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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. THOMAS WATTERS SOFFEL JR., Petitioner.	2 CA-CR 2012-0319-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007145873001DT

Honorable Karen L. O'Connor, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche — Phoenix
Attorneys for Respondent

Thomas Watters Soffel Jr. — Tempe
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Thomas Soffel Jr. 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). Soffel has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Soffel was convicted of aggravated assault and assault. The charges stemmed from his having swung a baseball bat at a security guard and at a tow truck driver who had attempted to tow Soffel's vehicle for a parking violation. The trial court imposed an enhanced, mitigated, five-year prison term on the aggravated assault charge and time served on the assault charge. His convictions and sentences were affirmed on appeal. *State v. Soffel*, No. 1 CA-CR 08-0218 (memorandum decision filed Feb. 3, 2009). Thereafter, Soffel initiated a proceeding for post-conviction relief,[1] and appointed counsel filed a notice stating he had been "unable to find a meritorious issue" to argue. Soffel filed a pro se petition in which he raised various claims, including violation of his right to remain silent, violation of his right to a twelve-person jury, and claims of ineffective assistance of both trial and appellate counsel. Finding Soffel's claims either precluded or without merit, the trial court summarily denied relief.

¶3 On review, Soffel essentially repeats the arguments he raised below[2] and asserts the "trial court erred in its decision to summarily dismiss [his] petition." For several reasons, we disagree. First, the court correctly found precluded Soffel's claims

[1]Soffel's notice of post-conviction relief was filed in the trial court five days beyond the deadline provided by Rule 32.4, Ariz. R. Crim. P. But he subsequently established that he had given the notice to prison officials for mailing before the deadline. *Cf. Mayer v. State*, 184 Ariz. 242, 244, 908 P.2d 56, 58 (App. 1995).

[2]We do not address any new arguments raised on review, including Soffel's contention that trial counsel was ineffective in failing to request a justification instruction under A.R.S. § 13-407, on self defense. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

that his right to remain silent and right to a twelve-person jury were violated. *See* Ariz. R. Crim. P. 32.2(a)(3). His claim that the state presented perjured testimony, raised without supporting argument or authority in his petition for post-conviction relief, is likewise precluded. *See id.*

¶4 We also agree with the trial court that Soffel's claims of ineffective assistance of counsel are without merit. To present a colorable claim of ineffective assistance, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶5 In this case, Soffel asserts trial counsel was ineffective in failing to request a justification instruction under A.R.S. § 13-411, which provides a defense when a person acts to prevent a crime. Soffel claims counsel should have requested this additional instruction because "[e]vidence was clearly and sufficiently presented at trial that [the victims] . . . committed burglary in the first degree, armed robbery, kidnapping, and aggravated assault." But, the record before us does not show the victims committed any such crimes, rather it shows they were attempting to impound Soffel's vehicle, in a

marked tow truck, for violating his mobile home park's parking regulations. The only contrary evidence was Soffel's testimony that he had believed the car was being stolen, but he also acknowledged he had been aware the car was being taken by a towing company who patrolled the neighborhood and the driver had told him he was impounding the vehicle. In any event, even assuming arguendo that Soffel's testimony was sufficient to merit the instruction, Soffel has not shown that counsel's decision not to request it was the result of "ineptitude, inexperience or lack of preparation" rather than a tactical decision. *See State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984); *see also State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988) ("[m]atters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as basis for claim of ineffective assistance).

