IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

MACHO JOE WILLIAMS,
*Petitioner*.

No. 2 CA-CR 2016-0359-PR
Filed February 8, 2017

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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NOT FOR PUBLICATION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.

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Petition for Review from the Superior Court in Pima County
No. CR20112971003
The Honorable Paul E. Tang, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Law Offices of Erin E. Duffy, P.L.L.C., Tucson
By Erin E. Duffy
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Judge:

**¶1** Macho Williams seeks review of the trial court's order denying, in part, 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). Williams has not met his burden of demonstrating such abuse here.

**¶2** After a jury trial, Williams was convicted of three counts of aggravated assault, two counts of kidnapping, and one count each of armed robbery, aggravated robbery, and weapons misconduct. Williams's convictions stem from his 2011 robbery of a dry cleaning business. Williams held an employee and customer at gunpoint while an accomplice took money from the cash drawer. Williams then stepped on the customer's head before forcing the employee to open the safe. He and the accomplice fled, but were apprehended shortly thereafter after a high speed chase; a gun was found in their car.

**¶3** The trial court sentenced Williams to concurrent and consecutive prison terms totaling 51.5 years. Specifically, the court imposed: (1) a 15.75-year prison term for armed robbery, to be served concurrently with an 11.25-year prison term for aggravated robbery; (2) concurrent 11.25-year terms for both counts of aggravated assault with a deadly weapon against the employee and customer, along with concurrent 15.75-year terms for kidnapping both victims, all to be served consecutively to the terms imposed for robbery; (3) a ten-year prison term for aggravated assault causing temporary but substantial disfigurement of the customer, consecutive to all other sentences; and (4) a ten-year prison term for

weapons misconduct, to be served consecutively to all other sentences. We vacated the criminal restitution order but otherwise affirmed his convictions and sentences on appeal. *State v. Williams*, No. 2 CA-CR 2013-0038 (Ariz. App. Dec. 23, 2013) (mem. decision).

**¶4** Williams sought post-conviction relief, arguing that some of his consecutive sentences were improper pursuant to A.R.S. § 13-116 and *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989), and that his trial and appellate counsel were ineffective in failing to raise that issue. The trial court granted partial relief, concluding that the sentence for Williams's assault of the employee should run concurrently to his sentences for armed robbery and aggravated robbery. It determined the remainder of Williams's consecutive sentences had been properly imposed. It did not address, however, whether Williams's trial and appellate counsel had been ineffective. The court resentenced Williams to an 11.25-year prison term for aggravated assault, ordering that term run concurrently with the terms imposed for robbery, again resulting in an aggregate 51.5-year prison term. This petition for review followed.

**¶5** On review, Williams asserts the trial court erred by concluding several of his consecutive sentences were proper. "Under § 13-116, a trial court may not impose consecutive sentences for the same act." *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). To determine whether the defendant's conduct constitutes a single act:

> First, we must decide which of the two crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually

> impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

*Id.* ¶ 7 (alteration in *Urquidez*), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

**¶6** Williams's sentencing claims are precluded because they could have been but were not raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). Thus, we address his arguments only in terms of his claims of ineffective assistance of trial and appellate counsel. To prevail on those claims, Williams must show both that counsel's performance fell below prevailing professional norms and that he was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

**¶7** Williams first asserts that his sentence for kidnapping the employee must be concurrent with his sentences for armed and aggravated robbery. But, even if Williams is correct, his other consecutive prison terms comply with § 13-116. Therefore, Williams has not shown his aggregate prison term would have changed, even had counsel raised this issue at sentencing or on appeal. First, the statute does not apply when there are multiple victims. *Gordon*, 161 Ariz. at 312 n.4, 778 P.2d at 1208 n.4 ("[A] single act that harms multiple victims may be punished by consecutive sentences."); *State v. Burdick*, 211 Ariz. 583, ¶¶ 5-6, 125 P.3d 1039, 1041 (App. 2005) (no violation of § 13-116 or double jeopardy principles where single act harms multiple victims); *State v. Riley*, 196 Ariz. 40, ¶ 21, 992 P.2d 1135, 1142 (App. 1999) ("§ 13-116 does not apply to sentences imposed for a single act that harms multiple victims"). Thus, Williams's 15.75-year prison term for kidnapping the customer and his 11.25-year prison term for assaulting the customer with a deadly weapon are properly consecutive to the sentences imposed for his offenses against the employee.

