

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0236-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
VICTOR LIRA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701464

Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF DENIED

Marc J. Victor, P.C.
By Marc J. Victor

Chandler
Attorney for Petitioner

ESPINOSA, Presiding Judge.

¶1 Petitioner Victor Lira was initially charged with first-degree murder, armed robbery, and theft. He was subsequently charged with second-degree murder, armed robbery,

and theft in a second indictment and the two indictments were consolidated. In January 2008, Lira pled guilty pursuant to a plea agreement to manslaughter, a class two, dangerous felony, stipulating to a sentencing range between 10.5 and nineteen years in prison. The trial court sentenced him to nineteen years' imprisonment. Lira sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting his plea was not supported by an adequate factual basis and that his trial counsel had been ineffective. The trial court denied relief, and this petition for review followed. We will not disturb the trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 “Before entering judgment on a guilty plea, the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads.” *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994). The trial court may rely on the extended record in determining whether a factual basis existed for a plea. *See State v. Johnson*, 181 Ariz. 346, 349, 890 P.2d 641, 644 (App. 1995). The extended record includes proceedings before the grand jury, *see State v. Varela*, 120 Ariz. 596, 598, 587 P.2d 1173, 1175 (1978), which the trial court specified it had considered in this case. “A factual basis can be established by ‘strong evidence’ of guilt.” *Salinas*, 181 Ariz. at 106, 887 P.2d at 987. It “does not require a finding of guilt beyond a reasonable doubt,” and “a judge is not limited to a defendant's statement at the plea hearing in ascertaining a factual basis for a

guilty plea.” *Id.* at 106-07, 887 P.2d at 987-88, *quoting State v. Brooks*, 120 Ariz. 458, 461, 586 P.2d 1270, 1273 (1978).

¶3 A person commits manslaughter by “[r]ecklessly causing the death of another person.” A.R.S. § 13-1103(A). In denying Lira’s petition for post-conviction relief challenging the sufficiency of the factual basis, the trial court stated it had reviewed the transcripts from two grand jury proceedings, one on June 14, 2006, the other on September 13, 2007. Pointing to the specific pages and lines of those transcripts, the court found they “include testimony that the victim in this case died as a result of stab wounds to the neck and torso,” and that Lira had admitted to Eloy police detective Brenda Erickson, the officer who testified at the grand jury proceedings, that he had “accidentally stabb[ed] the victim.” The court further noted that, at the change-of-plea hearing, Lira had “confirm[ed] that he [had] stabbed the victim in the torso or chest area and that it was a fatal wound.”

¶4 Lira contends on review that the trial court erred when it found the grand jury transcripts established an adequate factual basis for his plea because the detective who testified read portions of an autopsy report that were not supported by the examination itself. He asserts that, although the report stated the victim had died of stab wounds to the neck and torso with perforations to the interior neck venous structures and left lung, the autopsy report contains no description of cuts or stab wounds to the torso. He points to other instances in which he claims discrepancies existed between the detective’s testimony and the report. But Lira did not make this argument in his petition for post-conviction relief. Rather, he argued

he had “only admitted to an accidental cut to the victim, not the multiple deep stab wounds, one or more of which are the cause of death,” which he claimed were the basis of the testimony before the grand jury. He maintained he “never admitted to committing the requisite elements of the crime.” We will not address the arguments Lira raises for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9.

¶5 Moreover, Lira did not provide the trial court with a copy of the medical examiner’s report, nor was it part of the existing record. Therefore, even assuming the argument he raises on review could be regarded as a fair challenge to the trial court’s ruling rather than a new argument, he has not substantiated his claim that material discrepancies existed. Additionally, Lira acknowledges the autopsy report stated “that [the victim] had a least nine stab wounds to the head, torso, and extremities, with a skull fracture, perforations of the left lung, and perforations of the anterior neck venous structures.” We fail to see any material discrepancies between Detective Erickson’s testimony at the grand jury proceedings and what purportedly was in the autopsy report.

