IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL LEROY PHIFER,
Petitioner.

No. 2 CA-CR 2016-0100-PR
Filed May 19, 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NOT FOR PUBLICATION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. CR1995090982
The Honorable Dawn M. Bergin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
Counsel for Respondent

Daniel Phifer, San Luis
In Propria Persona

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 Daniel Phifer seeks review of the trial court's orders summarily dismissing his notice of post-conviction relief and subsequent motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Phifer has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Phifer was convicted of first-degree murder for strangling his girlfriend to death with a dog leash. The trial court sentenced him to natural life in prison. We affirmed his conviction and sentence on appeal. *State v. Phifer*, No. 1 CA-CR 98-0792 (memorandum decision filed Jul. 15, 1999). A notice of post-conviction relief Phifer filed in May 2000 was summarily dismissed, and Phifer did not seek review of that ruling.

¶3 In 2013, Phifer filed a notice of post-conviction relief indicating, inter alia, that he wished to raise claims of newly discovered evidence and a significant change in the law. He stated he had recently "discovered a change in the law," relevant to premeditation, specifically that the state and trial court had improperly relied on the passage of time "as an analog for reflection" in violation of *State v. Dann*, 205 Ariz. 557, 74 P.3d 231 (2003).[1] The trial court summarily dismissed the notice, stating

[1]Phifer also cited in his notice, as well as other filings, an unpublished 2006 memorandum decision of this court. Such decisions cannot be cited except in circumstances not presented here. Ariz. R. Sup. Ct. 111(c)(1). We therefore disregard Phifer's various references to that decision.

Phifer had not established *Dann* applied to his case or adequately explained his reasons for not raising the claim in a timely manner.

¶4 Phifer then filed a motion for rehearing, in which he further explained he had only recently learned of *Dann* because of the inadequate legal resources provided in prison and expanded on his claim the state had suggested the mere passage of time was sufficient to find he had premeditated his girlfriend's murder. He also argued that *Dann* and *State v. Thompson*, 204 Ariz. 471, 65 P.3d 420 (2003), which addressed some of the same premeditation issues discussed in *Dann*, were retroactively applicable to him. The court denied the motion after ordering a response from the state. In a detailed ruling, the court noted, inter alia, that the jury instructions did not violate *Dann* and *Thompson* and that the state had told the jury that premeditation required reflection. This petition for review followed.

¶5 On review, Phifer repeats his argument that *Dann* and *Thompson* represent a significant change in the law applicable to his case. *See* Ariz. R. Crim. P. 32.1(g) (permitting post-conviction relief when "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence"), 32.4(a) (permitting claim pursuant to Rule 32.1(g) to be raised in untimely proceeding). In those cases, our supreme court determined that premeditation was an element of first-degree murder, that it was improper to instruct a jury that "'proof of actual reflection is not required'" for it to find premeditation, and that the use of any instruction that premeditation could be as rapid "as instantaneous as successive thoughts of the mind" was "discourage[d]." *Thompson*, 204 Ariz. 471, ¶¶ 29, 32, 65 P.3d at 427-28; *accord Dann*, 205 Ariz. 557, ¶¶ 12-13, 74 P.3d at 238. The court additionally observed in *Dann* that it was error for a prosecutor to signal to the jury "that the mere passage of time will suffice to establish the element of premeditation." 205 Ariz. 557, ¶¶ 16-17, 74 P.3d at 239.

¶6 Phifer argues, as he did below, that the state improperly argued to the jury that the passage of time was sufficient to find premeditation. We disagree. Although the prosecutor suggested that the minute, at minimum, it took for Phifer to strangle his girlfriend was evidence of premeditation, such argument is

permitted. *See Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d at 428 (noting "passage of time is but one factor that can show that the defendant actually reflected"). The prosecutor did not suggest that time alone was sufficient, instead emphasizing the constant pressure Phifer exerted on the victim's throat during this time period and the time it took to for him to wrap the leash around her throat.[2] *See State v. VanWinkle*, 230 Ariz. 387, ¶ 16, 285 P.3d 308, 313 (2012) ("prolonged, brutal attack" including strangulation evidence of premeditation); *Thompson*, 204 Ariz. 471, ¶ 31, 65 P.3d at 428 (obtaining weapon evidence of premeditation).

¶7 Phifer also contends the jury instruction given was improper in light of *Thompson* and *Dann*. To the extent Phifer raised this argument below, he is incorrect. The trial court properly instructed the jury that actual reflection was required to find premeditation and did not suggest the passage of time alone was sufficient. Thus, even assuming *Dann* and *Thompson* constitute a significant change in the law, they do not apply to Phifer's conviction for first-degree murder.

¶8 We grant review but deny relief.

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[2]For the first time in his petition or review, Phifer seems to suggest the prosecutor's arguments were not supported by the evidence. We do not address arguments not first presented in the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").