IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KEYHAN TABAK,
Petitioner.

No. 2 CA-CR 2016-0204-PR
Filed September 12, 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NOT FOR PUBLICATION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. CR2010121206001
The Honorable Hugh Hegyi, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Susan L. Luder, Deputy County Attorney, Phoenix
Counsel for Respondent

The Nolan Law Firm, PLLC, Mesa
By Cari McConeghy Nolan
Counsel for Petitioner

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Keyhan Tabak 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 that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Tabak has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Tabak was convicted of two counts of aggravated assault and was sentenced to concurrent, twelve-year prison terms for both offenses. We affirmed his convictions and sentences on appeal. *State v. Tabak*, No. 1 CA-CR 11-0421 (Ariz. App. Apr. 30, 2013) (mem. decision). Tabak then sought post-conviction relief, arguing his trial counsel was ineffective, inter alia, for advising him the state would not proceed to trial if the victim could not be located—thereby prompting Tabak to reject a plea offer from the state—but failing to argue the victim's absence from trial constituted a violation of his rights under the Confrontation Clause of the Sixth Amendment. He also raised the purported violation of his confrontation rights as a separate issue.

¶3 The trial court summarily rejected the bulk of Tabak's claims of ineffective assistance, but held an evidentiary hearing to address his claim that counsel had informed him the state would not proceed without the victim. The court also heard oral argument on Tabak's confrontation claim. The court then denied relief on Tabak's remaining claims, and this petition for review followed.

¶4 On review, Tabak repeats his argument that, because the victim did not testify at trial, his confrontation rights were

violated. He also asserts this claim is not subject to preclusion pursuant to Rule 32.2(a) despite his failure to raise it on appeal. Finally, Tabak again contends his trial counsel was ineffective for failing to raise the argument at trial.

¶5 Tabak's confrontation claim is a constitutional claim brought pursuant to Rule 32.1(a). Pursuant to Rule 32.2(a)(3), a defendant is precluded from raising a claim under Rule 32.1(a) if that claim "has been waived at trial, on appeal, or in any previous collateral proceeding." Tabak argues, however, that constitutional claims are not encompassed by Rule 32.2(a). This argument not only ignores the plain language of the rule, it ignores that constitutional claims are subject to waiver and, thus, may be subject to preclusion. *See State v. Williams*, 220 Ariz. 331, ¶¶ 8-10, 206 P.3d 780, 783-84 (App. 2008) (waiver principles apply to constitutional claims).

¶6 Citing *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), Tabak nonetheless asserts Rule 32.2(a) does not apply to his confrontation claim because he did not knowingly, voluntarily, and intelligently waive that issue. As our supreme court explained in *Stewart*, claims of sufficient constitutional magnitude to require such waiver are, if no qualifying waiver has occurred, exempt from the preclusive effect of Rule 32.2(a). 202 Ariz. 446, ¶¶ 9, 10, 46 P.3d at 1070-71. But the confrontation right may be waived implicitly by failing to properly object.[1] *Melendez-Diaz v. Massachusetts*, 557 U.S.

[1] Tabak cites *Brookhart v. Janis*, 384 U.S. 1 (1966), for the proposition that counsel cannot waive a defendant's confrontation rights. *Brookhart* does not support Tabak's assertion; the Court in that case addressed counsel's waiver of nearly all the defendant's trial rights, resulting in "the practical equivalent of a plea of guilty" despite the defendant's "desire expressed in open court to plead not guilty." *Id.* at 7-8. His reliance on *Barber v. Page*, 390 U.S. 719 (1968), is similarly unavailing. There, the state sought to introduce at trial the statements of a witness made at a preliminary hearing despite having "ma[d]e no effort to produce [the witness] at trial." *Id.* at 725. In such circumstances, the Court determined the defendant did not waive his confrontation rights by failing to cross-examine the witness at the preliminary hearing. *Id.*

305, 314 n.3 (2009) ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence . . . ."). Thus, no personal waiver was required and Tabak's confrontation claim is subject to preclusion under Rule 32.2(a)(3).

¶7 Tabak also argues he is entitled to raise his claim for the first time in post-conviction proceedings because it requires factual development beyond that available in the trial record, specifically, details of his conversations with defense counsel. *See generally State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) ("One of the purposes of a Rule 32 proceeding 'is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record.'"), *quoting State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982). But he has not explained how those conversations are relevant to his claim under the Confrontation Clause or why this claim could not have been raised on appeal.

¶8 Tabak also reasserts his claim that counsel was ineffective in failing to raise a claim based on the Confrontation Clause. "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); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶9 The essence of Tabak's confrontation claim is that the confrontation clause is violated when the state presents only circumstantial evidence, rather that the victim's testimony, to show that victim was in reasonable apprehension of imminent physical injury as required by A.R.S. § 13-1203(A)(2). But Arizona law has long held that circumstantial evidence is sufficient. *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994) ("Either direct or circumstantial evidence may prove the victim's apprehension. There is no requirement that the victim testify to actual fright."). Although Tabak suggests our rule is contrary to federal law, he cites no authority supporting that assertion. Moreover, he does not cite

authority or evidence suggesting defense counsel falls below prevailing professional norms by failing to argue that established state law should be overturned.

¶10 In any event, Tabak's underlying confrontation claim is meritless. The Confrontation Clause of the Sixth Amendment provides a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. It does not, as Tabak suggests, require that the victim testify. *See United States v. Bryant*, 461 F.2d 912, 916 (6th Cir. 1972) ("The Sixth Amendment right of confrontation does not impose upon the Government the duty to call a particular witness."). Tabak has acknowledged that he was not prohibited from examining any testifying witness, and that no statements made by the victim were introduced at trial. There was no violation of his confrontation rights.

¶11 We grant review but deny relief.