

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MELVIN ELEM,
Petitioner.

No. 2 CA-CR 2017-0147-PR
Filed July 25, 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NOT FOR PUBLICATION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. CR20124581001
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Emily Danies, Tucson
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Kelly¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Melvin Elem 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. 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). Melvin has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Melvin was convicted of drive-by shooting, discharging a firearm at a residential structure, endangerment, and disorderly conduct. He was sentenced to concurrent and consecutive prison terms totaling 19.5 years. His convictions stemmed from a 2012 incident in which Melvin and his brother, Larry Elem, confronted the victim at her home, resulting in an exchange of gunfire in which Melvin was wounded. We affirmed Melvin's convictions and sentences on appeal, but modified his sentence for endangerment to run concurrently with his sentences for drive-by shooting and discharging a firearm at a residential structure; the modification did not alter Melvin's aggregate prison term. *State v. Elem*, No. 2 CA-CR 2014-0167 (Ariz. App. Nov. 30, 2015) (mem. decision).

¶3 Larry also appealed his convictions and sentences, arguing inter alia that the trial court had erred by denying his request that an expert be permitted to examine and test-fire the victim's firearm. We concluded that Larry was entitled to examine

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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the firearm pursuant to Rule 15.1, Ariz. R. Crim. P., and that the error was not harmless because it may have led to evidence about the direction in which the gun had been fired during the incident and thus bolstered Larry's justification defense by showing the victim also had fired at him instead of only at Melvin. We therefore reversed his convictions and sentences and remanded the case for a new trial. *State v. Elem*, No. 2 CA-CR 2014-0437 (Ariz. App. May 12, 2016) (mem. decision).

¶4 Melvin sought post-conviction relief, asserting his appellate counsel was ineffective in failing to raise the same argument as Larry. The trial court summarily dismissed the petition. The court observed that Melvin did not raise a justification defense at trial, any additional evidence the victim had fired at him would have been cumulative since that fact was undisputed, and it was "reasonable" for appellate counsel to "rely[] on the facts presented at trial" in determining which arguments to raise on appeal. This petition for review followed.

¶5 On review, Melvin repeats his claim that his appellate counsel was ineffective in failing to raise the Rule 15.1 issue on appeal. "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). We presume that appellate counsel provided effective assistance. *Id.* ¶ 22. And, because "[a]ppellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal," counsel "'is not ineffective for selecting some issues and rejecting others.'" *Id.*, quoting *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). To show prejudice, "the petitioner must offer evidence of a reasonable probability that but for counsel's unprofessional errors, the outcome of the appeal would have been different." *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382.

¶6 We agree with the trial court that Melvin's claim warranted summary dismissal. Melvin has not demonstrated he would have been entitled to relief had he raised the issue on appeal.

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As we noted above, in our decision granting Larry relief on appeal, we concluded the Rule 15.1 error was not harmless because the evidence could have bolstered Larry's justification defense by showing the victim had shot at him. Melvin, however, has failed to show the error was not harmless as to him. He acknowledges that, unlike Larry, he did not assert justification as a defense. And, given that he was shot, it is undisputed the victim fired at him. Moreover, although he contends a forensic expert who evaluated the victim's gun would have been able to contradict her testimony and thus "undermine[] her credibility," he does not identify any such testimony or otherwise offer any reason to conclude the expert's testimony would have aided his defense. Accordingly, Melvin has shown neither that counsel fell below prevailing professional norms by failing to raise this issue or that he was prejudiced thereby.

¶7 We grant review but deny relief.