

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EDUARDO HERNANDEZ,
Petitioner.

No. 2 CA-CR 2017-0019-PR
Filed April 4, 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NOT FOR PUBLICATION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 Santa Cruz County
No. CR14035
The Honorable Anna M. Montoya-Paez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

George E. Silva, Santa Cruz County Attorney
By Liliana Ortega, Chief Deputy County Attorney, Nogales
Counsel for Respondent

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
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.

VÁSQUEZ, Judge:

¶1 Eduardo Hernandez seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review, but we deny relief.

¶2 Pursuant to a plea agreement, Hernandez was convicted of second-degree burglary, a dangerous offense. At sentencing, the trial court considered, as factors in aggravation, Hernandez's possession of a weapon, the presence of an accomplice, the "physical and emotional and mental harm" to the adults and children present during the burglary, and his criminal record, including a felony offense committed within the ten years immediately preceding this offense. *See* A.R.S. § 13-701(D)(2), (4), (9), (11). The court also considered the "escalation of violence" reflected in a "high risk assessment" in his presentence report, and his commission of the offense in the presence of very young children and while on intensive probation. *See* § 13-701(D)(25). The court found these aggravating circumstances outweighed the mitigating circumstance of Hernandez's remorse and sentenced him to an enhanced, aggravated term of fifteen years' imprisonment, the maximum sentence permitted by his plea agreement.

¶3 Hernandez filed a timely notice of and petition for post-conviction relief in which he alleged the trial court "erred" in finding aggravating factors under § 13-701(D). Among other issues raised, Hernandez argued the trial court improperly considered the "[u]se, threatened use or possession of a deadly weapon or dangerous instrument," § 13-701(D)(2), and the "[i]nfliction or

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threatened infliction of serious physical injury” pursuant to § 13-701(D)(1). He contends that both of those subsections provide that the identified circumstance may not be used in aggravation if it “is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under [A.R.S.] § 13-704.”¹

¶4 Without expressly asserting or developing a claim of ineffective assistance of counsel, and without the support of “[a]ffidavits, records, or other evidence,” Ariz. R. Crim. P. 32.5, he also listed several omissions by his attorney. Specifically, with respect to sentencing, Hernandez stated his attorney failed to (1) argue, as a mitigating circumstance, the possibility that the weapon Hernandez used was an “air gun”; (2) introduce a photograph of one of the victims that purportedly would rebut his claim that he had been pistol-whipped by Hernandez; (3) object to the court’s “*in camera* inspection of [unidentified] records” or a “highly prejudicial” letter from one of the victims; and (4) argue that the one-year-old child in the family of victims “may have reacted” but “did not have the ability to comprehend and interpret the events.” The trial court summarily denied relief, noting the presumption that trial counsel’s conduct was motivated by strategy or tactics and finding “there is nothing indicating” that any such evidence or argument would have affected its sentence.² With respect to Hernandez’s direct challenge to his aggravated sentence, the court acknowledged language in § 13-701(D)(2) prohibiting reliance on the possession of a weapon to aggravate a sentence when that factor is the basis for sentence enhancement pursuant to § 13-704, and Hernandez’s sentencing range had already been enhanced by that statute. The court first noted the offense involved “more than brandishing a weapon,” citing Hernandez’s “inva[sion of] the sanctity of the victim’s home with his family present” and the participation of an armed

¹We do not address any issues that have been abandoned on review. See Ariz. R. Crim. P. 32.9(c)(1) (“Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.”).

²The trial court stated it had never reviewed the unidentified records *in camera*, because they were presented only in Spanish.

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accomplice, stating “these facts heightened the propensity for violence and fear.” Ultimately, however, the court concluded that, “even setting this factor aside,” it had found other aggravating factors warranting its imposition of an aggravated sentence, and the court further found “an aggravated sentence was warranted.”

¶5 The trial court expressly rejected Hernandez’s argument that reliance on § 13-701(D)(1) was foreclosed because the “[i]nfliction or threatened infliction of serious physical injury” was an essential element of “aggravated assault by using or threatening to use deadly force,” which he maintained had been “incorporated” into the dangerous-nature burglary that was his offense of conviction. The court concluded it had properly considered physical and emotional harm to the victims, stating, “Harm to the victims is not an element of the burglary.” The court then dismissed Hernandez’s petition, finding “no claim presents a material issue of fact or law which would entitle [Hernandez] to relief” under Rule 32 and “no purpose would be served by any further proceeding.” See Ariz. R. Crim. P. 32.6(c) (standard for summary dismissal). This petition for review followed.

