

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRIAN MARK HOPF,
Petitioner.

No. 2 CA-CR 2014-0098-PR
Filed May 21, 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NOT FOR PUBLICATION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 Maricopa County

No. CR2009007508001DT

The Honorable Robert L. Gottsfield, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Brian Hopf, Florence
In Propria Persona

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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 Brian Hopf petitions this court for review of the trial court's order summarily dismissing his pro se petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. 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). Hopf has not met his burden of demonstrating such abuse here.

¶2 Hopf pled guilty to second-degree murder pursuant to A.R.S. § 13-1104 and child abuse pursuant to A.R.S. § 13-3623(A); the charges stemmed from the death of his three-week-old daughter due to skull fractures and subdural hematoma caused by blunt-force trauma. The plea agreement included a stipulation calling for the imposition of consecutive prison terms. Referring to that stipulation, the trial court sentenced Hopf to an aggravated, twenty-two-year prison term for murder to be followed by a minimum, 14.95-year prison term for child abuse.

¶3 Hopf filed a notice of post-conviction relief and appointed counsel filed a notice stating she had reviewed the record and had found no "claims for relief to be raised in post-conviction relief proceedings." Hopf then filed a pro se petition for post-conviction relief claiming his trial counsel had been ineffective because he did not: (1) object to purported errors in a probation violation report concerning the nature of the victim's injuries; (2) object to the trial court's reliance on his prior felony convictions and probation status at sentencing; (3) object to the court, rather than a jury, finding aggravating factors; and (4) argue, based on the prohibition against double jeopardy, that his conviction for child

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abuse should be vacated because it was a lesser-included offense of second-degree murder. He further expanded the last argument in his reply to the state's response to his petition, asserting that even if double jeopardy did not bar his child-abuse conviction, consecutive sentences were prohibited by A.R.S. § 13-116 because his convictions stemmed from the same conduct.

¶4 The trial court summarily dismissed Hopf's petition. It concluded that the errors in the probation report did not affect the sentence imposed, that the court properly could rely on Hopf's criminal history in aggravating his sentence, and that Hopf had waived his right to have a jury determine the existence of aggravating factors. Finally, it found there was no double jeopardy violation or sentencing impropriety because "[a] person can commit second degree murder without committing child abuse" and "each provision requires proof of a fact the other does not."

¶5 On review, Hopf repeats his claim that counsel was ineffective because he did not object to the probation report, specifically its incorrect reference to wrist and ankle fractures sustained by the victim. He further asserts counsel should have objected to his conviction for child abuse, based on the double-jeopardy prohibition, and to his consecutive sentences, based on § 13-116.

¶6 "To state a colorable claim of ineffective assistance of counsel," Hopf was required to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate resulting prejudice, Hopf must show a reasonable probability that the outcome would have been different absent counsel's ineffectiveness. See *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). A claim for relief is colorable, thereby entitling the defendant to an evidentiary hearing, when the "allegations, if true, would have changed the verdict." *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995).

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¶7 The probation violation report, filed before sentencing, stated the victim had sustained so-called “Bucket Handle Fractures” to her ankles and wrist. This information conflicts with the opinion of a forensic anthropologist who attended the victim’s autopsy, that there were no such fractures and a medical examiner’s interview in which she did not mention fractures to the victim’s wrists or ankles. We agree with the trial court that Hopf has not demonstrated any prejudice resulting from this apparent error in the probation report. The court, in imposing sentence, noted that the victim died as a result of Hopf’s “brutal, brutal beating” of the victim. Hopf does not assert the court’s characterization was incorrect and, indeed, the record supports this finding. Nor does Hopf cite anything in the record suggesting the court found the probation report’s reference to the fractures material to its decision to impose an aggravated prison term for second-degree murder.