¶6 Lira also contends there was an insufficient factual basis because he never admitted he had inflicted the fatal wounds. We disagree. First, we note that, at the settlement conference/change-of-plea hearing, Lira stated he had reviewed the plea agreement with counsel, counsel had explained the terms of the agreement to him, and he understood the rights he was waiving by entering the plea. Among the questions the court

asked was whether he agreed to enter the plea because he had committed the crime; Lira responded, “Yes.” Although there were discussions about the adequacy of the factual basis for the plea, ultimately the parties and the court were satisfied an adequate factual basis had been established. Lira admitted he “had an altercation with a cousin of the victim. It got out of hand. [The victim] got cut. I left and this is the result.” When the court asked whether this wound had led to her death, Lira responded, “[T]hey never established that.” But Lira’s counsel added, “[T]here is no reason to believe that anything else happened. There’s every reason to believe that it was this cut or more than one cut that did lead to her death.” When the court asked Lira whether he was satisfied with the work of his attorneys in this regard and the information they had obtained showing he had caused her death, Lira said he was.

¶7 The parties then agreed the court could incorporate the grand jury transcripts to aid in establishing the factual basis. The prosecutor stated she was

still somewhat concerned about the factual basis. If we could just be more specific about where he actually cut her, stabbed her, and then I think we can incorporate the grand jury transcript. You know, that wound was considered one of the possible fatal wounds, then I think it would be clearer.

Lira responded, “I’m not too positive about, but it was around this area,” indicating the left breast. The prosecutor then added, “I think the medical examiner’s report will reflect that there was a puncture wound to that area which is—that ended up puncturing her lung[,] that may have been one of the fatal wounds.” Defense counsel stated he had no objection to that statement, and the court found the factual basis was adequate to support the plea.

¶8 Detective Erickson testified at the first grand jury proceeding that she had responded to a call after the victim was found dead in her trailer. Erickson then read from the autopsy report: ““Death of this woman is due to stab wounds to the neck and torso with perforations of the interior neck venous structure[s] and left lung.”” Erickson agreed this meant the victim had been stabbed in the neck, upper shoulder, and torso. Erickson further described where the wounds had been inflicted.

¶9 Erickson also summarized statements made to her by various individuals, including Lira. She stated Lira’s story was not supported by the physical evidence. Lira told her he had been involved in an altercation with another male, that the two of them had knives, the victim had tried to stop it, and he had “slice[d] her shoulder.” But, Erickson later clarified that Lira ““suppose[d]”” he could have stabbed her more times than that. Erickson continued, “At this time there is a lot of anger. He loses track, they fall back, they go forward” Lira claimed the victim gave him the keys to her car, he left in the victim’s car and later learned she had died.

¶10 At the second grand jury proceeding, Erickson testified Lira had said he stabbed the victim “at least once or a couple of times, he’s not sure how many times, in the chest area” Erickson also testified about the medical examiner’s report, describing all of the stab wounds and the cause of death. She agreed with the prosecutor that the victim had sustained “multiple stab wounds in the chest, the back, the shoulder, her face, her head, her forearm, [and] her knee.” Erickson’s testimony, together with Lira’s admissions at the

change-of-plea hearing, provided strong evidence that Lira had stabbed the victim and that one or more of the wounds he had inflicted caused or contributed to her death. The trial court did not err initially when it accepted the plea, nor did it abuse its discretion when it denied Lira's petition for post-conviction relief after having had the opportunity to re-examine the sufficiency of the record to support the plea.

¶11 Lira also asserts, as he did below, that trial counsel had been ineffective in permitting the court to accept the plea without objecting to the sufficiency of the factual basis. But, because the factual basis was adequately established, trial counsel's performance, even if deficient, was not prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (defendant must prove both prongs of *Strickland* test). The trial court did not abuse its discretion by denying relief on this claim.

¶12 Although we grant the petition for review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge