IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MATEO DINA ZAVALA,
Petitioner.

No. 2 CA-CR 2023-0158-PR
Filed December 15, 2023

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NOT FOR PUBLICATION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. CR20193162001
The Honorable Kathleen A. Quigley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Laura Conover, Pima County Attorney
By Tai Summers, Deputy County Attorney, Tucson
Counsel for Respondent

Law Office of Francisco León, Tucson
By Francisco León
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Gard concurred.

V Á S Q U E Z, Chief Judge:

¶1 Petitioner Mateo Zavala seeks review of the superior court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Mendoza*, 249 Ariz. 180, ¶ 1 (App. 2020). Zavala has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Zavala was convicted of second-degree murder and two counts of aggravated assault with a deadly weapon or dangerous instrument. The superior court sentenced him to consecutive prison terms totaling thirty-four years. Zavala sought post-conviction relief, arguing his guilty plea and resulting sentences were invalid because he had been present telephonically rather than in person at the change-of-plea proceeding and the court had failed to advise him of his right to a twelve-person jury. He further argued trial counsel had been ineffective for failing to object to these errors.[1] The court summarily dismissed the proceeding. This petition for review followed.

¶3 On review, Zavala repeats his claim that his "telephone conference plea violated his right to be personally present for a change of plea." Zavala correctly points out that absent exceptions not applicable here, Rule 17.1(a)(2), Ariz. R. Crim. P., provides that "a court may accept a plea only if the defendant makes it personally in open court." But he fails to acknowledge that at the time he pleaded guilty, Ariz. Sup. Ct. Admin. Order 2021-187 (Dec. 14, 2021) was in effect. That order allowed for proceedings in the superior court to "be held by teleconferencing or video

[1] Zavala also argued trial counsel had been ineffective at the mitigation hearing because counsel "did not present any evidence or testimony tending to mitigat[e] his sentence." He does not reassert this claim on review, and we therefore do not consider it. *See* Ariz. R. Crim. P. 33.16(c)(4); *see also State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013).

conferencing, consistent with core constitutional rights." Zavala does not expressly argue that his telephone appearance to plead guilty violated any core constitutional right. *See State v. Hagerty*, 255 Ariz. 112, ¶¶ 5, 7 (App. 2023) (Rule 17 violation "does not necessarily mean that the defendant's constitutional rights were violated"); *see also State v. Forte*, 222 Ariz. 389, ¶ 15 (App. 2009) (classification of presence error depends on impact of constitutional violation on overall structure of criminal proceeding); A.R.S. § 26-303(D) (governor may proclaim state of emergency); Ariz. Const. art. VI, §§ 3 ("The supreme court shall have administrative supervision over all the courts of the state."), 5 (supreme court has power "to make rules relative to all procedural matters in any court"); *State v. Basquin*, 970 N.W.2d 643, 654, 659-60 (Iowa 2022) (supervisory order during pandemic allowing written guilty pleas instead of in-person pleas did not violate defendant's due process rights). Zavala also fails to challenge—or even acknowledge—the Pima County Superior Court administrative order stating change-of-plea hearings would "presumptively be conducted telephonically."

¶4 Zavala contends the superior court was unable to observe his demeanor and his telephonic presence denied him "the right to have his counsel by his side to advise and counsel him regarding the proceedings" or "seek advice confidentially." But the record reflects that during the plea colloquy, Zavala never raised any issue, asked to speak privately with counsel, or otherwise indicated he had concerns with the plea. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998) (claim not colorable when directly contradicted by record). And while the personal presence requirement helps the court ascertain that a defendant's waiver is truly knowing, voluntary, and intelligent, *see Hagerty*, 255 Ariz. 112, ¶¶ 4-5, we are convinced that on this record those requirements were satisfied here. Although the court could not see Zavala, it nevertheless heard his voice in real time, giving it the opportunity to hear any hesitance there might have been, consistent with the purpose of Rule 17.1.