¶6 We review a trial court’s summary dismissal, based on the lack of a colorable claim, for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. On review, Hernandez first contends the trial court found “aggravating factors not authorized under Arizona law.”³ He

³Hernandez also suggests the trial court found aggravating factors that were “unsupported by the evidence,” asserting, without citation to the record or to legal authorities, that “no serious physical injury [was] inflicted [on the victim], and all allegations that did not support the charge of second degree burglary and its dangerous nature were dismissed as part of the plea.” But the trial court did not rely on a “serious physical injury” to aggravate Hernandez’s sentence, and, by his plea agreement, Hernandez authorized the court to find aggravating circumstances based on a preponderance of evidence, unbound by the rules of evidence. Additionally, § 13-701(C) permits the court’s consideration of “any evidence or information introduced or submitted to the court or the trier of fact

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specifically challenges any findings pursuant to § 13-701(D)(1) and (2), and he asks this court to remand his case for resentencing. As we have observed, the trial court acknowledged that finding Hernandez's use of a weapon as an aggravating factor under § 13-701(D)(2) may have been improper, but it also found that factor was not critical to the sentence it imposed.

¶7 With respect to § 13-701(D)(1), Hernandez argues the trial court's references to "physical injury" and "emotional and mental harm" are "elements of assault and aggravated assault that relate to inflicting or threatening to inflict serious physical injury, as well as placing another person in reasonable apprehension of imminent physical injury," and were therefore foreclosed by the statutory exception. As an initial matter, we are not convinced that the trial court relied on § 13-701(D)(1). The court's findings of "physical and emotional and mental harm" more closely reflect § 13-701(D)(9), which provides a ground for aggravation when a victim has "suffered physical, emotional or financial harm." Unlike § 13-701(D)(1) and (2), § 13-701(D)(9) does not contain any exceptions to its application.

¶8 In addition, we are not persuaded that the harms cited by the trial court—although they frequently may result from an aggravated assault—are necessarily "essential element[s]" of that offense. § 13-701(D)(1); *see also* A.R.S. § 13-1204 (defining aggravated assault). Moreover, the court correctly concluded that burglary—not assault—was the relevant "offense of conviction" under § 13-701(D)(1). We reject Hernandez's suggestion that aggravated assault be considered a crime of conviction because it was "the felony to be committed when [Hernandez was] entering the victims' residence."

before sentencing," including the presentence investigation report. Hernandez has failed to explain why he believes the court abused its discretion in finding it was entitled to rely on the presentence investigation report. We regard this issue as waived and do not address it further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (petitioner who cites no relevant authority and develops no meaningful argument waives claim on review).

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“[T]he crime of burglary is complete when entrance to the structure is made with the requisite criminal intent,” and it “does not require the successful completion of the underlying felony.” *State v. Bottoni*, 131 Ariz. 574, 575, 643 P.2d 19, 20 (App. 1982). The harms identified by the court, whether grounded in § 13-701(D)(1) or (D)(9), were not essential elements of the crime of burglary and were properly considered in aggravation.

¶9 Critically, Hernandez fails to address the most salient points of the trial court’s ruling: (1) the court was statutorily authorized to aggravate Hernandez’s sentence based on finding a single aggravating factor—such as the previous felony conviction Hernandez admitted in his plea agreement, and (2) based on the “one or more statutory aggravating circumstances . . . found or admitted . . . an aggravated sentence was warranted.” Thus, even if the sentencing court abused its discretion in citing Hernandez’s use of a weapon as a factor in aggravation, that same court, on review of Hernandez’s petition for post-conviction relief, has concluded it would have imposed the same sentence without consideration of that improper factor. No relief is warranted in these circumstances. *Cf. State v. Munninger*, 213 Ariz. 393, ¶ 12, 142 P.3d 701, 705 (App. 2006) (no fundamental error for improper use of aggravator where sentencing court “explicitly found that each of the aggravating factors alone would outweigh the mitigating factors” and it was thus “clear that an aggravated sentence would have been imposed even if the improper aggravator had not been used”) (internal citation omitted).

¶10 For similar reasons, we deny relief on Hernandez’s argument that the trial court abused its discretion or erred in summarily denying his claim of ineffective assistance of counsel. To state a colorable claim of ineffective assistance, Hernandez was required to “offer some demonstration that the attorney’s representation fell below that of the prevailing objective standards . . . [and] some evidence of a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the [proceeding] would have been different.” *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999). Hernandez cannot state a colorable claim of prejudice resulting from counsel’s omissions

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when the trial court has clearly stated that, notwithstanding the arguments or objections proposed in Hernandez’s petition, “an aggravated sentence was warranted.” See *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (“[f]ailure to satisfy either prong” of the colorable showing required “is fatal” to an ineffective assistance claim).⁴

¶11 The trial court did not abuse its discretion in dismissing without a hearing Hernandez’s petition for post-conviction relief based on his failure to state a colorable claim. Accordingly, we grant review but deny relief.

⁴Hernandez also failed to state a colorable claim that counsel’s performance was deficient. Although he referred in his petition below to certain physical evidence that counsel should have presented to the trial court—including a photograph, police reports, and the transcript of a witness interview—none of that evidence was part of the record or attached to his petition for post-conviction relief. See Ariz. R. Crim. P. 32.5 (requiring, as attachments to petition, “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations”). In the absence of any such supporting evidence, Hernandez failed to rebut the “strong presumption” that his attorney performed competently. *State v. Valdez*, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991).