

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JONATHAN BARRETT EDGAR,
Petitioner.

No. 2 CA-CR 2015-0047-PR
Filed July 14, 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NOT FOR PUBLICATION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 Pima County

No. CR056376

The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Jonathan B. Edgar, Florence
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Petitioner Jonathan Edgar seeks review of a January 2015 order dismissing his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” See *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Pursuant to a plea agreement, Edgar was convicted in June 1997 of second-degree burglary, a class three felony. In August 1997, the trial court suspended the imposition of sentence and placed Edgar on intensive probation for five years. A petition to revoke probation was filed just a few months later; the court continued Edgar on probation in January 1998 after he admitted one of the allegations in the petition. In May 1998, a second petition to revoke probation was filed, asserting, inter alia, that Edgar had “changed his residence without prior approval of his probation officer and his current whereabouts [were] unknown.” Edgar was arrested almost sixteen years later, in April 2014, at which time he admitted having absconded from probation. At the disposition hearing in May 2014, the court imposed a maximum, seven-year term of imprisonment, finding as aggravating factors trauma to the victim and Edgar’s having absconded, and as a mitigating factor, Edgar’s difficult childhood.

¶3 Edgar filed a notice of post-conviction relief in June 2014, followed by a petition for post-conviction relief in October 2014, claiming the trial court had illegally imposed a maximum prison term in violation of *Blakely v. Washington*, 542 U.S. 296, 301 (2004), because the aggravating factors were not found to be true

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beyond a reasonable doubt by a jury, rendering his sentence illegal. He also argued trial counsel was ineffective for failing to raise a *Blakely* claim at sentencing. He maintained that although he had admitted to absconding, because it was unclear whether a jury “would have found harm to the victim as an aggravating factor,” he had been prejudiced by counsel’s failure to raise a *Blakely* claim.

¶4 The trial court dismissed Edgar’s Rule 32 petition in January 2015, finding that had he not absconded, “he would have been sentenced prior to *Apprendi*”¹ which, along with *Blakely*, does not apply retroactively. The court reasoned that, based on Edgar’s “rapid inability to comply with conditions of probation, and the victim input at the time, [Edgar] would have been sentenced to an aggravated term,” and explained it was “not prepared to now give [Edgar] the benefit of the *Apprendi/Blakely* line of cases when he absconded for almost a decade and a half preventing the Court from sentencing him, at all.” The court also rejected Edgar’s claim of ineffective assistance of counsel, concluding not only that counsel had not been ineffective because *Blakely* did not apply to Edgar, but he had not been prejudiced: “victim statements were very clear and the crime was terrible. It stretches the imagination to think a jury would not find emotional harm to the victim” See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (in order to state colorable claim of ineffective assistance of counsel, defendant must establish counsel’s performance fell below objectively reasonable professional standards and that deficient performance was prejudicial to defense). Although we disagree with the court’s reasoning, we nonetheless find that it reached the right result and also deny relief. See *State v. Oakely*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994) (appellate court “will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons”).

¶5 In his pro se petition for review, Edgar raises several arguments.² We limit our discussion, however, to the two

¹*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²After Edgar filed his petition for review, we ordered both parties to file supplemental memoranda addressing the effect of

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arguments counsel presented to the trial court in the Rule 32 petition below, to wit, whether Edgar’s sentence was aggravated in violation of *Blakely*, a claim he asserts constitutes fundamental, prejudicial error, and whether counsel was ineffective in failing to raise this issue at sentencing.³ See Ariz. R. Crim. P. 32.9(c)(1)(2) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”).

¶6 We assume without deciding that *Blakely* applies to the sentence imposed upon Edgar’s probation revocation in May 2014.⁴ Cf. *State v. Schmidt*, 220 Ariz. 563, ¶¶ 2-3, 6-7, 11, 208 P.3d 214, 215-17 (2009) (although defendant entered guilty plea before *Blakely* decided, his sentence upon revocation of probation subject to intervening *Blakely* decision). But Edgar failed to object based on *Blakely* at sentencing; he therefore forfeited his right to relief absent fundamental, prejudicial error. See *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). It is Edgar’s burden to establish the error here is both fundamental and prejudicial. See *id.* ¶ 20.

