

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOHN MARTIN TELLEZ,
Appellant.

No. 2 CA-CR 2019-0259
Filed October 8, 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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Pima County
No. CR20183375001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; DISMISSED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Acting Section Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

Vanessa C. Moss, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 John Tellez appeals from his convictions of burglary and theft and terms of probation, and from the denial of his motion to vacate judgment pursuant to Rule 24.2, Ariz. R. Crim. P. We dismiss the appeal from the convictions and probationary terms for lack of jurisdiction, but affirm the denial of the motion to vacate judgment.

¶2 Following a jury trial, Tellez was convicted of burglary and theft. On June 3, 2019, the trial court suspended the imposition of sentence and placed Tellez on concurrent, two-year terms of probation. On August 1, 2019, Tellez filed a pro se notice of post-conviction relief, indicating he was “[u]nsure of Rule 32,” and that his intent was to file a motion to vacate judgment; he attached to the notice a motion to vacate judgment based on newly discovered evidence.¹ The court denied Tellez’s motion to vacate judgment on October 25, 2019. Tellez filed a pro se notice of appeal on October 31, 2019, stating he was appealing from the court’s October 25, 2019 ruling, but also checking the boxes on the form notice indicating he was appealing from the “Judgment(s) of guilt,” and the “Motion to Vacate Judgment as Abuse of Discretion.”

¶3 In the sole argument he raises on appeal,² Tellez contends the trial court abused its discretion by denying his request to instruct the jury on criminal trespass as a lesser-included offense of burglary. The state

¹In an order dated August 7, 2019, the trial court stated it would treat Tellez’s notice as a notice of appeal and a timely filed notice of post-conviction relief. On August 12, 2019, Tellez informed the court he was not seeking post-conviction relief, rather, he was seeking to file a motion to vacate judgment pursuant to Rule 24.2, Ariz. R. Crim. P. The court then vacated its prior order and directed the state to respond to Tellez’s motion to vacate judgment.

²Tellez is represented by counsel on appeal.

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argues, and we agree, that we lack jurisdiction to address this claim.³ This court's jurisdiction "to entertain a criminal appeal is vested . . . by the timely filing of a notice of appeal pursuant to a jurisdictional statute." *State v. Smith*, 171 Ariz. 501, 503 (App. 1992); *see also State v. Serrano*, 234 Ariz. 491, ¶ 4 (App. 2014) (appellate jurisdiction "provided and limited by law"). Although an appeal may be taken by a defendant from a "final judgment of conviction," A.R.S. § 13-4033(A)(1), a notice of appeal "must be filed no later than 20 days after the oral pronouncement of sentence," Ariz. R. Crim. P. 31.2(a)(2)(A). Because Tellez was sentenced on June 3, 2019,⁴ but did not file his notice of appeal until October 31, 2019, we lack jurisdiction to address his claim regarding the lesser-included offense instruction. His appeal from his convictions and probationary terms is therefore dismissed.⁵

¶4 However, as previously noted, Tellez's notice of appeal, which identified the October 25, 2019 ruling denying his motion to vacate judgment, also identified the denial of that motion as a subject of the appeal. Rulings on post-trial motions are separately appealable orders. *See* A.R.S. § 13-4033(A)(3); Ariz. R. Crim. P. 24.2(d); *see also* Ariz. R. Crim. P. 31.4(b). But on appeal, Tellez focuses only on the trial court's denial of his request for the lesser-included jury instruction, over which we lack jurisdiction as explained above, and makes no argument regarding the denial of the motion to vacate. That issue has therefore been waived, and we do not address it. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument waives claim on review); *see also State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

¶5 For the foregoing reasons, Tellez's appeal as to his convictions and probationary terms is dismissed, and the trial court's denial of the motion to vacate conviction is affirmed.

³Although we granted Tellez's motion to extend the time to file a reply brief, none was filed.

⁴*See State v. Risher*, 117 Ariz. 587, 589 (1978) ("Except for the purpose of commencing the time within which a person must appeal, probation is not a sentence and is granted only after the imposition of sentence is suspended.").

⁵Rule 32.1(f), Ariz. R. Crim. P., permits a non-pleading defendant to seek permission to file a delayed notice of appeal if "the failure to timely file a notice of appeal was not the defendant's fault." Tellez has not, however, sought relief under that rule.