

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN FLOYD CASTILLO III,
Petitioner.

No. 2 CA-CR 2017-0128-PR
Filed May 1, 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NOT FOR PUBLICATION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 Mohave County
No. CR201001133
The Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Gail G. Natale, Phoenix
Counsel for Petitioner

STATE v. CASTILLO
Decision of the Court

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 John Castillo III seeks review of the trial court’s order denying 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). Castillo has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Castillo was convicted of aggravated assault based on a physical altercation with the victim in which the victim sustained head injuries resulting in his death. The trial court sentenced Castillo to an aggravated, fourteen-year prison term. We affirmed his conviction and sentence on appeal. *State v. Castillo*, No. 1 CA-CR 11-0588 (Ariz. App. Dec. 27, 2012) (mem. decision).

¶3 Castillo sought post-conviction relief, arguing the state had committed misconduct during closing argument, the jury had been instructed improperly on self-defense and “could not have followed” the instruction given because it reached inconsistent verdicts by finding Castillo guilty of aggravated assault but not guilty of second-degree murder or manslaughter, and the trial court had erred in imposing an aggravated sentence due to the purportedly inconsistent verdicts. He also asserted his trial counsel had been ineffective by failing to call certain witnesses at trial, specifically a medical examiner to testify that kicking the victim did not cause “significant damage,” and a “use-of-force” expert to testify that Castillo had used minimal force against a larger attacker.

¶4 In a detailed, thoughtful ruling, the trial court summarily denied relief, concluding that Castillo’s claims regarding misconduct, the self-defense instruction, and sentencing were precluded because he could have raised them on appeal. The court

STATE v. CASTILLO
Decision of the Court

further concluded Castillo had not demonstrated that either proposed witness would have offered testimony favorable to Castillo's defense. This petition for review followed.

¶5 On review, Castillo repeats his argument that the state committed misconduct during closing argument, his arguments related to the self-defense instruction, and his sentencing claim. We agree with the trial court that these claims are precluded because they could have been raised on appeal but were not. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶6 Castillo additionally asserts his trial counsel was ineffective in failing to object to the state's purported misconduct. But Castillo made this argument for the first time in his reply to the state's response to his petition for post-conviction relief. Thus, the trial court was not required to, and did not, address that claim; accordingly, we do not address it on review. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 7-8, 221 P.3d 1052, 1054 (App. 2009) (trial court need not consider issues first raised in petitioner's reply); *see also* Ariz. R. Crim. P. 32.9(c) (permitting petition "for review of the actions of the trial court").

¶7 Castillo also repeats his claim that counsel was ineffective for failing to call the medical examiner at trial. "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.

STATE v. CASTILLO
Decision of the Court

¶8 As he did below, Castillo points to an affidavit by trial counsel in which counsel stated he had made a mistake in failing to call the medical examiner because he “could have provided further confirmation of the lack of evidence to establish the State’s theory that some significant damage to the decedent happened from the alleged kicks.” The trial court, however, concluded this statement was insufficient to establish a claim, noting Castillo had not provided the examiner’s “autopsy report, an affidavit from him, or anything else that would allow the Court to surmise what his testimony would have been.” Thus, the court reasoned, it could not evaluate whether calling the examiner “would have resulted in a different verdict in this case.” Castillo has not identified any error in this reasoning, nor cited any authority suggesting trial counsel’s conclusory opinion about an expert’s possible testimony is sufficient to establish a colorable claim. Thus, we do not address this argument further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review). Nor do we address his passing suggestion that counsel should have called a “use-of-force” expert at trial. *See id.*

¶9 We grant review but deny relief.