IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GREGORY ROSS JASKIEWICZ,
Petitioner.

No. 2 CA-CR 2022-0051-PR
Filed June 10, 2022

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NOT FOR PUBLICATION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. CR20192994001
The Honorable Michael J. Butler, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Erin E. Duffy P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Gregory Jaskiewicz seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Jaskiewicz has not met his burden of establishing such abuse here.

¶2 Pursuant to a 2019 plea agreement, Jaskiewicz was convicted of attempted sexual assault and kidnapping, and he also admitted to having one historical prior felony conviction. The trial court sentenced him to 6.5 years' imprisonment for the attempted sexual assault and suspended the imposition of sentence and placed Jaskiewicz on a consecutive seven-year term of probation for the kidnapping.

¶3 Thereafter, Jaskiewicz initiated a proceeding for post-conviction relief. In his July 2021 petition, Jaskiewicz raised a claim of ineffective assistance of trial counsel. He argued that counsel should have requested a competency evaluation pursuant to Rule 11, Ariz. R. Crim. P., before Jaskiewicz entered into the plea agreement based on his "extensive mental health history," specifically, his post-traumatic stress disorder (PTSD), and his "history of alcohol abuse." In addition, Jaskiewicz asserted that counsel had "failed to visit and consult with [him]" and "should have

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "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) ("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'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

entered into meaningful plea negotiations," including "requesting the charges be lowered to available lesser included offenses."

¶4 In its December 2021 ruling, the trial court summarily dismissed Jaskiewicz's petition. With regard to the competency evaluation, the court explained that Jaskiewicz's counsel had not been deficient because Jaskiewicz failed to advise counsel of his PTSD or alcohol abuse and also did not "explain . . . how these issues prohibited him from rationally understanding the nature of the proceedings or from consulting with his attorney in a rational manner." The court also noted that "[g]enuine and rational reasons existed" for taking the plea, including that he had been sentenced as a category two repetitive offender, rather than a category three repetitive offender, as he "almost certainly would have been" if he lost at trial. Even if counsel should have requested an evaluation, however, the court determined that Jaskiewicz "cannot establish how the result of the proceedings would have been any different." The court next concluded that counsel had not been "ineffective for failing to meet additional times with [Jaskiewicz]" and that Jaskiewicz could not "show prejudice," in part because he "admits he was adamant about taking the plea, regardless of the advice of counsel." Finally, the court determined that counsel had not been ineffective in negotiating a different plea and that Jaskiewicz had failed to establish prejudice, again, because "he was going to take the plea" that was offered. This petition for review followed.

¶5 On review, Jaskiewicz repeats his claim that trial counsel was ineffective in failing to request a competency evaluation.[2] He maintains the trial court abused its discretion by not ordering an evidentiary hearing because he had "included proof of his mental health issues" with his petition and, "[h]ad the trial court taken these facts as true . . . , the only conclusion [it] could have reached was that the outcome of the proceedings would have been different." He further reasons that, "[u]pon a finding of incompetence," he "would have been restored to competency" and then "would have followed counsel's advice and rejected the plea agreement."

[2]Jaskiewicz does not raise on review his claim that trial counsel was ineffective in failing to negotiate a better plea agreement. In addition, he only reasserts the argument that counsel failed to consult with him to the extent that it relates to counsel's discovery of his mental-health issues. We therefore do not address his other claims of ineffective assistance of counsel. *See* Ariz. R. Crim. P. 33.16(c)(4); *see also State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013).

¶6 In a proceeding for post-conviction relief, a petitioner is entitled to an evidentiary hearing if he presents a colorable claim. *State v. Bigger*, 251 Ariz. 402, ¶ 9 (2021). The relevant inquiry is whether the petitioner "has alleged facts which, if true, would *probably* have changed the verdict or sentence." *Id.* (quoting *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016)). "The claim is subject to summary dismissal '[i]f the alleged facts would not have probably changed the verdict or sentence.'" *Id.* (quoting *Amaral*, 239 Ariz. 217, ¶ 11).

