IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JAMES LEON WALKER,
Petitioner.

No. 2 CA-CR 2020-0167-PR
Filed October 20, 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NOT FOR PUBLICATION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 Maricopa County
Nos. CR2000012987 and CR2016132783001DT
The Honorable Kevin B. Wein, Judge

REVIEW GRANTED; RELIEF DENIED

James Leon Walker, Florence
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 James Walker seeks review of the trial court's order summarily dismissing his successive post-conviction relief proceeding, filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We review a court's denial of post-conviction relief for an abuse of discretion.[2] *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Walker has not demonstrated such abuse here.

¶2 In 2001, Walker pled guilty to attempted child molestation and attempted sexual conduct with a minor in CR2000-012987. The trial court imposed a fifteen-year sentence for attempted child molestation and, for attempted sexual conduct with a minor, suspended the imposition of sentence and placed Walker on lifetime probation. On August 16, 2016, the court determined Walker had violated the conditions of his lifetime probation, revoked his probation, and sentenced him to a fifteen-year term of imprisonment.[3]

[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." *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020).

[2]Although Walker asks us to review the trial court's ruling for both fundamental error and abuse of discretion, we note the proper standard of review is abuse of discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015).

[3]The trial court's ruling stated that although probation was available, Walker "wishe[d] to reject" it and preferred to "be sentenced to a term of incarceration."

¶3 Walker also pled guilty in CR2016-132783 to one count of interference with monitoring devices, and also on August 16, 2016, the trial court entered judgment and sentenced him to a six-year term of imprisonment in that matter, to be served consecutively to the fifteen-year sentence for the probation violation in CR2000-012987. We denied relief on Walker's petitions for review of the court's dismissal of several prior post-conviction petitions in CR2000-012987. *State v. Walker*, No. 1 CA-CR 12-0636-PRPC (Ariz. App. Oct. 24, 2013) (mem. decision), No. 2 CA-CR 2014-0304-PR (Ariz. App. Sept. 22, 2014) (mem. decision), and No. 1 CA-CR 15-0124-PRPC (Ariz. App. Apr. 6, 2017) (mem. decision).

¶4 In August 2019, Walker initiated this successive post-conviction proceeding, apparently his fourteenth such proceeding in CR2000-012987 and his third in CR2016-132783.[4] Treating his notice, petition and memorandum as a single notice of post-conviction relief in both matters, the trial court summarily dismissed the proceeding. The court rejected Walker's claims pursuant to Rule 33.1(a), (b), (c), (e) and (f), concluding, inter alia, that he had failed to "assert substantive claims and adequately explain the reasons for their untimely assertion." *See* Ariz. R. Crim. P. 33.2(b). This petition for review followed.

¶5 On review, Walker reasserts his claim of newly discovered evidence—that the trial court lost subject-matter jurisdiction by failing to include an essential element of the charged offenses in the 2001 plea agreement, specifically, the names of the victims. Therefore, he argues, he pled guilty to actions that did not constitute actual offenses, violating his due process rights and rendering his convictions and sentences in both matters illegal.[5] *See* Ariz. R. Crim. P. 33.1(a), (b), (c), (e). He also contends,

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[4]These numbers are based on information from the trial court's ruling below, which Walker does not appear to dispute.

[5]Walker also asserts on review that the trial court erroneously stated the sentencing judge had suspended the imposition of sentence in his 2001 convictions and that the six-year sentence was "duplicitous." However, by imposing lifetime probation on count three, the court did indeed suspend the imposition of sentence as to that count. Moreover, because Walker did not expressly assert below that his sentences were duplicitous, we do not consider that claim. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review).

as he did below, that his current sentences are the "fruit of the poisonous tree" flowing from the improper 2001 guilty plea.

¶6 We initially note Walker essentially presented his jurisdiction argument as a claim of newly discovered evidence, which the trial court correctly found he did not establish. *See* Ariz. R. Crim. P. 33.1(e); *see also State v. Saenz*, 197 Ariz. 487, ¶ 7 (App. 2000) (to establish claim of newly discovered evidence, defendant must show "that the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict"). Because Walker failed to address, much less establish, the required elements of a claim of newly discovered evidence, we conclude the court did not abuse its discretion by summarily dismissing his proceeding.[6]

¶7 In any event, to the extent Walker contends he was entitled to raise his claim at any time, as previously noted, the trial court nonetheless addressed it as a jurisdictional matter as well. As the court correctly noted in its ruling, Walker did not lack notice of the names of the victims, nor, as he suggested below, was such notice necessary for him to present a "defense."[7] First, each charge in the indictment named the victims; second, when the parties agreed to amend the indictment for purposes of the plea agreement, they expressly agreed the plea agreement "serve[d] to amend the complaint or information . . . without the filing of any additional pleading"; and third, the plea agreement itself contained language prohibiting Walker from future contact with the victims, who were identified by name. *See also State v. Villegas-Rojas*, 231 Ariz. 445, ¶¶ 8-9 (App. 2012) (clarifying that "[m]erely because a victim is a necessary element [of the offense] does not mean that the name of the victim is a necessary element of the offense"); *Wright v. Gates*, 243 Ariz. 118, ¶ 18 (2017)

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[6] In his petition below, Walker asserted, without support or meaningful explanation, that he had discovered his claim while "[d]iscussing his case with another inmate in mid-2018." He also pointed out that he had limited access to a law library and suffers from health problems. The trial court thus concluded Walker had not "adequately explain[ed] the reasons for" the untimely assertion of his claim.

[7] We are unclear what defense a pleading defendant, like Walker, was required to present or prevented from raising.

(sentence enhancement under § 13-705 does not require state to identify victim, only to show victim is actual child).

¶8 Finally, Walker maintains he is entitled to an evidentiary hearing. However, other than asserting he is entitled to such a hearing, he has not sustained his burden to show why he is correct. *See State v. Amaral*, 239 Ariz. 217, ¶¶ 10-12 (2016) (to be entitled to evidentiary hearing, defendant must make "colorable claim" by alleging "facts which, if true, would *probably* have changed" the outcome of case).[8]

¶9 Accordingly, we grant review but deny relief.

[8]The trial court also found Walker's claims raised pursuant to Rule 33.1(a) and (c) precluded. Although claims under Rule 33.1(c) are not subject to the same rules of preclusion as before the recent changes in the rule, the outcome here is the same under either the former or current version of the rule. *See* Ariz. R. Crim. P. 33.2(b). In addition, because Walker has not referred to any claim of ineffective assistance of counsel on review, to the extent he raised such a claim below, we do not address it. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). Similarly, if Walker intended to raise a claim under Rule 33.1(f) below, because he has not challenged on review the court's rejection on that ground, we likewise do not address it. *See id.*