¶6 He also asserts trial counsel was ineffective in "fail[ing] to object on the grounds of claim preclusion" and "to [a purported] claim of attempted criminal damage." Soffel's claim-preclusion argument is based on certain testimony by the security guard. He asserts that the trial court sustained an initial objection to the guard's testimony that Soffel's vehicle's tires had been on the street by a few inches, but that the guard thereafter had continued to testify on the point. The record, however, does not show that the initial objection related to the testimony about the tires' location, rather it was to Soffel's apparently having "been warned several times," about parking violations. And, nothing in Rule 16.4, Ariz. R. Crim. P., on which Soffel relies, requires the state to disclose before trial every detail to which a witness might testify. Rather, Rule 15.1(b), Ariz. R. Crim. P., requires the state to disclose "[t]he names and addresses of all persons

whom the prosecutor intends to call as witnesses . . . together with their relevant written or recorded statements." The state disclosed the security guard as a witness before trial. We therefore agree with the trial court that Soffel failed to establish counsel's performance was deficient on this point.[3]

¶7 We likewise reject Soffel's claim that counsel was ineffective in failing to object to what he characterizes as the state's having "alleged that [he] was attempting to commit criminal damage upon the tow truck." In closing argument, the prosecutor argued that the tow truck driver had acted reasonably in response to Soffel's actions, stating "you are justified in defending your property if you are committing theft or criminal damage, it applies to both, not only theft—we're considering theft here but criminal damage." He went on to state, "when the defendant was swinging the bat at the tow truck driver, [the driver] could have used physical force as well." Thus, his argument was not that the jury should convict Soffel of criminal damage, but that the driver had been reasonable in responding to Soffel. Contrary to Soffel's assertions, this does not amount to the state's having "alleged criminal activity that was not in the indictment []or a lesser included offense." The prosecutor did not mention criminal damage again or ask the jury to convict Soffel of that offense. Nor can we say the prosecutor's statement amounted to prosecutorial misconduct. *See State v. Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d 368, 403 (2006) ("'[A] defendant must demonstrate that the prosecutor's

[3]Soffel also maintains he gave photographs to counsel that showed his vehicle could fit on his driveway without being in the street. But, such photographs would not have been relevant to whether the vehicle was in fact on the street on the day of the incident or, more importantly, to whether it was parked in the driveway "facing the roadway," which was the basis for its removal.

misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Thus, the trial court correctly concluded Soffel did not establish counsel was ineffective in failing to object to the statement or that he was prejudiced.

¶8 Soffel further asserts appellate counsel was ineffective in failing to raise two issues on appeal; the propriety of the trial court's overruling a defense objection to a statement by the prosecutor in closing arguments and the court's denial of Soffel's motion pursuant to Rule 20, Ariz. R. Crim. P. As to the first argument, Soffel contends that by overruling an objection to the prosecutor's statements that Soffel could have called the property manager, gone to court, or complained to security instead of picking up his bat, the court had "in essence told the jury that [he] didn't have a right to [the] defense of property." But the court instructed the jury that if it found the requisite facts, it could find Soffel justified in using physical force to defend his property. And it instructed the jurors that the arguments of counsel were not evidence. In view of these instructions and the fact that the court merely overruled the objection without comment, we cannot agree with Soffel that the court took a position on his justification defense. We therefore agree with the trial court that Soffel failed to establish either deficient performance or resulting prejudice. *See Strickland*, 466 U.S. at 687.

¶9 Likewise, Soffel's claim that appellate counsel was ineffective in not challenging on appeal the trial court's denial of his Rule 20 motion fails. "A directed verdict of acquittal is appropriate only where there is no 'substantial evidence' to support each element of the offense." *State v. Sabalos*, 178 Ariz. 420, 422, 874 P.2d 977, 979

(App. 1994), *quoting* Ariz. R. Crim. P. 20(a). Soffel's arguments on the Rule 20 motion highlight only the evidence favorable to him and ignore the contrary evidence. But, "[t]he mere existence of an inference of innocence does not mandate a directed verdict of acquittal," and when "reasonable minds could differ" as to the conclusions to be drawn from the evidence, a trial court does not err in denying a Rule 20 motion. *State v. Rowan*, 174 Ariz. 285, 289, 848 P.2d 864, 868 (App. 1992), *aff'd in part, vacated in part on other grounds*, 176 Ariz. 114, 859 P.2d 737 (1993). Accordingly, Soffel has failed to establish that counsel's failure to raise the claim on appeal was deficient performance or prejudicial to him.

¶10 For all these reasons, although we grant the petition for review, relief is denied.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge