

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

DAVID ANTHONY IBARRA,  
*Petitioner.*

No. 2 CA-CR 2015-0414-PR  
Filed February 25, 2016

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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NOT FOR PUBLICATION  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.*

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Petition for Review from the Superior Court in Pima County  
No. CR20134015001  
The Honorable Scott Rash, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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

The Law Offices of Stephanie K. Bond, P.C., Tucson  
By Stephanie K. Bond  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Presiding Judge:

¶1 Petitioner David Ibarra 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). Ibarra has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Ibarra was convicted of aggravated assault, assault, and criminal damage, all designated as domestic violence offenses. The trial court sentenced Ibarra to a slightly aggravated eleven-year prison term, followed by concurrent two-year terms of probation. This court affirmed Ibarra’s convictions for aggravated assault and criminal damage, but vacated and remanded his conviction and probationary term for assault.<sup>1</sup> *State v. Ibarra*, No. 2 CA-CR 2014-0296 (memorandum decision filed Apr. 8, 2015). Ibarra then filed a petition for post-conviction relief, asserting claims of ineffective assistance of trial and appellate counsel. The court summarily denied relief.

¶3 On review, Ibarra maintains, as he did below, that: 1) trial counsel was ineffective by failing to seek a curative instruction or moving to strike the victim’s testimony regarding a prior incident of domestic violence between the parties and by referring to that

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<sup>1</sup>On remand, the trial court dismissed the assault conviction and related probationary term without prejudice.

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incident during closing argument; 2) trial counsel should have moved to preclude or strike photographs related to the same incident;<sup>2</sup> and, 3) trial counsel failed to object to a duplicitous charge for aggravated assault pursuant to A.R.S. § 13-1204(B) (count one), thus permitting the jury to possibly reach a non-unanimous verdict, and appellate counsel failed to raise this issue on appeal. *See* § 13-1204(B) (person commits aggravated assault by “intentionally or knowingly impeded[ing] the normal breathing or circulation of blood of another person by applying pressure to the throat or neck or by obstructing the nose and mouth” in context of domestic violence assault). Ibarra also asserts that, at the very least, he was entitled to an evidentiary hearing.

¶4 The trial court properly identified the claims Ibarra had raised and resolved them correctly “in a fashion that will allow any court in the future to understand the resolution.” *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore need not repeat the court’s decision in full, but rather adopt that portion of it which applies to the issues Ibarra has raised on review. *See id.*

¶5 Additionally, to the extent Ibarra points out that “[t]rial [c]ounsel did not provide an affidavit in response to Ibarra’s Petition,” purportedly leading the trial court to “speculat[e]” about trial counsel’s “thoughts and reasoning,” we note that it was Ibarra’s

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<sup>2</sup>On appeal, we concluded the trial court properly denied Ibarra’s motion for mistrial based on the victim’s testimony about prior domestic abuse by Ibarra that was not the subject of the underlying convictions, specifically noting that “the attention given to [the victim’s] remarks was minimal.” *Ibarra*, No. 2 CA-CR 2014-0296, ¶¶ 5, 10-13. When asked about marks on her neck depicted in a photograph admitted as an exhibit at trial, the victim testified that although the marks were “from [Ibarra],” they were not caused by Ibarra “choking” her, nor did they occur during the incident that was the subject of the trial.

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responsibility as the petitioner to provide such an affidavit.<sup>3</sup> See Ariz. R. Crim. P. 32.5. Ibarra submitted no affidavit or other evidence suggesting counsel's decisions had not been based on a reasonable trial strategy. And, Ibarra cites no authority, nor are we aware of any, suggesting a trial court may not rely on its own experience in assessing whether counsel's trial decisions were reasonable, as the court did here. Cf. *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994) ("Because [claims of ineffective assistance of counsel] are fact-intensive and often involve matters of trial tactics and strategy, trial courts are far better-situated to address these issues.").

¶6 Finally, Ibarra argues the trial court improperly relied on *State v. Delgado*, 232 Ariz. 182, ¶ 24, 303 P.3d 76, 83 (App. 2013), a case in which we concluded § 13-1204(B), the statute at issue here, creates a single offense that can be committed in more than one form, requiring proof of only the particular harm set forth in the statute. Ibarra maintains *Delgado* is inapplicable because we addressed only the issue of a duplicitous indictment in that case, while he "is claiming that the evidence presented at trial rendered the *charge* [rather than the indictment] duplicitous."<sup>4</sup>

¶7 We find Ibarra's argument unpersuasive for several reasons. First, despite stating on review that he is challenging only a duplicitous charge, and not a duplicitous indictment, in his Rule 32 petition Ibarra expressly asserted that "[t]he indictment and the

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<sup>3</sup>In his reply to the state's response to his petition below, Ibarra similarly argued "the [s]tate failed to provide a sworn affidavit from trial counsel."

<sup>4</sup>A duplicitous indictment charges two or more offenses in a single count. See *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009). Similarly, a duplicitous charge occurs "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). The potential problems posed by either error include the risk of a non-unanimous jury verdict. See *id.*

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charges for . . . count[] one . . . were duplicitous.” Second, Ibarra has not persuaded us that *Delgado* is meaningfully distinguishable from his case. *Id.* ¶¶ 1, 18. Third, Ibarra has not supported his argument that the jury instructions and verdict form in his case “further compounded the duplicitous charge” for his conviction under § 13-1204(B), issues we specifically addressed and resolved in *Delgado*, our resolution of which supports the trial court’s dismissal of Ibarra’s claim below. *See id.* ¶¶ 20-24.

¶8           Therefore, we grant review but deny relief.