

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RAY SEGALA,
Petitioner.

No. 2 CA-CR 2014-0177-PR
Filed October 6, 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NOT FOR PUBLICATION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. CR20110653001
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Respondent

Ray Segala, Tucson
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Ray Segala seeks review of the trial court's order denying his motion to modify his sentence, which the trial court treated as a 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). We grant review but deny relief.

¶2 Segala pled guilty to manslaughter and was sentenced to a partially aggravated, 13.5-year prison term. The trial court found as aggravating factors the presence of "[m]ultiple victims; prior felony conviction(s); [and] the brutality/nature of the offense." As part of Segala's plea agreement, the court dismissed pending charges of kidnapping and aggravated assault related to a second victim.

¶3 Segala filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the case but had found no claims for relief to raise in a Rule 32 proceeding. Segala then filed a "Motion to Modify Sentence Pursuant to Rule 24.3," claiming his sentence was unlawful because the trial court, instead of a jury, had found aggravating factors in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The trial court, stating it would treat Segala's motion as a petition for post-conviction relief, ordered the state to respond. In that response, the state argued that Segala had waived his right to a jury determination of aggravating factors because he did not object at sentencing, that the aggravating factors were "implicit in the factual basis" for his plea, and that any error was

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harmless because “[a] jury would have found the same aggravating factors.”

¶4 In his reply, Segala argued the trial court’s finding of multiple victims as an aggravating factor was improper. He asserted he had not “abused” the second victim and, in fact, he had killed the first victim because the first victim had been abusing the second victim; there were “no admissions or jury finding[]” that there had been multiple victims; and any error was not harmless because he had “committed a crime against” only one victim. He further argued his failure to object at trial did not constitute waiver because his claim was of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver.

¶5 The trial court summarily denied relief and dismissed Segala’s petition. It noted Segala had waived in his plea agreement the right to have a jury determine aggravating factors and, “[e]ven if the Court did not consider ‘multiple victims’ as an aggravator, the remaining aggravating factors support an aggravated sentence.” This petition for review followed.

¶6 On review, Segala again insists he “has committed a crime only against” one victim and that no admission or jury finding supports the trial court’s finding of multiple victims. He also claims any error is not harmless because “the non-existent aggravating factor contributed to determining [his] sentence.”

¶7 We find no error. Although a defendant is entitled to a jury determination of aggravating factors other than prior convictions, *see Blakely*, 542 U.S. at 301, 303-04, Segala waived that right in his plea agreement, agreeing that the court could find aggravating and mitigating circumstances by a preponderance of the evidence. And the presentence report stated Segala had prevented the second victim from leaving an apartment and had struck her repeatedly. Thus, the court’s finding of multiple victims was sufficiently supported by the evidence. *State v. Moreno*, 153 Ariz. 67, 70, 734 P.2d 609, 612 (App. 1986) (court may find aggravating factor based on information in presentence report).

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¶8 Moreover, although Segala points out he was not convicted of any offenses related to the second victim, a trial court may consider a defendant's criminal character and criminal history as aggravating factors for sentencing purposes. *See State v. Williams*, 134 Ariz. 411, 413-14, 656 P.2d 1272, 1274-75 (App. 1982). And it may consider conduct that did not result in a criminal conviction, even if any charges were dismissed, as long as there is sufficient information "to demonstrate that a crime or some bad act was probably committed by [the] defendant.'" *State v. Carbajal*, 177 Ariz. 461, 463, 868 P.2d 1044, 1046 (App. 1994), *quoting State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989).

¶9 Finally, even if the trial court had erred in finding the presence of multiple victims, any error was harmless. The court, which had sentenced Segala, found that the remaining factors supported the partially aggravated sentence imposed. Sentencing error is harmless where, as here, the court would have imposed the same sentence absent the inappropriate factor. *See State v. Pena*, 209 Ariz. 503, ¶ 24, 104 P.3d 873, 879 (App. 2005).

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