NOTICE: NOT FOR PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

CESAR DANIEL VASQUEZ-MORALES, *Petitioner*.

No. 1 CA-CR 13-0424 PRPC
FILED 12-23-2014

Petition for Review from the Superior Court in Maricopa County
No. CR2008-180701-004
The Honorable George H. Foster, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Respondent

Cesar Daniel Vasquez-Morales, San Luis
Petitioner

MEMORANDUM DECISION

Presiding Judge Margaret H. Downie, Judge Patricia K. Norris and Judge Randall M. Howe delivered the decision of the court.

PER CURIAM:

¶1 Cesar Daniel Vasquez-Morales petitions this Court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review and, for the following reasons, grant review and deny relief.

¶2 A jury convicted Vasquez-Morales of two counts of armed robbery. During trial, Vasquez-Morales pled guilty to two counts of misconduct involving weapons. The trial court sentenced Vasquez-Morales to an aggregate term of 12 years' imprisonment for all four counts. We affirmed Vasquez-Morales's convictions for armed robbery on direct appeal. *See State v. Vasquez-Morales*, 1 CA-CR 09-0598 (Ariz. App. Mar. 1, 2011) (mem. decision). Vasquez-Morales filed a pro se petition for post-conviction relief after his counsel found no colorable claims for relief. The trial court summarily dismissed the petition, and Vasquez-Morales now seeks review. We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

¶3 The petition for review properly presents three issues, all of which allege ineffective assistance of counsel. To state a colorable claim of ineffective assistance, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶4 Vasquez-Morales first argues that his counsel was ineffective in failing to move for a mistrial after the clerk of the court made reference to his prior felony conviction and status as an undocumented immigrant. We deny relief because Vasquez-Morales has failed to present a colorable claim of ineffective assistance. Counsel had no grounds upon which to move for a mistrial. The references came when the clerk read the indictment to the panel of prospective jurors during jury selection. Vasquez-Morales's

prior felony conviction and his immigration status were elements of the two counts of misconduct involving weapons, both of which were still pending because Vasquez-Morales had not yet chosen to plead guilty to those two counts. *See* A.R.S. §§ 13–3102(A)(4) (misconduct involving weapons based on status as prohibited possessor); –3101(A)(7) (definition of "prohibited possessor").

¶5 Vasquez-Morales also contends that his counsel was ineffective in failing to request an "identity instruction." We deny relief because Vasquez-Morales does not identify a specific "identity instruction" counsel should have requested nor does he explain how the trial court's final instructions were inadequate to inform the jury of the applicable law. Finally, Vasquez-Morales argues that his counsel failed to adequately challenge a witness's testimony regarding the color of the jacket the witness allegedly saw Vasquez-Morales wearing. We deny relief because Vasquez-Morales does nothing more than attack the sufficiency of the evidence and offer his own version of events. This is not sufficient to present a colorable claim of ineffective assistance of counsel.

¶6 While the petition for review presents additional issues, Vasquez-Morales did not raise those issues in the petition for post-conviction relief. A petition for review may not present issues not first presented to the trial court. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *State v. Wagstaff*, 161 Ariz. 66, 71, 775 P.2d 1130, 1135 (App. 1988); *State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991); Ariz. R. Crim. P. 32.9(c)(1)(ii). While Vasquez-Morales argues that he raised some of these new issues in his reply, the trial court acted within its discretion in declining to address these new issues. Moreover, Vasquez-Morales also presented new issues in the reply he filed in this Court. Like the trial court, this Court will not consider arguments or issues first raised in a reply. *See State v. Watson*, 198 Ariz. 48, 51 ¶ 4, 6 P.3d 752, 755 (App. 2000).

¶7 We grant review and deny relief.



Ruth A. Willingham · Clerk of the Court
FILED: ama