

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOSHUA WHIPPLE, *Petitioner*.

No. 1 CA-CR 14-0233 PRPC
FILED 4-12-2016

Petition for Review from the Superior Court in Coconino County

No. CR 2012-00409

CR 2012-00410

CR 2012-00411

The Honorable Jacqueline Hatch, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Coconino County Attorney's Office, Flagstaff

By David W. Rozema

Counsel for Respondent

Joshua Whipple, Florence

Petitioner

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MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Maurice Portley and Judge Patricia K. Norris joined.

THOMPSON, Presiding Judge:

¶1 Petitioner Joshua Lynn Whipple seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19, 278 P.3d 1276, 1280 (2012). Finding no such error, this court grants review, but denies relief.

BACKGROUND

¶2 Whipple was charged in three separate indictments for sexual conduct with minors. He resolved all three matters in a single plea agreement. He pled guilty to the following: in case number CR 2012-00409, attempted sexual conduct with a minor, a class 3 felony, and dangerous crime against children; in case number CR 2012-00410, sexual conduct with a minor, a class 6 felony; and in case number CR 2012-00411, sexual conduct with a minor, a class 6 felony. The parties stipulated that in CR 2012-00409, Whipple would be sentenced to prison for a term between 5 and 15 years, and that he would be placed on lifetime probation in CR 2012-00410 and CR 2012-00411.

¶3 At sentencing, the prosecutor requested that the court impose a "slightly aggravated term" of 12 years' imprisonment based on "the emotional harm to the three victims in this case." The prosecutor indicated that the victims and some of their family members were present and wished to address the court.

¶4 Victim Summer L. and her mother, Angie L., both addressed the court. Angie L. explained to the court that after Whipple had sexually abused her daughter, "It was very emotional, trying, and a difficult process for [Summer L.] She was upset, angry, confused, and emotionally drained." Summer L. spoke next. She explained how hard it had been for her to tell

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her mother about the sexual encounter. "That was really hard for me to tell her, being only 14-years-old, having to break it to her that I had given my virginity to an 18-year-old." She then explained how her "grades began to drop and I had a feeling of depression. This is an event that caused a lot of tension, confusion, distance between my parents and I."

¶5 Next, victim Jasmine C. told the court that her mother, Summer C., would speak on her behalf. Summer C. told the court that she found out one evening on the way to work that her daughter was suicidal. She "immediately drove . . . home . . . and found [Jasmine C.] sobbing in the bedroom there. Through her tears, she explained several times that she had lost her faith in God and that she could not find a reason to live." Her daughter then began counseling for "anxiety and depression." She then related to the court how difficult the situation had been for the family, "[Jasmine C.] has endured endless suffering in more ways than I can even begin to express. Her pain has, of course, affected us as a family." The "ordeal has also had a very detrimental affect [sic] on me, my husband, and our family as a whole."

¶6 Victim Daniella E.'s mother, Maeva E., also addressed the court on behalf of her daughter. She began by telling the court that "this person [Whipple] destroyed my family." She then explained that even though she had obtained a restraining order against Whipple, he violated the order and continued to have contact with her daughter. She told the court that Daniella E. "cannot sleep" because of what happened. Maeva E. also told the court that she had to quit her job because "I would have to be home with my daughter, basically holding an all-night vigil with her, because she couldn't sleep. And right now she's still suffering from this."

¶7 Finally, Jasmine C's grandparents, Janice K. and Gerry K., addressed the court. Janice K. related similar experiences as the others, and noted that after watching their granddaughter grow up, Jasmine C. suddenly "wanted to distance herself from us. Her choice of friends changed. Her grades weren't as excellent. She became angry for no reason, disrespectful." She stated that "When the relationship with [Whipple] came to light . . . We felt rage, complete bewilderment and helplessness."

¶8 After hearing the mitigating and aggravating evidence, the court found three aggravating factors (1) that there were multiple victims; (2) that despite being offered a second chance to avoid prosecution by two of the victims, Whipple had "just went right ahead" and reoffended; and (3) "the emotional harm to the victims and their families." After it considered the aggravating and mitigating factors, the court found "that a

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presumptive sentence is appropriate in this matter” and sentenced Whipple to the presumptive term of 10 years’ imprisonment in CR 2012-00409, and, pursuant to the plea agreement, placed him on lifetime probation in CR 2012-00410 and CR 2012-00411.

¶9 Whipple later commenced petition for post-conviction relief proceedings.¹ The trial court appointed counsel. Counsel filed a petition and asserted that the trial court had improperly considered the emotional harm caused to the victims’ families as an aggravator, and that Angie L. and Jasmine C.’s grandparents were improperly allowed to present statements to the court because they are not “victims” as defined by Arizona Revised Statutes (A.R.S.) section 13-4401(19) (2010).

¶10 Counsel also argued that trial counsel had been ineffective for failing to object to both the court’s use of emotional harm to the victims’ families as an aggravator, and to the statements by Angie L. and Jasmine C.’s grandparents. The trial court found that Whipple had failed to raise a colorable claim and summarily dismissed the petition. Whipple then timely petitioned this court for review.

DISCUSSION

¶11 On review, Whipple argues that the trial court abused its discretion when it summarily dismissed his petition. He maintains that Angie L. and Jasmine C.’s grandparents were not victims, and therefore should not have been allowed to give statements at sentencing. He also argues that the court erred when it considered the emotional harm to the victims’ families as an aggravating factor. Finally, Whipple asserts that his counsel was ineffective for failing to object to these statements, and to the court’s use of emotional harm to the victims’ families as an aggravating factor.

¶12 Whipple’s claims are not colorable. As to the trial court’s consideration of emotional harm to the victims’ families as an aggravator, we note that the trial court did not consider emotional harm to the victims’ families as a separate aggravator, but only as a part of the “emotional harm to the victims and their families.” In any event, although A.R.S. § 13-701(D)(9) limits consideration of emotional harm to the victim’s family to

¹ We note that Whipple filed his notice of petition for post-conviction relief on April 18, 2013, more than ninety days after the entry of judgment and sentence. The notice was untimely and thus subject to summary dismissal. Ariz. R. Crim. P. 32.4(a).

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the situation in which “the victim has died as a result” of the defendant’s conduct, subsection 25 of the statute permits the court to consider “any other factor . . . relevant to the . . . circumstances of the crime.” Thus, it was not improper for the court to consider emotional harm to the victims’ families as an aggravating factor.

¶13 Furthermore, it was not error to allow Angie L. and Jasmine C.’s grandparents to present statements to the court because these individuals are the victims’ “immediate family,”² and A.R.S. § 13-701(G) requires that “in imposing sentence,” the trial court shall “consider the evidence and opinions presented by the victim or the victim’s immediate family at any aggravation or mitigation proceeding.”

¶14 In light of the above, Whipple’s ineffective assistance of counsel (IAC) claim fails. A colorable claim of IAC is “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). To state a colorable claim, Whipple must show that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced him. *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.*; *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶15 Here, Whipple has failed to satisfy the deficient performance prong. Because it was not error for the trial court to consider emotional harm to the victims’ families as an aggravator, and because it was not error to allow Angie L. and Jasmine C.’s grandparents to present statements to the court, counsel was not deficient for failing to object.

CONCLUSION

¶16 Whipple has not met his burden of establishing an abuse of

² A victim’s immediate family includes parents and grandparents. A.R.S. § 13-4401(11) (Supp. 2015).

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the trial court's discretion. Therefore, we grant review, but deny relief.



Ruth A. Willingham · Clerk of the Court
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