IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DOMINIQUE DEWAYNE GRAYER,
Petitioner.

No. 2 CA-CR 2020-0104-PR
Filed November 9, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201300646
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Bureau Chief, Florence
Counsel for Respondent

Dominque D. Grayer, Florence
In Propria Persona

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Dominique Grayer 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). Grayer has not shown such abuse here.

¶2 After a jury trial, Grayer was convicted of negligent homicide and aggravated assault and sentenced to consecutive prison terms totaling sixteen years. His convictions stemmed from an incident in April 2013 in which he crashed his car while impaired, killing one passenger and injuring another. We affirmed his convictions and sentences on appeal. *State v. Grayer*, No. 2 CA-CR 2015-0429 (Ariz. App. May 8, 2017) (mem. decision).

¶3 Grayer sought post-conviction relief and appointed counsel filed a notice stating she had reviewed the record but found "no colorable claims pursuant to Rule 32." Grayer then filed a pro se petition arguing the state had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence, specifically, a fire department report stating that Grayer had told responders he was "the restrained front passenger." He additionally argued counsel had been ineffective in failing to obtain the report and interview responders from the fire department about this statement. And he asserted counsel should have hired an expert to testify that his apparently impaired behavior resulted from his concussion, not

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. 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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

intoxication, and that the HGN test performed was unreliable due to his head injury. The trial court summarily dismissed his petition, and this petition for review followed.[2]

¶4 On review, Grayer repeats his claims and asserts he is entitled to an evidentiary hearing. In a proceeding for post-conviction relief, a defendant is entitled to an evidentiary hearing upon establishing a colorable claim—that is, one that, if the allegations are true, probably would have changed the verdict or sentence. *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016).

¶5 We agree with the state that Grayer's claim the state violated *Brady* by failing to provide him with the fire department report is precluded because he could have raised it on appeal. Ariz. R. Crim. P. 32.1(a), 32.2(a)(3). And, insofar as Grayer asserts the claim is not subject to preclusion because it "raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant," *id.*, he does not develop this argument in any meaningful way. Thus, we do not address it. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). Nor do we address his argument, made for the first time on review, that the report is newly discovered evidence under Rule 32.1(e). *See id.; State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (issues raised for first time in petition for review not addressed).

¶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 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* To establish prejudice, a defendant must show "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 25 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* ¶ 25 (quoting *Strickland*, 466 U.S. at 694). And, to establish prejudice under the second prong of *Strickland*, a defendant

[2] After the court dismissed his petition, Grayer filed two other "[p]etition[s]" asking that the court make findings of fact and conclusions of law. The trial court treated those filings as motions for reconsideration and denied them.

cannot meet that burden by "mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

¶7 Assuming, without deciding, that competent counsel would have obtained the report and interviewed its author, Grayer has not shown prejudice. Without the author's testimony, the report has little probative value, even assuming its admissibility. And, Grayer assumes the author, if located and interviewed, would have confirmed the report accurately reflected Grayer's statement.

¶8 In any event, admission of Grayer's statement through the report author's testimony would have been unlikely to change the verdict. First, the investigating detective testified that, when he arrived at the scene "there was a report of someone other than Mr. Grayer" having been the driver—so the substance of Grayer's statement was presented to the jury. In any event, Grayer later admitted in an interview with the investigating detective that he had been the driver, even going so far as to blame mechanical problems with the vehicle for the crash. And, although Grayer states that he had suffered a concussion, and a possible symptom of that concussion is confusion, he was able to provide an account of his activities the night of the crash and evinced no notable confusion during his interview. Additionally, he has cited no evidence suggesting he was likely to be less confused immediately following the accident than he would have been later.

¶9 Bruises on Grayer's chest and abdomen were consistent with having been wearing the driver's side seatbelt. This evidence was consistent with the detective's testimony that it appeared the front passenger-side restraints had not been in use at the time of the collision. Last, the surviving victim testified Grayer had been in the driver's seat. We recognize that another witness testified he could not "definitively" say that Grayer's bruises were caused by a seat belt because investigators had not measured the width of the belt, and that the victim had motive to lie. But that Grayer may have made a single statement immediately after the accident inconsistent with having been the driver is insufficient to undermine confidence in the outcome of his trial.

¶10 Grayer also argues that counsel was ineffective for failing to consult with an expert regarding field sobriety tests to argue that his apparent symptoms of intoxication were instead concussion symptoms. But rather than develop any argument in his petition as required by Rule 32.16(c)(2)(D), Grayer instead attempts to incorporate by reference the

arguments made in his petition below. That procedure does not comply with our rules. *See* Ariz. R. Crim. P. 32.16(d); *State v. Hess*, 231 Ariz. 80, ¶ 13 (App. 2012). Grayer has therefore waived this claim, and we do not address it further. *See Stefanovich*, 232 Ariz. 154, ¶ 16.

¶11 For the first time in his reply, Grayer also asserts counsel should not have pursued an "impairment" and "causation" defense. We do not address claims first raised in reply. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7 (App. 2009) (court not required to consider claims raised for first time in reply brief); *see also Ramirez*, 126 Ariz. at 468 (issues raised for first time in petition for review not addressed).

¶12 We grant review but deny relief.