

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FREDERICK RAMON JR.,
Petitioner.

No. 2 CA-CR 2013-0388-PR
Filed February 7, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR038802

The Honorable Anna M. Montoya-Paez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Lori J. Lefferts, Pima County Public Defender
By Rebecca A. McLean, Deputy Public Defender, Tucson
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Frederick Ramon seeks review of the trial court's order summarily denying his petition for post-conviction relief. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Ramon has not met his burden of demonstrating such abuse here.

¶2 Ramon was convicted after a jury trial of felony murder, attempted murder, two counts of armed robbery, and three counts of automobile theft. The convictions stemmed from two robberies and several vehicle thefts committed by Ramon and two other individuals during a one-week period in May 1992. The trial court sentenced Ramon to life imprisonment for felony murder and concurrent, presumptive sentences on the remaining convictions. We affirmed his convictions on appeal but remanded for resentencing on several counts. *State v. Ramon*, 2 CA-CR 93-0394 (memorandum decision filed Feb. 7, 1995).

¶3 In 2008, Ramon sought post-conviction relief claiming his trial and appellate counsel had been ineffective and he was permitted to raise those claims in an untimely petition because his failure to timely seek post-conviction relief should be excused pursuant to Rule 32.1(f), Ariz. R. Crim. P. He further claimed that evidence of later perjury in an unrelated case committed by a detective who had testified at his trial – Joseph Godoy – constituted a newly discovered material fact pursuant to Rule 32.1(e), and that *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), constituted a significant change in the law pursuant to Rule 32.1(g) relevant to accomplice liability for attempted murder. The trial court

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summarily dismissed the petition, concluding his claims could not be raised in an untimely proceeding.

¶4 We concluded on review that the trial court had correctly determined his claims of ineffective assistance of counsel were barred as untimely and that Rule 32.1(f) did not apply to him. We granted partial relief, however, because the court had erred in finding that his claims of newly discovered material facts and a significant change in the law were barred as untimely, and we remanded the matter to the trial court for further proceedings. *State v. Ramon*, No. 2 CA-CR 2010-0223-PR (memorandum decision filed Dec. 3, 2010).

¶5 On remand, Ramon filed a supplement to his petition for post-conviction relief raising new claims.¹ Specifically, he argued that *Evanchyk v. Stewart*, 202 Ariz. 476, ¶ 14, 47 P.3d 1114, 1118 (2002), also constituted a significant change in the law relevant to his conviction for felony murder and that he was actually innocent of that crime. He further argued that the United States Supreme Court's decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), was a significant change in the law permitting him to raise untimely claims of ineffective assistance of trial counsel. Thus, he asserted, his claims of ineffective assistance of counsel must be "reinstated."

¶6 The trial court summarily denied relief. It concluded that, because Godoy's perjury had occurred after Ramon's trial, it did not constitute newly discovered evidence because it did not exist at the time of trial. It further found, however, that Ramon could not demonstrate the impeachment evidence probably would have

¹As the trial court noted in its ruling, Ramon did not seek leave to supplement his petition and raise new claims. *See* Ariz. R. Crim. P. 32.6(d) (amendment of pleadings permissible only "upon a showing of good cause"). But, because the court addressed the merits of Ramon's new claims, and because the claims may be raised in an untimely proceeding, we address them on review. *See* Ariz. R. Crim. P. 32.4(a).

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changed the verdict because it “is regarding a collateral matter . . . not related directly to the testimony that was offered at the trial.” The court also noted Ramon would not be permitted to introduce direct evidence of Godoy’s perjury and instead would be “bound by [his] answer” to any questions about that perjury. Regarding Godoy’s testimony at a suppression hearing, the court determined the impeachment evidence would not have changed the outcome because there was no testimony contradicting Godoy’s and thus no “issue of credibility was . . . established.”

¶7 The trial court also rejected Ramon’s claims of actual innocence and his claims that *Phillips* and *Evanchyk* constituted a significant change in the law entitling him to relief, concluding that even in light of those cases there was sufficient evidence to support his convictions for felony murder and attempted murder. Finally, the court determined *Martinez* was inapplicable to Ramon.

¶8 On review, Ramon first asserts the trial court erred in determining Godoy’s perjury did not constitute newly discovered evidence because it had occurred after Ramon’s trial. He asserts that it is evidence of Godoy’s “character trait of dishonesty” that existed at the time of trial. To obtain relief pursuant to Rule 32.1(e), the proffered evidence must have existed at the time of trial but be discovered only after trial; thus, evidence is “newly discovered” only if it is “unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *State v. Saenz*, 197 Ariz. 487, ¶¶ 7, 13-14, 4 P.3d 1030, 1032-34 (App. 2000).

¶9 But we need not determine if evidence of perjury occurring after the trial in question supports a claim of a newly discovered character trait. As the trial court correctly noted, the evidence would be admissible “solely for impeachment” and thus must “undermine[] testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.” Ariz. R. Crim. P. 32.1(e)(3). Ramon has not met his burden to meet that standard.