Blakely on Edgar’s sentence, along with the effect, if any, of *State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214 (2009), and *State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005).

³To the extent counsel suggested in the Rule 32 petition below that Edgar “may have other issues he wishes to raise in a *pro se* Petition,” we note that, not only is there no constitutional or other right to hybrid representation, *State v. Murray*, 184 Ariz. 9, 27, 906 P.2d 542, 560 (1995), but the trial court had informed Edgar more than once that it would not accept hybrid representation, and in fact, had asked counsel to “remind [Edgar] of the proper procedure.”

⁴In its supplemental memoranda, the state conceded *Blakely* applied to “Edgar’s aggravated revocation sentence,” and acknowledged Edgar had not knowingly waived his right to have a jury determine the aggravating factors at sentencing.

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¶7 “In *Blakely* . . . , the Supreme Court held that, generally, any fact that increase[s] a defendant’s sentence beyond a ‘statutory maximum’ must be proved to the jury beyond a reasonable doubt.” *State v. Martinez*, 218 Ariz. 421, ¶ 78, 189 P.3d 348, 363-64 (2008), quoting *Blakely*, 542 U.S. at 301-05 (other than fact of prior conviction, trial court may only impose sentence beyond statutory presumptive sentence based on facts submitted to jury and proven beyond reasonable doubt, reflected in jury verdict, or admitted by defendant). In order for the trial court to impose an aggravated sentence under A.R.S. § 13-702(D),⁵ the state had to prove at least one aggravating factor enumerated in A.R.S. § 13-701(D). See *Schmidt*, 220 Ariz. 563, ¶ 1, 208 P.3d at 215 (court may not increase defendant’s maximum potential sentence based solely on catch-all aggravator). Emotional or physical harm (trauma) to the victim is an enumerated aggravating factor under § 13-701(D)(9). Because Edgar’s having absconded is not an enumerated aggravating factor and instead falls under the catch-all provision in subsection (D)(25), it cannot be the sole basis to increase his sentence from the presumptive to an aggravated term. See *Schmidt*, 220 Ariz. 563, ¶ 12, 208 P.3d at 217.

¶8 Edgar does not appear to contest the trial court’s findings related to his having absconded or the court’s use of that factor as a catch-all aggravator under § 13-701(D)(25), nor would the record support such an objection. He instead asserts the court erred by imposing an aggravated sentence based on harm to the victim because he did not waive his right to have a jury determine that factor. We review constitutional issues related to sentencing de novo. *State v. Lizardi*, 234 Ariz. 501, ¶ 12, 323 P.3d 1152, 1155 (App. 2014). Because the court considered the harm to the victim as an aggravating circumstance in the absence of a jury finding to that effect, a finding that was neither *Blakely* compliant nor exempt, it violated *Blakely* and fundamental error occurred. See *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (“Imposition of an illegal sentence constitutes fundamental error.”). To show that a

⁵We cite the current sections of the applicable statutes.

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Blakely error is prejudicial, however, we must consider whether “a reasonable jury, applying the appropriate standard of proof, could have reached a different result [regarding the aggravators] than did the trial judge.” *Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. And, such a determination is “fact intensive.” *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993).

¶9 Before the May 2014 sentencing hearing, the trial court notified Edgar it intended to impose an aggravated sentence. The presentence report and addendum thereto, which the court had reviewed, contained graphic details of the acts of rape and sodomy Edgar perpetrated on the victim, Edgar’s estranged wife, during the burglary in 1997, which “caused significant and long-lasting psychological trauma to the Victim.” The author of the second addendum to the presentence report stated that, when the victim was notified Edgar had been taken into custody in 2014, she “was hoping the caller would tell her [Edgar] was dead, rather than in custody, so she could stop worrying about him returning from Mexico and causing her further injury.” The author also reported that the victim “ha[d] been diagnosed with Generalized Anxiety Disorder as a result of the [1997] assaults and continues to take medication for the disorder,” and that Edgar had “continued to re-victimize and traumatize” her by threats of future harm during the sixteen years he had absconded and was living in Mexico.

¶10 The victim submitted a five-page letter for the trial court’s consideration at sentencing, describing in detail the emotional and physical impact of Edgar’s actions on her. The court also noted it had reviewed Edgar’s sentencing memorandum, in which his attorney had acknowledged “Edgar is abhorrent about his offense conduct.” Noting it had attempted to “get up to speed on a case this old” by looking at “everybody’s perspective,” the court found Edgar had caused “significant harm, trauma to the victim,” and also stated it could not overlook the fact that he had “absconded all these years.” The court then sentenced Edgar to an aggravated term based on harm to the victim and his having absconded.

¶11 On the record before us, we conclude that no rational jury could have failed to find beyond a reasonable doubt that the

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victim suffered substantial emotional harm resulting from Edgar's actions during the 1997 burglary, and we thus conclude Edgar has not demonstrated he was prejudiced by any error. *See Martinez*, 218 Ariz. 421, ¶ 78, 189 P.3d at 363-64 (fact increasing sentence beyond statutory maximum must be proved to jury beyond reasonable doubt). Not only was the trial court presented with overwhelming evidence of harm to the victim in the presentence reports, to which Edgar offered no meaningful objection,⁶ and in the victim's letter, but Edgar did not argue at sentencing that such evidence was incredible. *See State v. Cleere*, 213 Ariz. 54, ¶ 12, 138 P.3d 1181, 1185 (App. 2006) (referring to presentence report and statements of counsel to support lack-of-prejudice finding). In addition, Edgar's own sentencing memorandum conceded his conduct had been "abhorrent." *See id.*

¶12 Thus, Edgar has not demonstrated the result could have been different had a jury, rather than the trial court, determined that he had inflicted emotional or physical harm on the victim. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (to prevail on fundamental error review, defendant must show prejudice). Because Edgar has failed to persuade us the court's finding of harm to the victim as an aggravating factor under § 13-701(D)(9) was prejudicial, any error was harmless. *See State v. Anderson*, 211 Ariz. 59, ¶ 7, 116 P.3d 1219, 1221 (2005) (trial court's failure to submit to jury issue of aggravating factor "at worst harmless error"); *State v. Glassel*, 211 Ariz. 33, ¶ 104, 116 P.3d 1193, 1218 (2005) (no reversible *Blakely* error when defendant could not establish that any reasonable jury would have failed to find aggravating factor).

¶13 And, once a jury would have found this aggravating factor, the trial court would have been permitted to consider other aggravating factors, including Edgar's having absconded. *See State*

⁶At the conclusion of the sentencing hearing, defense counsel asked the trial court if the language regarding "sexual assault and sodomy [as] the basis of the burglary offense of conviction" could be removed from the second addendum to the presentence report, a request the court denied.

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v. Martinez, 210 Ariz. 578, ¶¶ 26-27, 115 P.3d 618, 625-26 (2005) (when jury finds one *Blakely*-compliant aggravating factor, trial court free to consider other aggravating factors not found by jury); *cf. State v. Bonfiglio*, 231 Ariz. 371, ¶ 1, 295 P.3d 948, 949 (2013) (once court identifies specific statutory aggravating factor, it may rely on catch-all aggravator to increase sentence). Finally, because Edgar has not established fundamental, prejudicial error, we cannot say the court abused its discretion in denying relief on his related claim of ineffective assistance of counsel. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if petitioner fails to establish either prong of *Strickland* test, claim of ineffective assistance of counsel necessarily fails).

¶14 Accordingly, although we grant the petition for review, relief is denied.