

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

FILED BY CLERK

AUG 15 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0046-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SAUL VIRGEN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094545002

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

Tucson
Attorneys for Petitioner

M I L L E R, Judge.

¶1 Saul Virgen petitions this court for review of the trial court's orders dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Virgen has not met his burden of establishing such abuse here.

¶2 Virgen pled guilty to second-degree murder and was sentenced to a twenty-year prison sentence. His guilty plea was based on a theory of accomplice liability; Virgen’s brother, Jose, had stabbed the victim to death, and Virgen had aided in the attack.¹ Virgen then sought post-conviction relief, arguing the “factual basis for his plea did not establish his guilt beyond a reasonable doubt” because it did not demonstrate he had acted as Jose’s accomplice, and suggesting he had been “under duress when pleading guilty.” Virgen also suggested he was actually innocent, relying primarily on an interview—conducted after the change-of-plea hearing—of a witness, N.R., who claimed a third person had stabbed the victim. In his reply to the state’s response, Virgen further claimed his trial counsel had been ineffective because she did not provide Virgen with “relevant disclosure,” specifically the interview of the aforementioned witness inculcating a third party and an autopsy report. Thus, Virgen asserted, he could not make an informed decision whether to plead guilty.

¶3 The trial court summarily rejected Virgen’s claims that the factual basis for his plea was insufficient, that he entered the plea under duress, and that he was actually innocent. The court determined, however, that Virgen had presented a colorable claim of ineffective assistance of counsel and set an evidentiary hearing. After the hearing, at

¹Virgen’s plea was a contingency agreement requiring Jose also to plead guilty to second-degree murder. *See State v. Solano*, 150 Ariz. 398, 402, 724 P.2d 17, 21 (1986). Both entered their pleas at the same change-of-plea hearing immediately before the start of the second day of trial. At that point, the trial court and defendants had heard a description of the state’s evidence.

which Virgen and trial counsel testified, the court denied relief on that claim and dismissed Virgen’s Rule 32 proceeding. This petition for review followed.

¶4 On review, Virgen repeats his claim that the factual basis for his plea was insufficient and again argues that he is actually innocent of second-degree murder. He further asserts those claims were colorable and the trial court thus erred in summarily rejecting them without holding an evidentiary hearing. “A defendant is entitled to an evidentiary hearing on a colorable claim—one that, ‘if defendant’s allegations are true, might have changed the outcome.’” *State v. Donald*, 198 Ariz. 406, ¶ 8, 10 P.3d 1193, 1198 (App. 2000), *quoting State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

¶5 We first address Virgen’s claim that the factual basis for his guilty plea was insufficient. The factual basis for a plea is “established by ‘strong evidence’ of guilt and does not require a finding of guilt beyond a reasonable doubt.” *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994), *quoting State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986). Thus, to adequately support Virgen’s conviction of second-degree murder, the record must contain strong evidence that he knowingly participated in, aided in, or attempted to aid in conduct that would lead to the victim’s death or serious injury. *See* A.R.S. §§ 13-301; 13-303; 13-1104(A)(2).

¶6 Virgen argues the factual basis was insufficient because he only admitted “that he intervened to end the fight between” Jose and the victim, and thus the factual basis did not establish his liability as an accomplice. But the trial court correctly noted that Jose had admitted stabbing the victim, that Virgen had admitted holding the victim down, and that counsel had represented to the court that a witness would testify that

Virgen had struck the victim during the struggle. Even if Virgen is correct that the plea colloquy only permits the inference that he had attempted to hold the victim down only after Jose had stabbed him, that conduct plainly permits the inference that Virgen had attempted to aid in Jose’s attack on the victim, particularly in light of his admission that he had assisted Jose, knowing his conduct would result in the victim’s death or serious physical injury. *See* §§ 13-303(2); 13-1104(A)(2). Additionally, during the plea colloquy, the court incorporated the grand jury transcript, which provided further evidence that Virgen had not only participated in the attack on the victim, but that he or Jose, or both of them, had later acknowledged that they had killed the victim in retaliation for a supposed earlier attack on Virgen—although they were unsure the victim had participated in that attack—and had disposed of a knife after cleaning blood from it. Viewed as a whole, the plea colloquy and grand jury transcript clearly are sufficient to permit the conclusion that Virgen participated as an accomplice in the victim’s murder.

