

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JULIAN OLIVAS,
Petitioner.

No. 2 CA-CR 2015-0235-PR
Filed November 10, 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NOT FOR PUBLICATION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. CR20110656001
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

Julian Olivas, Kingman
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 Petitioner Julian Olivas seeks review of the trial court’s order denying his 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.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Olivas has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Olivas was convicted of two counts of aggravated assault and was sentenced to concurrent prison terms of five years. This court vacated a criminal restitution order entered at sentencing, but otherwise affirmed his convictions and sentences on appeal. *State v. Olivas*, No. 2 CA-CR 2013-0082 (memorandum decision filed Jan. 28, 2014).

¶3 Olivas thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was “unable to find any colorable issue” to raise in a Rule 32 proceeding. In a supplemental, pro se petition, however, Olivas argued he had received ineffective assistance of counsel in that counsel had not adequately advised him in relation to a plea offer, had “failed to obtain or preserve [his] rights to a sep[a]rate or bifurcated trial regarding the dangerous nature allegation,” had not objected to prosecutorial misconduct in closing arguments, and had not invoked the rule to exclude witnesses from the courtroom. The trial court summarily denied relief.

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¶4 On review, Olivas repeats his claims and argues the trial court abused its discretion in denying his petition without a hearing. “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). 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.*

¶5 Olivas claims his counsel failed to properly advise him of “the strength of the state’s case, the burden to prove his innocence after the victims testified, and the benefits of the plea agreement proffered by the state.”¹ He contends that had counsel advised him about these factors, he would have accepted the plea offer. And he maintains on review that by denying an evidentiary hearing, the trial court improperly resolved “the factual dispute between [his] affidavit . . . and the cold record.”

¶6 But to obtain relief on a claim of ineffective assistance of counsel, Olivas is required to do more than simply contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant’s claim he was unaware sentence “must be served without possibility of early release” not colorable when “directly contradicted by the record”). At a hearing held pursuant to *Donald*,² trial counsel indicated he had explained to Olivas that he had been offered a “probation-available plea” to a class three felony and “it’s more likely than not that he would . . . be

¹At points in his petition for review, Olivas attempts to incorporate by reference the arguments made in his petition for post-conviction relief. Rule 32.9(c)(1) specifically prohibits this procedure, stating “[t]he petition shall not incorporate any document by reference, except the appendices.”

²*State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

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placed on probation.” Counsel also explained that Olivas was charged with two class three felonies that “could run consecutive” and “could be alleged dangerous nature.” Counsel further indicated “there [we]re some major factual problems” with the state’s case, particularly that there were “two witnesses in the car for Mr. Olivas who stated that nobody did” what was alleged. But counsel stated, “if convicted” Olivas would face “a maximum . . . of about 20 years in D.O.C.” On the record before us, the trial court correctly determined that counsel was not ineffective in his advice—as the court stated “the burden of proof does not shift,” Olivas “was well aware that the alleged victims would testify,” and counsel “presented the [offered] plea to [him].”

¶7 Olivas also contends counsel was ineffective because he “failed to obtain or preserve [Olivas’s] right to a sep[a]rate or bifurcated trial regarding the dangerous nature allegations.” Specifically, he argues that *State v. Patterson*, 230 Ariz. 270, 283 P.3d 1 (2012), required bifurcation yet his attorney did not demand it. The latter point is arguable but, more important, this court determined on appeal that Olivas had no right to bifurcation where the allegation is an element of the crime charged. *Olivas*, No. 2 CA-CR 2013-0082, ¶¶ 17-19. Therefore, counsel was not ineffective in obtaining a legally impermissible result and the trial court did not abuse its discretion in rejecting the claim.

¶8 Olivas further maintains counsel should have objected to improper comments he purports the prosecutor made in closing arguments. Olivas fails to cite the record in support of his claim, as required by Rule 32.5. Moreover, we reviewed the transcript of closing arguments and found no such comments. The trial court therefore did not abuse its discretion in rejecting the claim.³

³The trial court also concluded that because a claim of prosecutorial misconduct could have been raised pursuant to Rule 24, Ariz. R. Crim. P., this claim was precluded. The claim of ineffective assistance of counsel relating to a failure to object, however, could only be raised in this proceeding and was not precluded. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). However, we will affirm if the court is correct for any reason, which

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¶9 Finally Olivas argues counsel “failed to invoke ‘the rule’ and exclude witnesses from the courtroom” and did not object to a victim’s presence in the courtroom during testimony. But as the trial court correctly noted, “[i]n keeping with a victim’s constitutional right to be present at proceedings involving a defendant, Rule 9.3(a) exempts victims, as defined in Rule 39(a), from the rule excluding witnesses.” *Patterson v. Mahoney*, 219 Ariz. 453, ¶ 8, 199 P.3d 708, 711 (App. 2008). Olivas has identified no witness other than a victim who was allowed to be present during other witnesses’ testimony. The court therefore properly denied relief on this claim.

¶10 For these reasons, although we grant the petition for review, we deny relief.

in this instance concerns the failure to have provided citations to the record. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).