¶8 We now address Hopf’s claims that his conviction of child abuse violates double jeopardy and, alternatively, that his consecutive sentences violated § 13-116.¹ He asserts that child abuse is a lesser-included offense of second-degree murder “committed against an infant” and thus that his conviction of both crimes violates double jeopardy. Hopf is correct that double-jeopardy principles prohibit convictions for both the lesser and greater offense based on the same conduct. *See Merlina v. Jejna*, 208 Ariz. 1, ¶ 12 & n.3, 90 P.3d 202, 205 & n.3 (App. 2004); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 8, 21, 965 P.2d 94, 96, 99 (App. 1998). Similarly, § 13-116 prohibits consecutive sentences for “[a]n act or omission . . . made punishable in different ways by different sections of the law.” Section 13-116, however, permits consecutive sentences if the

¹We assume, without deciding, that Hopf did not waive these objections by pleading guilty and stipulating to consecutive sentences. *See generally State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008) (guilty plea waives all non-jurisdictional defects, including violation of constitutional rights); *State v. Millanes*, 180 Ariz. 418, 420, 885 P.2d 106, 108 (App. 1994) (“a defendant does not waive a double jeopardy claim by entering into a plea agreement” absent knowing, voluntary expression of waiver).

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defendant's conduct constitutes more than one act. See *State v. Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d 1177, 1179 (App. 2006). Thus, if consecutive sentences can properly be imposed, double jeopardy necessarily is not implicated because the defendant's conduct constitutes multiple acts. See *Blockburger v. United States*, 284 U.S. 299, 302-03 (1932) (if individual acts prohibited, each is punishable separately); see also *State v. Eagle*, 196 Ariz. 27, ¶ 21, 992 P.2d 1122, 1126-27 (App. 1998) (double jeopardy implicated only when "same act or transaction" violates two distinct criminal statutes).

¶9 To determine if consecutive sentences are permitted, we apply the test set forth in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989).

First, we must decide which of the two crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179, quoting *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (citations omitted; alteration in *Urquidez*).

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¶10 Hopf admitted at his change-of-plea hearing that he had “poked his daughter in the eye” and “hit [her] head into a doorjamb,” and that he subsequently failed to take her to the hospital or notify anyone in the house where he lived despite the fact the victim was “unresponsive.” To find Hopf had committed the greater offense of second-degree murder, the factual basis for his guilty plea had to establish that, “[u]nder circumstances manifesting extreme indifference to human life,” he “recklessly engage[d] in conduct that create[d] a grave risk of death and thereby cause[d] the death of another person.” § 13-1104(A)(3). Hopf’s conduct in striking his daughter in the eye and hitting her head against a doorjamb, which caused her to become unresponsive and caused her to sustain skull fractures and a subdural hematoma that resulted in her death, constituted the offense of second-degree murder.

¶11 The remaining evidence—Hopf’s conduct in failing to seek any medical attention for his severely injured daughter—was child abuse pursuant to § 13-3623(A)(1), which requires proof he “cause[d] or permit[ted] a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered,” in “circumstances likely to produce death or serious physical injury.” And because Hopf’s conduct in committing second-degree murder was complete before he committed child abuse by failing to seek medical attention, it was factually possible for him to have committed second-degree murder without having committed child abuse. Thus, Hopf’s commission of second-degree murder and child abuse were based on separate acts, double jeopardy principles are not implicated, and consecutive sentences were permissible under § 13-116.² Counsel therefore could not have been ineffective for failing to raise either argument.

²Because we conclude Hopf’s conduct did not constitute a single act, we need not consider the third *Gordon* factor—whether the child abuse increased the risk of harm to the victim beyond that inherent in murder. See *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (if analysis of first and second factors indicates single act under § 13-116, court “will then consider” third factor); see also *State v. Anderson*, 210 Ariz. 327, ¶ 143, 111 P.3d 369, 400 (2005) (determining offenses were not a single act without reaching third factor of *Gordon*

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¶12 For the reasons stated, although we grant review, we deny relief.

analysis); *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (*Gordon* does not require reaching third factor if consecutive sentences permissible under first two factors).