¶5 Moreover, Zavala has not asserted, let alone shown, that he would not have entered his guilty plea had he been personally present. *See State v. Morales*, 215 Ariz. 59, ¶ 11 (2007) (prejudice generally established by showing defendant would not have pleaded guilty absent error); Ariz. R. Crim. P. 33.7(e) ("The defendant must attach to the petition any affidavits . . . available to the defendant supporting the allegations in the petition."). Instead, the record reflects that before proceeding with his guilty plea, trial counsel spoke with Zavala, reviewed his right to be present in the courtroom, and asked him whether he would prefer to continue the matter to a time when he could attend personally, but Zavala "decided to

proceed telephonically." *See Jenkins*, 193 Ariz. 115, ¶ 15. Thus, even assuming that the superior court erred by accepting Zavala's plea telephonically, the error was not prejudicial and the court did not abuse its discretion by summarily dismissing this claim. *See Mendoza*, 249 Ariz. 180, ¶ 1.

¶6 Zavala also maintains his guilty plea and resulting sentence are invalid because he was not specifically "informed of his right to a 12-person jury." He correctly points out that our constitution guarantees the right to a twelve-person jury in cases involving the possibility of thirty or more years of imprisonment. Ariz. Const. art. II, § 23; *see also* A.R.S. § 21-102(A). But Zavala was advised that by pleading guilty he was giving up, among other things, "a jury trial," consistent with Rule 17.2(a)(3), Ariz. R. Crim. P. *See State v. Schoonover*, 128 Ariz. 411, 415 (App. 1981) (compliance with Rule 17.2(a)(3) requires defendant be informed of right to jury trial). And Zavala has not cited any authority, nor are we aware of any, to support his contention that the superior court must inform the defendant of the number of jurors he is foregoing by waiving a jury trial. We will not read such a requirement into the rule. *See Roberts v. State*, 253 Ariz. 259, ¶ 20 (2022) (courts will not "read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself" or "inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions" (quoting *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965))); *State v. Simon*, 229 Ariz. 60, ¶ 7 (App. 2012) (applying principles of statutory construction when interpreting rules of procedure, looking to plain language of rule as best and most reliable index of its meaning).

¶7 Zavala relies on *State v. Maldonado*, 206 Ariz. 339 (App. 2003), arguing that he never waived his right to a twelve-person jury. In that case, we explained that "[t]he waiver of a twelve-person jury is comparable to the waiver of a jury trial," and thus must be knowing, voluntary, and intelligent. *Id.* ¶ 12. We reversed the defendant's convictions because the defendant was entitled to a twelve-person jury but was convicted by a jury of eight and the trial court did not ascertain the validity of the defendant's waiver. *Id.* ¶¶ 10-16. *Maldonado* is distinguishable. Zavala was not convicted by an eight-person jury, nor was he asked to proceed to trial with a jury of less than twelve. Rather, by pleading guilty, Zavala waived his right to a trial by a jury regardless of the number of jurors. And, as noted, the superior court informed Zavala of his right to a trial by jury and that he was foregoing that right. Again, Zavala has not asserted, let alone shown, that he would not have entered his guilty plea had he been advised about his right to a twelve-person jury.

¶8 Zavala also challenges the superior court's dismissal of his claim that trial counsel was ineffective for failing to object to these purported errors. "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)). As we have explained, none of the issues Zavala raised constituted error. Accordingly, we cannot say counsel's failure to object to them was unreasonable. *Cf. State v. Valdez*, 160 Ariz. 9, 15 (1989) (not every failure of counsel to object to improper question, exhibit, or argument ineffective assistance of counsel), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364 (1995). Nor could Zavala demonstrate prejudice, as he has not asserted that but for counsel's purported errors, he would have rejected the plea. *See State v. Nunez-Diaz*, 247 Ariz. 1, ¶ 13 (2019). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Bennett*, 213 Ariz. 562, ¶ 21. The superior court did not abuse its discretion by summarily dismissing this claim. *See Mendoza*, 249 Ariz. 180, ¶ 1.

¶9 We grant review but deny relief.