¶7 "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)). Whether conduct is objectively reasonable is measured by the "'practice and expectations of the legal community' at the time the lawyer provides representation." *State v. Miller*, 251 Ariz. 99, ¶ 10 (2021) (citation omitted) (quoting *Hinton v. Alabama*, 571 U.S. 263, 272-73 (2014)). A defendant establishes prejudice by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bennett*, 213 Ariz. 562, ¶ 25 (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* ¶ 21.

¶8 Jaskiewicz's prejudice argument is flawed insofar as it is based on unwarranted assumptions. He asserts that, had trial counsel requested a competency evaluation, the trial court would have granted that request, he would have been found incompetent, he would have then been restored to competency, and he would have ultimately rejected the plea agreement. But the court suggested it would not have ordered a competency evaluation and, at a minimum, would have required "additional facts" to support the request, "not just that [Jaskiewicz] was entering into a plea agreement against counsel's advice and had a history of PTSD and alcohol abuse."[3] *See* Ariz. R. Crim. P. 11.3(a)(2) (court must order competency examination if "reasonable grounds exist"); *State v. Amaya-Ruiz*, 166 Ariz. 152, 162 (1990) ("The trial court has broad discretion in determining whether reasonable grounds exist to order a competency

[3] The same judge presided over the change-of-plea hearing, the sentencing, and this Rule 33 proceeding.

hearing and its decision will not be reversed absent a manifest abuse of discretion.").

¶9 In addition, Jaskiewicz has failed to establish that he would have been found incompetent. Jaskiewicz's "proof of his mental health issues" included a finding by the Department of Veterans Affairs that he suffered from PTSD as a result of his military service and that his alcohol use was related to his PTSD. But "[a] defendant is not incompetent . . . merely because the defendant has a mental illness, defect, or disability." Ariz. R. Crim. P. 11.1(b). Instead, to support his assertion, Jaskiewicz needed to show that he was "unable to understand the nature and objective of the proceedings or to assist in his . . . defense because of a mental illness, defect, or disability." Ariz. R. Crim. P. 11.1(a)(2). Although Jaskiewicz's Rule 33 counsel avowed that she had "doubts whether he was able to assist [trial counsel] on his case," her uncertain, unsupported opinion was based on interactions with Jaskiewicz more than a year after he had entered into the plea. *See State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999) (petitioner carries burden of showing ineffective assistance and showing must be "provable reality, not mere speculation"); *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (trial court sole arbitrator of witness credibility). Jaskiewicz has not met his burden of establishing that he was prejudiced by counsel's failure to request a competency evaluation.

¶10 Moreover, Jaskiewicz does not challenge the trial court's additional finding that trial counsel's performance did not fall below objectively reasonable standards. *See* Ariz. R. Crim. P. 33.16(c)(4) ("A party's failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue."); *see also State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to develop argument waives claim on review). Notably, despite not requesting a competency evaluation, counsel informed the court of his concerns about Jaskiewicz's state of mind at the change-of-plea hearing:

> [Counsel]: Your Honor, I do have concerns about Mr. Jaskiewicz taking the plea today. He has indicated his desire to do so. I spoke with him about it at the jail.
>
> At the time that I spoke with him, he had indicated that he had been having some mental health issues at the jail and was even—had suicidal ideations. I think that he'd indicated to me that it is a result of being in the jail, that he

> is struggling with his conditions there in the jail, . . . and that he wants to take it just so he can get to prison.
>
> . . . .
>
> The Court: All right. Well, let me ask you this, is there anything to suggest that he doesn't understand the terms of the plea?
>
> [Counsel]: No.
>
> The Court: Anything to suggest that he can't assist you in a defense?
>
> [Counsel]: No.
>
> The Court: Okay. And so anything to make you believe that he can't—he doesn't understand the proceedings and how a trial would work?
>
> [Counsel]: No.
>
> The Court: All right. So it's not a competency issue?
>
> [Counsel]: No.
>
> The Court: You're just concerned about an emotional issue?
>
> [Counsel]: Right.

We agree with the court that counsel's conduct was reasonable under the circumstances. *See Miller*, 251 Ariz. 99, ¶ 10 (strong presumption exists that counsel's conduct falls within range of reasonable professional assistance). The court therefore did not abuse its discretion in summarily dismissing Jaskiewicz's petition. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶11 Accordingly, we grant review but deny relief.