¶7 We reject Virgen’s related suggestion that his plea must be examined under a more stringent standard because he “repeatedly maintained his innocence during the change-of-plea colloquy.” We agree with the trial court that Virgen did not maintain his innocence during the plea colloquy but instead evinced a clear intent to plead guilty by admitting that he held the victim down during Jose’s assault and that he knew he was participating or aiding in conduct that would lead to the victim’s death or serious injury.² *See* §§ 13-301; 13-303; 13-1104(A)(2).

²Although Virgen was at times confused about the facts asserted at the change-of-plea hearing and professed that he had only a “sketchy” recollection of the events leading

¶8 We now turn to Virgen’s claim of actual innocence. A defendant is entitled to relief pursuant to Rule 32.1(h) if he or she “demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt.” First, to the extent Virgen’s actual-innocence claim relies on his argument that the factual basis for his plea was not sufficient, we have rejected that argument. Virgen suggests his innocence nonetheless is established by a witness’s statement that a third party had stabbed the victim to death after Virgen and Jose had left and a doctor’s statement that “a person would have blood on [his] clothing if [he] stabbed somebody as many times as [the victim] was stabbed.”³ Virgen did not rely on the doctor’s statement in his petition below and we therefore do not consider it here. And we

to the victim’s death, Virgen does not suggest his plea was involuntary because he was unable to recall whether he participated in the victim’s murder. Also, to the extent Virgen raises the argument on review, we agree with the trial court that he has not identified any evidence suggesting he was coerced into entering the plea.

³We assume, without deciding, that a defendant can raise a cognizable claim pursuant to Rule 32.1(h) when that defendant has knowingly and intelligently admitted his or her guilt and waived the right to have his or her guilt determined beyond a reasonable doubt, as Virgen did here. *See State v. Norgard*, 92 Ariz. 313, 315, 376 P.2d 776, 778 (1962) (characterizing as “frivolous” motion to withdraw from plea when “the only basis given . . . was that the defendant apparently changed his mind and claimed to be innocent”); *State v. McFord*, 125 Ariz. 377, 379, 609 P.2d 1077, 1079 (App. 1980) (agreeing with trial court that “when a plea is knowingly and voluntarily entered with effective assistance of counsel, and when there is a factual basis for the plea, the foundation and purpose of plea bargaining would be undermined by allowing a party to later recant and request withdrawal of his guilty plea”); *see also State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (plea agreement waives all non-jurisdictional defects, including deprivations of constitutional rights); *Salinas*, 181 Ariz. at 106, 887 P.2d at 987 (factual basis requires only “‘strong evidence’ of guilt and does not require a finding of guilt beyond a reasonable doubt”), *quoting Wallace*, 151 Ariz. at 365, 728 P.2d at 235.

agree with the trial court that the witness's statement does not constitute clear and convincing evidence of Virgen's innocence. That statement, at best, contradicts the remaining evidence in the record, which clearly is sufficient to support Virgen's guilty plea.

¶9 We additionally reject Virgen's argument that he is entitled to an evidentiary hearing on either claim. As we noted above, the witness's statements regarding a third party do not establish his innocence. And, whether the factual basis of a plea is sufficient is an inquiry necessarily limited to the facts in the record. *See State v. Johnson*, 181 Ariz. 346, 349, 890 P.2d 641, 644 (App. 1995). Evidence not in the record is irrelevant to that inquiry and, thus, an evidentiary hearing would serve no purpose.

¶10 Virgen next asserts the trial court erred in rejecting his claim that counsel had been ineffective in failing to provide him with "relevant exculpatory disclosure before he accepted the plea." He argues the court erred in concluding that counsel had, in fact, provided Virgen with the autopsy report. Virgen's argument, however, amounts to a request to reweigh the evidence presented at the hearing, which we will not do. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). And, although Virgen claims the court's findings are inconsistent with the evidence, he provides no citation to the hearing transcripts or exhibits to support his claim that counsel had delivered disclosure to him before receiving the report or that counsel's "trial file . . . was in great disarray." *See Ariz. R. Crim. P. 32.9(c)(1)* (petition for review shall contain "specific references to the record"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). In any event, even had Virgen

adequately presented this claim on review, we conclude the trial court correctly resolved it in its thorough order denying relief. No purpose would be served by restating the court's ruling, which we adopt. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶11 Finally, Virgen argues counsel was ineffective because she did not “attempt to locate and interview” N.R. before Virgen entered his guilty plea. Virgen did not raise this claim below and we therefore do not address it. *See Ariz. R. Crim. P. 32.9(c)(1)* (petition for review shall include “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court will not consider for first time on review issues not presented to, or ruled on by, trial court).

¶12 For the reasons stated, although review is granted, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge