

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

JUL -2 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0108-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ALBERT EDWARD MORELLI JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082223

Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

Lori J. Lefferts, Pima County Public Defender
By David Euchner

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Albert Morelli seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he had received ineffective assistance of counsel. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.”

State v. Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Morelli has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Morelli was convicted of two counts of child abuse and two counts each of aggravated driving under the influence of an intoxicant (DUI), aggravated driving with a blood alcohol concentration of .08 or more, and aggravated driving while under the extreme influence of intoxicating liquor, all while a minor was present. These charges arose from an incident in which he was stopped by a police officer while backing his car out of a driveway with his wife and two children inside after his wife and her mother had been engaged in a verbal altercation. The trial court imposed concurrent sentences, the longest of which was three years. This court affirmed Morelli's convictions and sentences on appeal. *State v. Morelli*, No. 2 CA-CR 2010-0206 (memorandum decision filed May 18, 2011).

¶3 Morelli thereafter initiated a proceeding for post-conviction relief, arguing in his petition (1) he had received ineffective assistance of trial counsel because counsel had failed "to request a jury instruction on necessity" in relation to the child abuse charges,¹ (2) he had received ineffective assistance of appellate counsel because counsel should have challenged the trial court's failure to give such an instruction sua sponte, and (3) there had been a significant change in the law relating to a defendant's invocation of his Fourth Amendment rights. The trial court summarily denied relief, concluding Morelli had not stated a colorable claim of ineffective assistance of counsel and had not

¹"[T]he necessity defense does not apply to criminal offenses defined outside Title 13," including DUI offenses under Title 28. *State v. Fell*, 203 Ariz. 186, ¶¶ 1, 14, 52 P.3d 218, 219, 222 (App. 2002).

established a significant change in the law. Morelli then filed a motion for rehearing on his claim of ineffective assistance, and the court denied that motion as well.

¶4 On review, Morelli abandons his claim of a significant change in the law, *see* Ariz. R. Crim. P. 32.9(c)(1); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010), but again claims appellate counsel was ineffective because he did not challenge the trial court’s failure to give a necessity instruction sua sponte and trial counsel was ineffective in failing to request a necessity instruction. And he alleges the court’s ruling rejecting his claim of ineffective assistance of trial counsel is “unsupported by the record.” We disagree. The court’s findings of fact are supported by the record and it resolved Morelli’s claim of ineffective assistance of trial counsel correctly in thorough, well-reasoned minute entries, allowing this court, and any other in the future, to understand its resolution. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore adopt the court’s rulings on this point.

¶5 Furthermore, Morelli does not address how the trial court erred in implicitly rejecting his claim of ineffective assistance of appellate counsel. Rather, he merely repeats the argument made below. We therefore need not address his claim of ineffective assistance of appellate counsel. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii), (iv). But in any event, we cannot say the court abused its discretion in implicitly rejecting this claim.

¶6 Although Morelli asserts counsel should have raised this claim because it “was a much better issue for appeal” than that which counsel did raise, he has not established that a necessity instruction was in fact required. He has not cited any facts in the record to show that the children were endangered by the fight between his wife and

her mother, nor has he shown that he lacked a “reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from [his] own conduct.” A.R.S. § 13-417. Indeed, on the record before us, the fight between Morelli’s wife and her mother was merely verbal. And Morelli already had called law enforcement for assistance. Indeed, an officer arrived as he was attempting to leave the scene of the fight, suggesting at least one reasonable alternative to his actions was readily available. Accordingly, we cannot say Morelli has established counsel’s choice to exclude this issue on appeal was deficient or that he was prejudiced in any event. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (“Appellate counsel is not ineffective for selecting some issues and rejecting others.”).

¶7 For all these reasons, although we grant the petition for review, relief is denied.

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

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.