IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RONALD PAUL GULLI,
Petitioner.

No. 2 CA-CR 2020-0001-PR
Filed May 28, 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NOT FOR PUBLICATION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. CR20122523001
The Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Petitioner

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 Ronald Gulli seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, 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). Gulli has not shown such abuse here.

¶2 After a jury trial, Gulli was convicted of twenty-six counts of sexual exploitation of a minor and two counts of sexual conduct with a minor. *State v. Gulli*, 242 Ariz. 18, ¶ 1 (App. 2017). The trial court sentenced him to consecutive prison terms of seventeen years for each count of sexual exploitation and twenty years for each count of sexual conduct. *Id.* ¶ 3. On appeal, we affirmed his convictions and sentences for sexual exploitation but vacated his convictions and sentences for sexual conduct. *Id.* ¶ 1.

¶3 Gulli sought post-conviction relief, arguing counsel had been ineffective for failing to seek exclusion of the "large amount" of testimony about "uncharged child pornography and legal child erotica, anime, and computer generated images" found on Gulli's computers and other electronic devices based on the risk of jury confusion and unfair prejudice. He also claimed counsel "did not adequately discuss" a plea offer from the state with him "before rejecting it in court." The trial court summarily dismissed the petition. This petition for review followed.

¶4 On review, Gulli asserts the trial court erred by dismissing his petition and asserts he is entitled to an evidentiary hearing on his claims. A

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[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.

defendant is entitled to a hearing if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016). "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 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 Gulli first argues the trial court erred by concluding that counsel had made a tactical decision to not contest the admission of the images and videos found on his computers and electronic devices because it could have supported a defense that Gulli's downloading of the child pornography had been accidental. *See State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (reasoned tactical decision by counsel cannot support claim of ineffective assistance). But, even were we to agree with Gulli that tactic was not supported by the record,[2] he has not addressed the trial court's additional determination that counsel did, in fact, seek to limit the admission of various files. Gulli notes in passing that he urged in his post-conviction petition that counsel could have sought exclusion under Rule 403, Ariz. R. Evid., by arguing the evidence "was cumulative and unfairly prejudicial." But he does not meaningfully argue on review that any competent attorney would have made the precise argument he suggests, nor that it is likely the argument would have succeeded.

¶6 Additionally, Gulli has acknowledged that "some" of the evidence would be admissible under Rules 404(b) and (c), Ariz. R. Evid., and asserts counsel merely needed to "pare[] down" the number of images identified to the jury. We see no appreciable likelihood that simply reducing the quantity of images and files discussed—which included legal pornography as well as uncharged child pornography—would have changed the jury's verdicts in light of his defense that his downloading of the charged child pornography files had been inadvertent. That is particularly so in light of evidence that Gulli had taken obscene photographs of his neighbors' then-eleven-year-old daughter. *See* Ariz. R. Evid. 404(c). Thus, even assuming Gulli has made a colorable claim that counsel fell below prevailing professional standards, he has not made a

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[2] Trial counsel's primary defense seemed to be that, given the quantity of movies and images Gulli had downloaded, he was simply unaware that he had downloaded child pornography.

colorable claim of prejudice. The trial court did not abuse its discretion in rejecting this claim.

¶7 Gulli also contends the trial court erred by rejecting his claim that counsel did not adequately advise him regarding a plea offer from the state. He asserts that his affidavit, which the trial court was obligated to treat as true, shows "he lacked the requisite information to weigh the options in front of him." "[A] defendant may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary." *State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013). A defendant must show not only that his counsel was ineffective, but that he would have accepted the plea and forgone trial except for his attorney's error. *See id.*

¶8 Gulli is correct that, in evaluating whether a claim is colorable, the trial court is required to treat his factual allegations as true. *See State v. Watton*, 164 Ariz. 323, 328 (1990). Gulli states in his affidavit that, had a plea agreement been offered, he "would have found a term of up to 20 years acceptable." As the trial court noted, the only plea offer Gulli has identified is a preliminary offer calling for him to plead guilty to two offenses and, at minimum, face consecutive ten-year prison terms. But that offer also included a maximum term of twenty-four years for each offense—again to run consecutively. Gulli has not suggested he would have accepted a plea offer that could have resulted in a forty-eight-year aggregate prison term. Thus, because he has not shown prejudice, the trial court did not err in rejecting this claim.

¶9 Although we grant review relief is denied.