

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALAN RODELO-VELAZQUEZ,
Petitioner.

No. 2 CA-CR 2019-0223-PR
Filed November 6, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20165244001
The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Alan Rodelo-Velazquez seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We grant relief and remand the case for an evidentiary hearing to determine whether Rodelo-Velazquez’s guilty plea was knowing, voluntary, and intelligent.

¶2 Rodelo-Velazquez pled guilty to second-degree murder and, in July 2018, was sentenced to a twenty-five-year prison term. At the change-of-plea colloquy, Rodelo-Velazquez’s counsel explained that the victim had been “found dead at [his rented] house of one gunshot wound to the heart. Four bales of marijuana were found. And two Jamaicans were stopped fleeing from the house with at least I think \$10,000 cash.” Counsel further stated that Rodelo-Velazquez had admitted to police that “he was there at the house, that he was taking part in the marijuana transaction with [the victim], who was dealing the marijuana, that he was present when several, possibly four Hispanic men, armed and masked, also entered the home and fired shots, killing the [victim], and shot [Rodelo-Velazquez] three times.”

¶3 The trial court then asked Rodelo-Velazquez whether he agreed “with what your [counsel] told me . . . , when you went inside with other individuals and caused the death during commission of a felony of

¹ Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). “Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (“amendments apply to all cases pending on the effective date unless a court determines that ‘applying the rule or amendment would be infeasible or work an injustice’” (quoting Ariz. Sup. Ct. Order R-19-0012)).

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[the victim]?”² Rodelo-Velazquez stated he agreed. The court accepted the plea, finding “there’s a factual basis to support [Rodelo-Velazquez’s guilty plea] based on your agreement with your lawyer’s summary of your criminal offense[.]”

¶4 Rodelo-Velazquez sought post-conviction relief, arguing his plea was invalid because “his guilt as to every element of the offense” had not been established “beyond a reasonable doubt.” He maintained that he had not admitted shooting the victim nor to being one of the home invaders and that his agreement to causing the victim’s death was “because he was involved in the marijuana deal when [the victim] was killed.” His participation in the marijuana transaction, he asserted, constituted neither felony murder nor second-degree murder.

¶5 The trial court summarily denied relief. Identifying counsel’s description as the factual basis, it noted the “recitation of the facts arguabl[y] would have supported a first-degree murder conviction, it was accepted as support for the negotiated plea” to a “lesser offense.” Thus, the court concluded that, because the plea was not “coercive,” Rodelo-Velazquez was not entitled to relief. This petition for review followed.

¶6 On review, Rodelo-Velazquez repeats his argument that his guilty plea to second-degree murder was invalid because the factual basis did not encompass “every element of the offense.” To be valid, a guilty plea must have a sufficient factual basis and the defendant’s admission of guilt must be knowing, voluntary, and intelligent. Ariz. R. Crim. P. 17.1(b),

²The court’s question appears to have mischaracterized defense counsel’s description of the events, possibly because Rodelo-Velazquez had, in the same proceeding only moments before, admitted to being a member of a home invasion crew in another case, consolidated with this one for purposes of his plea agreement disposing of both cases. But even if Rodelo-Velazquez’s affirmative answer to the question qualifies as his adoption of that characterization, it is nevertheless wanting, because the court’s reference to the death as occurring during the commission of a felony suggests that the finding of a factual basis for second-degree murder was premised upon the erroneous notion that crime is a lesser-included offense of felony murder, which we reject for the reasons explained below. Adding to the confusion, was Rodelo-Velazquez’s police statement that he was merely present assisting in a marijuana transaction. Thus, it may not have been clear whether the court was referring to the home invasion or the marijuana transaction.

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17.3(b); *see also State v. Devine*, 114 Ariz. 574, 576 (1977). A factual basis is sufficient if there is “strong evidence of guilt,” and such evidence “may be derived from the record as a whole or any part of it.” *State v. Hamilton*, 142 Ariz. 91, 93-94 (1984). The factual basis must “support each of the elements of the crime.” *State v. McKay*, 131 Ariz. 369, 373 (1982). Additionally, for a plea to be knowing, voluntary, and intelligent, the defendant must understand “the nature of the charges to which the defendant will plead.” Ariz. R. Crim. P. 17.2(a)(1); *State v. Herndon*, 109 Ariz. 147, 148 (1973).

¶7 The factual basis given by counsel, adopted by the trial court during the change-of-plea colloquy, and identified by the court in its order dismissing Rodelo-Velazquez’s petition, does not constitute second-degree murder. It states only that Rodelo-Velazquez was assisting in a marijuana transaction when he was shot in a robbery during which the victim was killed. He did not, under this set of facts, cause the victim’s death. *See* A.R.S. § 13-1104(A). Nor do these facts permit the inference that he was an accomplice to second-degree murder, since he did not direct anyone to kill the victim, aid anyone in doing so, or provide someone the means or opportunity to do so. *See* A.R.S. §§ 13-301, 13-303.

