IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

JEREMY LEE KOONS,
*Petitioner*.

No. 2 CA-CR 2019-0249-PR
Filed April 9, 2020

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Petition for Review from the Superior Court in Pima County
No. CR20143960002
The Honorable Scott Rash, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Jeremy Lee Koons, Eloy
*In Propria Persona*

**MEMORANDUM DECISION**

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

E S P I N O S A, Judge:

**¶1** Jeremy Koons seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Koons has not met his burden of establishing such abuse here.

**¶2** After a jury trial, Koons was convicted of one count of theft, one count of criminal damage, and nine counts of third-degree burglary. The convictions were based on a string of burglaries involving dozens of businesses. The trial court sentenced Koons to a combination of consecutive and concurrent, enhanced prison terms totaling 19.25 years. This court affirmed his convictions and sentences on appeal. *State v. Koons*, No. 2 CA-CR 2016-0270 (Ariz. App. Aug. 7, 2017) (mem. decision).

**¶3** Koons initiated a proceeding for post-conviction relief, and appointed counsel filed a notice, stating he was "unable to find a meritorious issue of law or fact which may be raised." In Koons's subsequently filed pro se petition, he asserted claims of ineffective assistance of trial counsel, including counsel's purported failure to object to a duplicitous indictment.[2] He reasoned that the theft and criminal damage

[1]Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The 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." *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

[2] In his petition, Koons also argued his trial counsel had been ineffective in failing to obtain disclosure, to request a plea agreement, and to hire a mitigation specialist. However, he abandoned those claims in his reply.

counts were duplicitous because they each named several "separate and distinct" businesses.

**¶4** The trial court summarily dismissed Koons's petition. It explained, "Counts Two and Three are not duplicitous, rather, they merely aggregate theft and criminal damage as is specifically permitted under A.R.S. § 13-1801(B) and A.R.S. § 13-1605." This petition for review followed.

**¶5** On review, Koons reasserts his claim that trial counsel was ineffective in failing to object to a duplicitous indictment. He points out that the theft charge named twenty-nine businesses, while the criminal damage charge named forty, and he reasons that they therefore alleged multiple offenses in a single count. Koons further contends that § 13-1801(B) does not "give the state authority to inject multiple charges into a single charge."[3]

**¶6** To prevail on a claim of ineffective assistance of counsel, a defendant must establish both "that counsel's performance fell below reasonable standards and that the deficient performance prejudiced him." *State v. Roseberry*, 237 Ariz. 507, ¶ 10 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). If a defendant fails to establish either prong, the claim fails. *Id.* In addition, a defendant cannot meet his burden by "mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

**¶7** The state has discretion in drafting an indictment "to charge as one count separate criminal acts that occurred during the course of a single criminal undertaking even if those acts might otherwise provide a basis for charging multiple criminal violations." *State v. Klokic*, 219 Ariz. 241, ¶ 14 (App. 2008). Contrary to Koons's suggestion otherwise, § 13-1801(B) expressly allows the state to aggregate in the indictment amounts taken in thefts that are part of one scheme or course of conduct, even if the amounts are taken from multiple people, for classification purposes. And § 13-1605 similarly provides that "[a]mounts of damage caused pursuant to one scheme or course of conduct, whether to property of one or more persons, may be aggregated in the indictment or information

[3] Koons also argues the state presented evidence of but "never charged the crime of theft at the Family Dollar on St. Mary's in the indictment." However, this argument was not presented in his petition below. Accordingly, we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

at the discretion of this state in determining the classification of [a criminal damage] offense."

**¶8** Koons has provided no affidavits or other evidence in the trial court suggesting that trial counsel's failure to object to the indictment falls below reasonable standards. *See* Ariz. R. Crim. P. 32.7(e) ("The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition."). And he cites no authority in his petition for review, nor did he below, showing similar decisions by counsel have been found to constitute ineffectiveness. Notably, if the acts had not been aggregated into a single theft and criminal damage count, Koons potentially faced dozens of additional charges. And, if convicted, those sentences could have run consecutively, exposing him to at least as much, if not more, prison time as he received for the single counts. *See* A.R.S. §§ 13-703(G), 13-711(A). Accordingly, Koons has not met his burden of showing counsel's conduct fell below reasonable standards.

**¶9** Koons also seems to suggest that he was prejudiced by trial counsel's failure to object to the duplicitous indictment because, had counsel done so, he would have accepted a plea agreement. But it is unclear how the indictment, or any change thereto, would have affected Koons's decision to plead guilty. After the state extended Koons a plea offer in July 2015, the trial court conducted a hearing and found Koons had "been adequately advised of the plea offer and knowingly, intelligently and voluntarily reject[ed] the plea offer." Whether the state would have extended another plea offer in response to any objection to the indictment is purely speculative.[4] Koons, thus, has not met his burden of establishing prejudice.

**¶10** Accordingly, although the petition for review is granted, relief is denied.

[4]Koons attached to his petition an affidavit, avowing he informed his counsel on the first day of trial that he wished to plead guilty because he "would probably lose at trial anyway." In its response to Koons's petition, however, the state asserted that it would not have offered Koons a plea at that time.