**¶8** Williams is also incorrect that the sentences imposed for his conviction for aggravated assault against the customer for causing temporary but substantial disfigurement cannot be consecutive to his sentences for kidnapping the customer and assaulting him with a deadly weapon or dangerous instrument. His argument is primarily based on his having committed armed robbery against the employee, but that conduct is irrelevant because the customer is a separate victim. The ultimate crime against the customer was kidnapping, which was completed when Williams aimed a weapon at him and ordered him to the floor for the purpose of committing robbery. *See* A.R.S. § 13-1304(A)(3). His remaining conduct—stepping on the customer's head—supports his conviction for aggravated assault causing temporary but substantial disfigurement. *See* A.R.S. § 13-1204(A)(3). And, even were we to conclude Williams could not have committed that assault without first kidnapping the customer, the assault clearly exposed the customer to an additional risk of harm. *See Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179.

**¶9** Williams also asserts, as he did below, that his sentence for weapons misconduct—prohibited possession of a firearm by a prohibited possessor—cannot be consecutive to his other sentences. In his reply to the state's response below, he relied on *State v. Carreon*, 210 Ariz. 54, ¶¶ 107-09, 107 P.3d 900, 921 (2005), in which our supreme court determined, after applying *Gordon*, that consecutive sentences were improper for a person convicted of weapons misconduct and attempted murder. The court reasoned that, although the first prong of *Gordon* permitted consecutive sentences, the second did not because "Carreon could not have attempted the murder . . . without also committing misconduct involving weapons." *Id.* ¶¶ 107-08. And, the court stated, "Carreon's misconduct involving weapons did not expose [the victim] to a risk that exceeded that inherent in the attempt on her life." *Id.* ¶ 109. Thus, the court concluded, consecutive sentences were improper. *Id.* The court did not discuss, however, whether Carreon continued to possess the weapon after the attempted murder. *See id.* ¶¶ 107-09.

**¶10** In denying relief, the trial court distinguished *Carreon*, concluding that Williams's continuing possession of the firearm "exposed the[] victims and others to a risk that exceeded that inherent in" his other offenses. On review, Williams argues the court erred because there was no additional risk to the victims because they "were miles away from [Williams] and were at no risk during the ensuing chase." But Williams has not argued the court erred by considering the possibility of harm to persons other than the victims caused by his continuing possession of the weapon. Our supreme court has determined that, for offenses with no specific victim, courts may consider the risk of harm to the public as a whole in evaluating risk under the third prong of the *Gordon* analysis. *See State v. Roseberry*, 210 Ariz. 360, ¶ 62, 111 P.3d 402, 413 (2005) (addressing "different risks" to "society" caused by conspiracy and transportation of marijuana). Thus, Williams has not established that the court erred in determining his sentence for weapons misconduct could run consecutively to his other sentences.

**¶11** In his petition below or in his petition for review, Williams has cited no authority or evidence suggesting that an attorney falls below prevailing professional norms by failing to raise arguments that would not change a defendant's aggregate sentence. *See Strickland*, 466 U.S. at 687. And, in any event, because he has not established his total prison term would have been different had trial or appellate counsel raised the issue, he has not shown resulting prejudice. *See id.* Thus, the trial court correctly denied relief. *See State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013) ("We can affirm the trial court's ruling for any reason supported by the record.").

**¶12** We grant review but deny relief.