¶8 In rejecting Rodelo-Velazquez’s petition, the trial court reasoned that the factual basis supported a conviction for first-degree murder, presumably felony murder under A.R.S. § 13-1105(A)(2). Thus, the court concluded, the factual basis could support the “lesser offense” of second-degree murder. But marijuana possession, even possession for sale, is not a predicate felony for felony murder; instead, only conduct under § 13-3405(A)(4), including transportation of marijuana for sale and the sale of marijuana, is a predicate felony under § 13-1105(A)(2).³ Rodelo-Velazquez cannot be convicted of felony murder based on his possession of marijuana.

¶9 Additionally, even if an appropriate predicate felony had been identified in the factual basis, second-degree murder is not a lesser-included offense of felony first-degree murder. *State v. Davolt*, 207 Ariz. 191, ¶ 92 (2004). The trial court correctly recognized that a defendant may plead guilty to a lesser offense even when the facts describe a greater offense. *See State v. Durham*, 108 Ariz. 327, 329-30 (1972). But that does not change the requirement of an adequate factual basis. *State v. Page*, 115 Ariz.

³The state has not argued that Rodelo-Velazquez’s admitted conduct falls within § 13-3405(A)(4) nor that the victim’s death could reasonably be described as furthering the sale of marijuana. *See* § 13-1105(A)(2).

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156, 157 (1977) (finding invalid plea for possession of dangerous drug when factual basis supported more serious charge of heroin possession because “a sentencing court in Arizona may not accept a plea of guilty or no contest until it has determined that there is a factual basis for the plea”); *State v. Norris*, 113 Ariz. 558, 559 (1976) (plea to lesser charge appropriate if “there is a factual basis to support all the essential elements of whatever charge the defendant pleads to”). Because there is no lesser-included offense of felony murder, *Davolt*, 207 Ariz. 191, ¶ 92, facts supporting a plea of guilty to felony murder do not necessarily support a guilty plea to second-degree murder.

¶10 The state argues, however, that we may find a sufficient factual basis for second-degree murder from testimony presented to the grand jury.⁴ As the state correctly notes, Rodelo-Velazquez’s plea agreement incorporates the grand jury transcript. A detective testified before the grand jury that the victim had been killed in a gunfight with “several unknown males” who “had forced their way into the residence.” While fleeing the scene, one of the suspects had dropped a cloth item with blood on it, which the officer described as a mask. Rodelo-Velazquez’s blood was found both in the home and on the mask. But the detective further relayed, consistent with the factual basis provided by Rodelo-Velazquez’s counsel, that Rodelo-Velazquez had stated he had been assisting another man in a marijuana deal at the home when the attackers arrived, and had hid in a bedroom when the shooting began, but he had been shot three times. The grand jury indicted Rodelo-Velazquez for first-degree murder and possession of marijuana for sale.

¶11 We agree with the state that, disregarding Rodelo-Velazquez’s statements to the detective, the remaining evidence suggests Rodelo-Velazquez was part of the group that invaded the home and killed the victim. And we agree that those facts are sufficient to form a factual basis for accomplice liability for second-degree murder. *See* §§ 13-301, 13-303, 13-1104. Although there was no evidence presented to the grand jury that Rodelo-Velazquez shot the victim or directly aided anyone in

⁴The state did not raise this argument below, instead arguing that the factual basis provided by counsel was “adequate.” We normally will not address an argument not raised in the trial court. *Cf. State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time on review). However, because we may uphold the trial court’s ruling for any reason supported by the record, *see State v. Banda*, 232 Ariz. 582, n.2 (App. 2013), we consider the state’s argument.

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doing so, the evidence would permit the conclusion that he was an accomplice to armed robbery. As such, he would have been additionally responsible for “any offense that is a natural and probable or reasonably foreseeable consequence of th[at] offense,” including the victim’s murder. § 13-303(A)(3). But, adopting the state’s approach would mean we must disregard the bulk of the plea colloquy, including the factual basis expressly adopted by the trial court: that Rodelo-Velazquez was a participant only in the marijuana transaction.⁵