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¶10 On review, Ramon generally claims Godoy’s testimony was “critical” to several issues and questions of fact, specifically: 1) tire tracks found near a convenience store that had been robbed, 2) a suppression hearing concerning Ramon’s police interview, and 3) whether Ramon had admitted during that interview to putting a gun in the defendants’ car before the first robbery. But Godoy’s testimony about the tire tracks was equivocal, and Ramon has not explained on review how that evidence was critical to the jury’s verdicts. Moreover, beyond stating that Godoy had testified that Ramon had nodded when asked whether he had placed the gun in the car, Ramon does not identify in his petition for review any incriminating statements made by Ramon that would have been subject to suppression; he merely claims without elaboration that the state “relied heavily” on those statements in closing argument. Although Godoy testified that Ramon nodded when asked if he had placed the gun in the vehicle, Godoy acknowledged on cross-examination that a co-defendant had admitted that he had put the gun in the car. And, in any event, Ramon has not explained how that testimony was crucial to any of Ramon’s convictions. Thus, Ramon has not shown the trial court incorrectly rejected his claim of newly discovered material facts.²

¶11 Ramon next claims the trial court erred in rejecting his claim that *Phillips* constitutes a significant change in the law regarding his conviction for attempted murder. A defendant is entitled to relief pursuant to Rule 32.1(g) if a significant change in the law both “appl[ies] to defendant’s case” and “would probably overturn the defendant’s conviction or sentence.” To be a significant change in the law, the new authority must be a “transformative event, ‘a “clear break” from the past.’” *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009), quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).

²We therefore need not address his argument that the trial court erroneously “believe[d] that [Ramon] would need to introduce extrinsic evidence on a collateral matter to present testimony that Godoy has a reputation and character trait of dishonesty.”

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¶12 On appeal, we rejected Ramon’s argument that there was insufficient evidence to support his conviction of attempted murder, citing *State v. Marchesano*, 162 Ariz. 308, 783 P.2d 247 (App. 1989), and concluding the evidence was sufficient because Ramon had known the shooter killed a convenience store attendant in the previous robbery.

¶13 In *Phillips*, our supreme court concluded the defendant could not be held accountable as an accomplice to first-degree murder because “the evidence did not show that he intended to facilitate or aid in committing a murder.” 202 Ariz. 427, ¶ 41, 46 P.3d at 1057. In doing so, the court expressly “disapprove[d] *Marchesano* to the extent it conflicts with today’s holding.” *Id.* n.4.

¶14 In his petition below, Ramon argued that, based on *Phillips*, “intentional participation in a robbery as an accomplice is not sufficient to hold the accomplice accountable for premeditated murder,” reasoning that he was therefore entitled to relief because the state “had presented no evidence of intent” or premeditation by Ramon. The trial court rejected this claim, determining the jury could have concluded Ramon was guilty of attempted murder based on accomplice liability because he knew his codefendant had killed an employee during the group’s robbery of another convenience store days earlier and that his codefendant was armed during the subsequent robbery.

¶15 On review, Ramon argues the trial court erred in evaluating the sufficiency of the evidence, asserting that the relevant issue is instead that the jury was incorrectly instructed that Ramon “did not need to intend the crime of murder be committed” to be guilty of first-degree murder as an accomplice. But Ramon did not raise this argument in his petition below, and we do not address arguments raised for the first time on review. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). And Ramon does not develop any meaningful argument that the trial court erred in concluding there was sufficient evidence to support his conviction of attempted murder based on accomplice liability. Accordingly, we do not address that question. See *State v. Bolton*, 182 Ariz. 290, 298,

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896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

¶16 Ramon next asserts the trial court erred in rejecting his claim that *Martinez* constitutes a significant change in the law entitling him to raise his claims of ineffective assistance of trial and appellate counsel, apparently because the “[i]neffective assistance of post-conviction counsel kept [him] from timely filing his claims.” We determined in *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 4, 6, 307 P.3d 1013, 1014 (App. 2013) that *Martinez* “does not alter established Arizona law” that non-pleading defendants, like Ramon, “have no constitutional right to [effective] counsel in post-conviction proceedings.” Accordingly, the trial court correctly rejected Ramon’s claim based on *Martinez*.

¶17 Finally, Ramon repeats his claim that “he is factually innocent of felony murder,” citing *Evanchyk* and claiming that, unlike the defendant in *Phillips*, his liability “is governed by A.R.S. § 13-303(A)(1), not by (A)(3).”³ Beyond his unexplained references to *Evanchyk* and § 13-303(A), however, Ramon develops no argument on review that he is innocent of felony murder.⁴

³Ramon does not assert on review that *Evanchyk* constitutes a significant change in the law.

⁴Ramon presumably refers to our supreme court’s statement in *Evanchyk* that a defendant cannot “be convicted of felony murder committed by a codefendant unless he was both an accomplice and a participant in the underlying felony.” 202 Ariz. 476, ¶ 14, 47 P.3d at 1118. This statement “is dict[um], and not controlling precedent.” *State v. Rios*, 217 Ariz. 249, ¶¶ 11, 16, 172 P.3d 844, 847-48 (App. 2007) (concluding defendant need not “be present at” or “participate in” underlying felony “to be convicted of felony murder based on the theory of accomplice liability”). We recognize that we referred to the supreme court’s language in *State v. Johnson*, 215 Ariz. 28, ¶ 15, 156 P.3d 445, 449 (App. 2007). But our reference there also was dictum, *see id.* ¶ 28, and “[d]ictum [twice] repeated is still dictum” and thus “is without force of adjudication.” *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81, 638 P.2d 1324, 1327 (1981).

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Moreover, Ramon has not explained why he failed to raise this claim in his earlier petition for post-conviction relief instead of in his unapproved supplement filed after we remanded the case—making said supplement effectively a successive petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.2(b) (when claim of actual innocence raised in successive post-conviction proceeding, defendant “must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition”); Ariz. R. Crim. P. 32.6(d) (no amendment to petition for post-conviction relief permitted “except by leave of court upon a showing of good cause”). Accordingly, we do not address this claim further. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

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