IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL ALEJANDRO MACIAS,
Petitioner.

No. 2 CA-CR 2016-0364-PR
Filed January 23, 2017

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NOT FOR PUBLICATION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 Pima County
No. CR20111954001
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

E S P I N O S A, Judge:

¶1 Daniel Macias seeks review of the trial court's orders denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and his motion for rehearing. We will not disturb those orders unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Macias has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Macias was convicted of first-degree burglary, aggravated robbery, armed robbery, theft of a means of transportation, three counts of aggravated assault with a deadly weapon, six counts of kidnapping, and three counts of aggravated assault with a deadly weapon of a minor under the age of fifteen. The trial court sentenced him to concurrent and consecutive prison terms totaling 112.5 years. On appeal, this court affirmed his convictions and sentences. *State v. Macias*, No. 2 CA-CR 2014-0249 (Ariz. App. Apr. 20, 2015) (mem. decision).

¶3 Macias sought post-conviction relief, asserting his trial counsel had been ineffective by: (1) failing to make a "sufficient[]" legal argument during his second trial for dismissal of the charges on the ground of double-jeopardy and misstated facts in that motion, prompting the court to grant a second mistrial; [1] (2) conceding "there was no problem with reliability of [an] out-of-court identification" and thus that an in-court identification was permitted; and, (3) giving him incorrect advice regarding his

[1]Macias's first trial ended in a mistrial when the jury was unable to reach a verdict on any of the counts. During the second trial, the court granted his mistrial motion based on the unavailability of a witness.

potential sentence in evaluating a plea offer from the state. As to the latter issue, Macias asserted he did not knowingly reject a plea offer from the state because counsel had informed him he could receive concurrent, 10.5-year prison terms if convicted after a trial, noting that counsel had requested that term in a sentencing memorandum. With its response, the state provided the transcript of a hearing held pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), during which Macias was informed of the correct sentencing range under the offered plea—fifteen to 38.75 years—and the range if convicted at trial—sixty-seven to 302.75 years. Macias informed the court he understood the sentencing ranges and wanted to reject the state's plea.

¶4 The trial court summarily denied Macias's claims, concluding, inter alia, that he had not established prejudice resulting from counsel's conduct because he had not shown the court would have granted a mistrial or excluded in-court identifications. The court further noted that it and counsel had informed Macias of the potential consequences of rejecting the state's plea offer regardless of any misinformation allegedly provided by counsel. This petition for review followed the court's denial of Macias's motion for rehearing.

¶5 On review, Macias repeats his claims and asserts he had raised a colorable claim for relief and was entitled to an evidentiary hearing. "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). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088 (2014). "To establish prejudice, a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, *quoting Hinton*, ___ U.S. at ___, 134 S. Ct. at 1089.

¶6 As to Macias's claims that counsel was ineffective in arguing for dismissal of the charges and for suppression of witness identification, he only briefly summarizes his claims and fails to address the court's conclusion that he was not prejudiced by counsel's conduct. Accordingly, we decline to address those claims further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review); *see also Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 ("Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.").

¶7 With regard to Macias's argument that his rejection of the state's plea offer was involuntary, we have reviewed the record and the trial court's ruling and conclude the court correctly rejected this claim in its thorough and well-reasoned minute entry; accordingly, we adopt that ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶8 We further note that, although Macias is correct that a court is generally required to treat a petitioner's factual assertions as true, *see State v. Jackson*, 209 Ariz. 13, ¶ 6, 97 P.3d 113, 116 (App. 2004), that rule is not without limitations. A defendant must do more than contradict what the record plainly shows, and must provide more than conclusory assertions in doing so. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998); *cf. State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995) (court may disregard "conclusory" affidavit "completely lacking in detail"); *Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). The record shows Macias informed the trial court that he understood the sentences he could face if convicted of all the charges after trial and that he knowingly rejected the state's plea offer despite that understanding. Also, notwithstanding Macias's statements in his supporting affidavit that trial counsel failed to inform him of the mandatory consecutive sentences, counsel agreed

on the record that his "calculations" were the same as the state's assertion of the minimum sentence if Macias was convicted of the offenses after trial. In light of these facts, Macias has not explained how counsel's allegedly incorrect advice rendered his rejection of the plea offer involuntary.

¶9 Although we grant review, relief is denied.