¶12 We recognize that our supreme court has approved of guilty pleas when the defendant has contested portions of the factual basis. For example, in *State v. Salinas*, the defendant denied during the plea colloquy that the marijuana he had possessed was for sale, despite having told officers that it was. 181 Ariz. 104, 107 (1994). Our supreme court concluded the trial court could rely on the “strong evidence of guilt in the extended record that outweighed defendant’s contradictory statements about what he intended to do with the marijuana he possessed.” *Id.* And the supreme court upheld a guilty plea when the defendant insisted, contrary to a victim’s statements, that he had not threatened her to coerce her into sexual intercourse. *State v. Denning*, 155 Ariz. 459, 462-63 (1987). The court noted the defendant had not denied the contact was nonconsensual and did not contest the prosecutor’s narration, which “clearly indicate[d] that the defendant’s actions threatened the victim and coerced her against her will.” *Id.* at 463. Similarly, in *State v. Freda*, the defendant insisted he had used a pipe as a fake weapon during a robbery and had not used an actual shotgun. 121 Ariz. 430, 431-32 (1979). The trial court nonetheless could accept the defendant’s guilty plea based on the victim’s assertion, grounded in his familiarity with guns, that the defendant had been wielding a shotgun. *Id.* at 432.

¶13 The critical distinction between those cases and the matter before us is that here, the state charged Rodelo-Velazquez based on two incompatible narratives. In the first, Rodelo-Velazquez participated in a home invasion in which the victim was killed. In the second, he

⁵Insofar as the state suggests that participating in a marijuana transaction is conduct “creat[ing] a grave risk of death,” supporting liability for reckless second-degree murder under § 13-1104(A)(3), it cites no supporting authority and fails to develop this argument in any meaningful way. Accordingly, the argument is waived. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review).

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participated in a marijuana transaction interrupted by that home invasion.⁶ That second narrative—the one admitted in open court by Rodelo-Velazquez and adopted as the factual basis by the court at the change-of-plea hearing—does not support his guilty plea to second-degree murder.⁷

¶14 As we previously noted, the trial court mischaracterized defense counsel’s recitation as suggesting Rodelo-Velazquez had entered the home with others as part of the home invasion, resulting in the victim’s death. Even were this brief statement sufficient to support a guilty plea to second-degree murder, the court did not adopt it as the factual basis—instead again referring to counsel’s “summary of [Rodelo-Velazquez’s] criminal offenses.” Although the grand jury presentation supports Rodelo-Velazquez’s guilty plea, the inconsistent factual basis the court adopted at his change-of-plea hearing casts doubt on whether Rodelo-Velazquez understood the charge to which he was pleading guilty. He asserts that he believed his guilt was predicated on his possession of marijuana for sale at the time of the home invasion. As we have explained, however, that conduct cannot support a conviction of second-degree murder. Thus, Rodelo-Velazquez has made a colorable claim that his plea was not knowing, voluntary, and intelligent. See Ariz. R. Crim. P. 17.2(a)(1); *Herndon*, 109 Ariz. at 148; see also *State v. Speers*, 238 Ariz. 423, ¶ 9 (App. 2015) (defendant entitled to an evidentiary hearing if he presents a

⁶Based on the detective’s grand jury testimony, Rodelo-Velazquez stated there had been one hundred pounds of marijuana at the home, while officers recovered approximately sixty-eight pounds. The state has not argued Rodelo-Velazquez’s charge of marijuana possession was based on the possible removal of marijuana from the home by the home invaders.

⁷Rodelo-Velazquez referred in his petition below to an affidavit in which he stated he “did not understand” his guilty plea to be that he had “entered the house with people who shot and killed [the victim], and that is not what happened.” Instead, he stated he understood his guilty plea to be based on the death of the victim “during the commission of a felony,” namely, possession of marijuana for sale. It does not appear, however, that this affidavit was filed before the trial court rejected Rodelo-Velazquez’s petition, and it is unsigned. Thus, we do not consider it. See *State v. Mulligan*, 126 Ariz. 210, 213 n.1 (1980) (declining to consider evidence not before trial court); *State v. Donald*, 198 Ariz. 406, ¶ 17 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements).

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colorable claim for relief, that is, he has alleged facts which, if true, “might have changed the outcome”).

¶15 Rodelo-Velazquez also argues for the first time in his reply to the state’s response that “double jeopardy preclude[s] reinstatement of the charges” against him should his plea be vacated. He asserts the detective’s testimony to the grand jury falsely implied that Rodelo-Velazquez had been “part of the home invasion crew.” We do not consider arguments raised for the first time in a reply brief. *See State v. Jones*, 248 Ariz. 499, n.1 (App.2020); *see also State v. Ramirez*, 126 Ariz. 464, 468 (App.1980) (appellate court will not address arguments asserted for first time on review).

¶16 We remand the case to the trial court for an evidentiary hearing to determine whether Rodelo-Velazquez understood that the factual basis of his plea was his participation in a home invasion resulting in the victim’s death.