

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DWIGHT EVERETT RAMIREZ,
Petitioner.

No. 2 CA-CR 2023-0234-PR
Filed April 30, 2024

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Mohave County
No. CR202100168
The Honorable Billy K. Sipe Jr., Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Matthew J. Smith, Mohave County Attorney
By Jacob Cote, Deputy County Attorney, Kingman
Counsel for Respondent

Law Offices of Robert J. McWhirter, Tempe
By Robert J. McWhirter
Counsel for Petitioner

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MEMORANDUM DECISION

Judge O'Neil authored the decision of the Court, in which Judge Sklar and Judge Eckerstrom concurred.

O'NEIL, Judge:

¶1 Petitioner Dwight Ramirez seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Ramirez has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Ramirez was convicted of attempted sexual exploitation of a minor and luring a minor for sexual exploitation. His convictions arose out of a series of messages exchanged between Ramirez and an undercover officer posing as a fourteen-year-old girl, culminating in a meeting at a park where Ramirez was arrested. As to the luring offense, the trial court sentenced Ramirez to seven years' imprisonment, and as to the attempt offense, the court suspended the imposition of sentence and placed Ramirez on a twenty-year term of probation commencing upon his release from prison.

¶3 Thereafter, Ramirez initiated a proceeding for post-conviction relief. In his petition, Ramirez asserted he had received ineffective assistance because trial counsel had failed "to identify that the factual bases alleged for the charged crimes do not conform to the statutory elements of the crimes." Ramirez maintained that had he "been aware of the potential challenges to the indicted charges, he would not have ple[d] guilty."

¶4 In March 2023, the trial court summarily dismissed Ramirez's petition. The court determined that, as to Ramirez's conviction for attempted sexual exploitation of a minor, "there were several occasions" in the message exchange "where [Ramirez] was clearly attempting to possess visual depictions of the decoy in which she was engaged in exploitive behavior." As to his luring conviction, the court recognized that Ramirez "was not intending to have sex with the decoy" at the park but explained that "the conversations leading up to the meeting established" the offense. Because "a factual basis existed for the indictment and for [Ramirez's]

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guilty plea,” the court concluded that he had failed to establish a colorable claim. This petition for review followed.

¶5 On review, Ramirez repeats his claim that he received ineffective assistance of trial counsel because the “factual basis did not support the crimes’ statutory definitions.” But Ramirez does not explain how the trial court erred in concluding otherwise. *See* Ariz. R. Crim. P. 33.16(c)(2)(D) (petition must include reasons why court should grant relief and citations to supporting legal authority, if known); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). Even assuming the argument were not waived, however, we cannot say the court abused its discretion.

¶6 “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 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Id.*

¶7 Pursuant to A.R.S. § 13-3553(A)(2), a person commits sexual exploitation of a minor by knowingly “[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.” And pursuant to A.R.S. § 13-3554(A), a “person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor.” That “the other person is not a minor” is “not a defense to a prosecution for” luring a minor. § 13-3554(B). Exploitive exhibition “means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.” A.R.S. § 13-3551(5). Sexual conduct means, in part, actual or simulated “[s]exual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex.” A.R.S. § 13-3551(10)(a).

¶8 At the change of plea hearing, the factual basis was provided by the prosecutor, who stated:

[T]his is a case rising out of an undercover investigation conducted by the Mohave County Sheriff’s Office in which a detective posed as a 14-year-old girl on dating

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websites. When contacted by individuals, he would represent his age as being actually 14 and have the individuals text message him.

During the text message conversation . . . the defendant solicited nude photos from the person representing themselves as a 14-year-old and . . . discussed and solicited various sexual conduct, including discussing sexual positions that he preferred.

This factual basis plainly meets the statutory requirements for luring a minor. *See* § 13-3554(A). Although the prosecutor did not mention Ramirez “[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging” a “visual depiction,” as required for sexual exploitation of a minor under § 13-3553(A)(2), Ramirez’s conviction was an attempt offense. *See* A.R.S. § 13-1001(A) (definition of attempt).

¶9 Moreover, the extended record shows the sexualized nature of the messages exchanged between Ramirez and the undercover officer, with Ramirez repeatedly requesting photographs—in various states of undress—from the officer. *See* Ariz. R. Crim. P. 17.3(b) (when determining factual basis, court may consider defendant’s statements, police reports, certified transcripts of grand jury proceedings, or other satisfactory information); *State v. Soddors*, 130 Ariz. 23, 25 (App. 1981) (factual basis may be determined from extended record). Because there was a factual basis for the plea, trial counsel did not provide ineffective assistance in that regard. *See Bennett*, 213 Ariz. 562, ¶ 21. Thus, the trial court did not err in summarily dismissing Ramirez’s petition. *See Martinez*, 226 Ariz. 464, ¶ 6.

¶10 Accordingly, we grant review but deny relief.