IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TERRY LYNELL BRABHAM JR.,
Petitioner.

No. 2 CA-CR 2017-0152-PR
Filed June 14, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2011115294002DT
The Honorable Michael D. Gordon, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By David R. Cole, Deputy County Attorney, Phoenix
Counsel for Respondent

Terry Lynell Brabham Jr., Buckeye
In Propria Persona

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Terry Brabham Jr. seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 After a jury trial, Brabham was convicted of aggravated assault and drive-by shooting. The trial court sentenced him to concurrent prison terms, the longer of which is fifteen years. On appeal, we affirmed Brabham's convictions and sentences as modified.[1] *State v. Brabham*, No. 1 CA-CR 13-0217 (Ariz. App. Sept. 25, 2014) (mem. decision).

¶3 Brabham then sought post-conviction relief, and after appointed counsel filed a notice of completion of post-conviction review, noting she was unable to find any claims to raise, the trial court permitted Brabham to file a pro se petition. Brabham, who had been convicted by a twelve-person jury, argued trial counsel was ineffective for failing to advise him "that he had a right to a[n] eight-person jury" and that he was not entitled to twelve jurors, asserting "it would have been easier to convince eight" jurors of his innocence.

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[1]We vacated that portion of the trial court's order requiring Brabham to pay for the cost of deoxyribonucleic acid testing. *State v. Brabham*, No. 1 CA-CR 13-0217, ¶ 10 (Ariz. App. Sept. 25, 2014) (mem. decision).

¶4 In its opposition to the petition, the state was willing to "assume, but not concede" that in no event could the convictions on the charges result in a term of more than thirty years. The trial court also "assume[d]," for the sake of argument, that an eight-person jury could have been used; nonetheless, it summarily denied relief. The court rejected Brabham's argument that "it would have been 'easier' to convince a smaller jury of his innocence," finding that argument made "no sense at all." The court also noted Brabham had not alleged, much less demonstrated, that "he was not provided a fair and impartial jury,"[2] and found that the "burden of proof remained with the State and the increased number of jurors placed a greater burden on the *State*, not the defendant." The court thus concluded Brabham had failed to establish a colorable claim of prejudice to support his claim of ineffective assistance of trial counsel.

¶5 On review, Brabham reasserts[3] that his sentences could not exceed thirty years, and again argues that trial counsel was ineffective by failing to request an eight-person jury and by failing to advise him he had a right to an eight-person jury and was not entitled to a twelve-person jury, contending this resulted in fundamental error. *See* Ariz. Const. art. II, § 23 (juries in criminal cases in which

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[2]To the extent Brabham argues on review that the trial court incorrectly found he had failed to allege the jury was unfair and impartial, we note that although it does not appear he specifically made that claim, he did maintain his trial strategy would have been different in regard to the exercise of peremptory challenges had he been given a jury of eight rather than twelve. In any event, that unsupported argument does not impact our ruling.

[3]Brabham contended in the trial court that A.R.S. § 13-116 prohibited consecutive sentences on the counts for which he was convicted. He did not, however, include a third count on which he was acquitted, which the attorneys and court would have had to consider. He does not argue § 13-116 in this court. Although we could find that Brabham abandoned his argument by failing to develop it here, in our discretion we also accept the assumption that the convictions on all three counts could not result in a term exceeding thirty years.

sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons); A.R.S. § 21-102(A) (same), (B) (jury in criminal cases other than those referred to in subsection A "shall consist of eight persons"). Brabham also maintains he was "substantially prejudice[d]" by counsel's conduct and he was entitled to an evidentiary hearing.

¶6 "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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, Brabham was required to demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶7 Even assuming without deciding that Brabham was not subject to a sentence of thirty years or more, in which case he would only have been entitled to an eight-person jury, *see* § 21-102(A), (B), Brabham has not established a colorable claim of ineffective assistance because he has not shown how he was prejudiced by trial counsel's purported error. Notably, Brabham has not cited nor are we aware of any case law suggesting that a defendant is prejudiced by having too many jurors, nor has he established how he was prejudiced by having a jury of twelve persons. *See State v. Salazar*, 146 Ariz. 540, 541-42, 707 P.2d 944, 945-46 (1985) (if defendant fails to make sufficient showing on either prong of *Strickland* test court need not determine whether other prong satisfied). To the contrary, the relevant constitutional provision suggests a twelve-person jury benefits a defendant because of the additional protection afforded by requiring unanimity of a larger group of jurors. *See State v. Fancy*, 139 Ariz. 76, 79, 676 P.2d 1134, 1137 (App. 1983) ("smaller juries inure to the benefit of the prosecution"), *citing Ballew v. Georgia*, 435 U.S. 223 (1978). Thus, we agree with the trial court that Brabham has not established prejudice.

¶8 We therefore grant review but deny relief.