

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GEORGE WILSON OVERTURF,
Petitioner.

No. 2 CA-CR 2014-0423-PR
Filed January 27, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2009113526001DT
The Honorable Jo Lynn Gentry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

George Wilson Overturf, Florence
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 George Overturf seeks review of the trial court's orders summarily denying his petition for post-conviction relief and motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Overturf has not met his burden of demonstrating such abuse here.

¶2 Overturf was convicted of second degree murder and sentenced to a twenty-five year prison term. This court affirmed his conviction and sentence on appeal. *State v. Overturf*, No. 1 CA-CR 10-0874 (memorandum decision filed Mar. 1, 2012). Overturf sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had found no "tenable issue to submit . . . pursuant to [Rule] 32." Overturf then filed a pro se petition arguing his trial counsel had been ineffective for failing to interview various witnesses, present evidence that his fingerprints were not on the murder weapon and that there was no gunshot residue found on his hands, adequately challenge a search, or rebut the state's evidence of aggravating factors. He also suggested his trial counsel had been ineffective during closing argument and advisory counsel¹ had been ineffective. And he claimed the trial court had "admitted" there were many trial errors, including that it had erred in precluding Overturf from questioning witnesses about the victim's purported conviction for child molestation.

¹Overturf represented himself briefly during trial, but opted to reinstate counsel. He again waived his right to counsel during sentencing.

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¶3 In a supplemental memorandum,² Overturf further claimed that inconsistent statements by certain witnesses “prove[d]” those witnesses “did not know him.” He also suggested counsel was ineffective for failing to adequately cross-examine witnesses and seek suppression of identification testimony. Overturf additionally argued counsel should have sought suppression of a video recording of the shooting and this court erred in rejecting on appeal his suppression argument regarding that video recording. He also suggested we erred in viewing the evidence in the light most favorable to upholding his convictions.

¶4 While the petition was pending, Overturf filed a request that the state disclose the results of fingerprint and gunshot residue analyses. After the state responded that no such analyses had been performed, Overturf asked the court to order the state to conduct the tests. The court denied that request. It then summarily denied Overturf’s petition for post-conviction relief, as well as his subsequent motion for rehearing. This petition for review followed.

¶5 On review, Overturf again asserts that he is entitled to the results of gunshot residue and fingerprint analyses and that trial counsel was ineffective in failing to obtain those results. We disagree for several reasons. First, Overturf has cited no authority suggesting he is entitled to the post-verdict testing of this type of physical evidence, particularly when he has provided no evidence corroborating his claim that the test results would tend to exonerate him. *See State v. Acinelli*, 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997) (speculation file might contain exculpatory information “not sufficient to require a remand for in camera inspection, much less

²Overturf filed the supplemental memorandum as well as a motion to supplement his petition for post-conviction relief with the arguments raised in that memorandum. The trial court did not rule on that motion, and it is not entirely clear from its ruling whether it considered the arguments raised in the supplemental memorandum. We therefore include those claims in our review, to the extent Overturf reasserts them in his petition for review.

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reversal for a new trial”), quoting *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984).

¶6 “To state a colorable claim of ineffective assistance of counsel,” Overturf 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). Even assuming the fingerprint evidence and gunshot residue testing would not inculcate Overturf, he has not shown any prejudice resulting from counsel’s decision not to pursue testing of the evidence. To show prejudice, a defendant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* In addition to the video recording of the shooting, there were several witnesses who saw Overturf fire a handgun at the victim before he was detained nearby. In light of this evidence, there is no reasonable probability Overturf would have been acquitted even if exculpatory evidence concerning fingerprints and gunshot residue had been presented.

¶7 Overturf also repeats his claims that the search warrant was invalid and that counsel was ineffective in failing to challenge it. We rejected his search warrant argument on appeal and he has not identified any meritorious argument counsel should have made. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶8 Overturf also asserts counsel was ineffective in failing to adequately cross-examine certain witnesses. Although he generally claims those witnesses made prior inconsistent statements, he does not identify any of those inconsistencies. Thus, we cannot evaluate this claim and do not address it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review).

¶9 Overturf further argues his counsel was ineffective in failing to contest the trial court’s order precluding him from

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presenting evidence or questioning witnesses concerning the victim's alleged criminal past. But he has not explained how that evidence would have been relevant to his defense or identified any basis upon which the evidence would have been admissible. Thus, this claim fails because he has demonstrated neither deficient performance nor prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶10 Overturf repeats his argument that counsel was ineffective during closing argument because, as he claimed below, counsel "motioned to [him]" while stating, "No matter who the shooter is." Overturf asserts this conduct showed counsel had "fail[ed] to present a defense."³ We reviewed counsel's closing argument and see no reasonable possibility counsel's alleged gesture influenced the jury to convict Overturf. *See id.* Instead, counsel properly and competently argued the state had failed to meet its burden of proof.

¶11 Overturf attempts to incorporate by reference his various filings in the trial court. That procedure is not permitted by our rules and, accordingly, we do not address any additional arguments Overturf raised below but not in his petition for review. *See Ariz. R. Crim. P. 32.5, 32.9(c); State v. Bortz*, 169 Ariz. 575, 578, 821 P.2d 236, 239 (App. 1991). To the extent he suggests we erred in rejecting his various arguments on appeal, he cannot seek review of that decision in a post-conviction proceeding, but instead was required to seek review by our supreme court. *See Ariz. R. Crim. P. 31.19, 32.1.*

¶12 Although we grant review, relief is denied.

³Overturf also alleges that, upon his being found guilty, his counsel received a congratulatory text message from one of his previous attorneys. Overturf has not provided any evidence supporting this allegation, nor has he explained how it is relevant to his claims.