First, to the extent Mitchell’s argument can be read as claims of trial error or violations of his rights to due process and confrontation, such claims are precluded. *See* Ariz. R. Crim. P. 32.2(a). We therefore address only his claim of ineffective assistance of counsel. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (claims of ineffective assistance may only be raised in Rule 32 proceeding).

¶5 “To state a colorable claim of ineffective assistance of 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.*

¶6 Mitchell first argues counsel was ineffective in relation to an offered plea agreement. In his reply below, Mitchell mentioned a plea offer, stating he would have accepted it had counsel “provided him with an opportunity to thoroughly review the original recorded calls after having” had an expert analyze them and determine they were unaltered. The state correctly points out on review that we will not consider an argument raised for the first time in a reply, *see State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052,

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1054 (App. 2009), and in his reply on review Mitchell contends only that the trial court was aware that the state had made an offer that counsel rejected. We therefore do not address the claim. *See id.*; *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review).

¶7 Mitchell next contends that before trial he told counsel that the recording of the confrontation call was inaccurate and he asked counsel to have it analyzed. He argues counsel was ineffective because he failed to have the recording tested or to obtain the original recording device. Mitchell has not specified what portions of the confrontation call were inaccurate. And although he contends he objected to some of the statements at trial, the portions of his testimony to which he cites are objections to the prosecutor’s characterization of what was said on the recording played at trial or in the transcript, not statements that the recording or transcript was itself incorrect. Indeed, Mitchell affirmed many of the recorded statements as accurate during his testimony. In view of that testimony, and the other evidence of the recording’s accuracy and his guilt, Mitchell has not established he was prejudiced by any deficiency in counsel’s failing to obtain or test the recording on the original device, even assuming it could be obtained, which has not been established on the record before us. We therefore cannot say the trial court abused its discretion in rejecting his claim relating to the recording of the confrontation call.

¶8 Mitchell next argues counsel’s performance was deficient in relation to recordings of jailhouse telephone calls made to Mitchell’s wife, mother, and brother. He contends counsel erroneously allowed a detective “to paraphrase his personal interpretation” of the calls and should have used the recordings to impeach the detective. Contrary to Mitchell’s assertions, although the recordings apparently were available, they were not entered into evidence. And, as was the case with the recording of the confrontation call, Mitchell affirmed the accuracy of some of the officer’s testimony about the jail calls during his own testimony.

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¶9 Furthermore, Mitchell has not established that counsel's failure to play more of the recordings was not a strategic decision, based on the apparent decision to allow Mitchell to explain the comments. Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). "Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). Nor has Mitchell specified what additional material on the recordings would have been helpful or how he was prejudiced by counsel's failure to present that material. The trial court therefore did not abuse its discretion in denying relief on this claim.

¶10 Mitchell also contends counsel should have "expanded" his wife's testimony to contradict the detective's account. But on direct examination by the state, she denied Mitchell had made some of the statements the detective testified about. Mitchell has not established that counsel's allowing such testimony to stand was deficient, not a strategic decision, or prejudicial. And to the extent Mitchell argues counsel should have more fully established his marital status or challenged his wife's testimony on the basis of the anti-marital fact privilege, he has not established that privilege applied in this case. *See* A.R.S. § 13-4062(1).

¶11 For all these reasons, the trial court did not abuse its discretion in summarily denying relief. Although we grant the petition for review, we deny relief.