

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

MATTHEW JAY FOGEL, *Petitioner*.

No. 1 CA-CR 18-0559 PRPC
FILED 10-23-2018

Appeal from the Superior Court in Maricopa County
No. 2014-105771-001
The Honorable Virginia L. Richter, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Daniel Strange
Counsel for Respondent

Brown Law, Chandler
By Matthew O. Brown
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 Petitioner Matthew Jay Fogel seeks review from the superior court’s denial of his petition for post-conviction relief filed pursuant to Arizona Rule of Criminal Procedure 32. We have considered the petition for review and the response, and, for the reasons stated, grant review but deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 On February 11, 2014, Fogel was indicted for aggravated assault, a class three dangerous felony. The charge arose after an altercation ended with Fogel stabbing the victim three times with a kitchen knife. *State v. Fogel*, 1 CA-CR 14-0784, 2015 WL 6935920, at *1, ¶ 3 (App. Nov. 10, 2015) (mem. decision). The case went to trial with Fogel claiming he had acted in self-defense. Fogel testified he picked up the knife only after the victim had grabbed a heavy, metal paper towel holder (“the holder”) and came at him. Fogel also testified that when the victim saw the knife, the victim dropped the holder and tried to take the knife away. In the resulting struggle for control of the knife, Fogel stabbed the victim. The prosecution attempted to undermine Fogel’s defense in part by arguing the holder was made of plastic and could not have posed a threat to Fogel. While photographs and testimony concerning the nature of the holder were utilized by both parties, the holder itself was never entered into evidence.

¶3 The jury found Fogel guilty of one count of aggravated assault. The jury also found that the offense involved the infliction or threatened infliction of serious physical injury, and that it was a dangerous offense involving the use or threatened exhibition of a dangerous weapon. Fogel was ultimately sentenced to six years’ imprisonment and given 42 days’ presentence incarceration credit. Fogel’s conviction was upheld on appeal. *Fogel*, 1 CA-CR 14-0784 at *1, ¶ 4.

¶4 Fogel petitioned for post-conviction relief, arguing he received ineffective assistance of counsel during at trial. Specifically, Fogel

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alleged that his trial counsel's failure to acquire, inspect, and present the holder to the jury undermined his self-defense claim and amounted to professionally unreasonable conduct. After holding an evidentiary hearing to consider why the holder was not entered into evidence at trial, the superior court denied Fogel's petition. The superior court found that trial counsel had made a strategic decision to rely on Fogel's testimony, and avoid allowing the jury to observe and handle the holder. The court also concluded that even if counsel's decision rose to the level of professional misconduct, it was not enough to call the jury's verdict into question.

¶5 Fogel then petitioned this court to review the denial of his petition for post-conviction relief.

DISCUSSION

¶6 In his petition for review, Fogel argues the superior court erred by denying relief under his ineffective assistance of counsel claim. Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012).

¶7 "To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant." *State v. Febles*, 210 Ariz. 589, 595, ¶ 18 (App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). Our supreme court has adopted the test outlined in *Strickland*. *State v. Salazar*, 146 Ariz. 540, 541 (1985); *State v. Nash*, 143 Ariz. 392, 397 (1985). The first prong of the *Strickland* test requires courts to consider "whether counsel's assistance was reasonable considering all the circumstances." *Nash*, 143 Ariz. at 397 (quoting *Strickland*, 466 U.S. at 687–88). The second prong asks whether there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Salazar*, 146 Ariz. at 541 (quoting *Strickland*, 466 U.S. at 694).

¶8 Here, although the superior court considered both prongs of the *Strickland* test, we "need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one." *Salazar*, 146 Ariz. at 531. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* (quoting *Strickland*, 466 U.S. at 697). We therefore examine first whether the superior court abused its discretion by concluding that

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counsel's strategic decision did not "prejudice[] the defendant to the extent that calls the jury's decision into question."

¶9 To succeed on his self-defense claim, Fogel needed the evidence to show that in stabbing the victim three times, he used the amount of deadly physical force that a reasonable person would believe was immediately necessary to protect himself against the victim's use or attempted use of deadly physical force. *See* Ariz. Rev. Stat. § 13-406(A). Fogel argues trial counsel's failure to present the holder to the jury undermined his defense because "the threat [the victim] posed with a heavy, metal object is far more . . . than it would be with the flimsy plastic object the State described" But Fogel himself testified that the victim dropped the holder before the stabbing occurred.

Q. What happened?

[Fogel] He tried to grab the knife. I mean, he dropped the paper towel holder at that point and he tried - - well, not tried. He grabbed the knife.

At that point, I mean, I was so scared, all I could think of was that if this dude got this knife from me, that he was just going to turn around and kill me with it.

Q. So at that point you guys were struggling in the kitchen for the knife?

[Fogel] It was a struggle for the knife, yeah.

The holder's characteristics were, therefore, of limited relevance to the operative event underlying Fogel's self-defense claim. Instead, the jury had to determine whether, under the circumstances, a reasonable person in Fogel's position would believe "the struggle for the knife" necessitated stabbing the victim three times after Fogel gained control of it. Fogel presents no argument that trial counsel's performance deprived him of a fair consideration of that key question by the jury.

¶10 Accordingly, we hold the superior court did not abuse its discretion by concluding, given the evidence presented and Fogel's own statements at trial, that any prejudicial effect of trial counsel's decision to forgo presenting the holder to the jury was minimal, and does not cause us to lose confidence in the jury's verdict. *Strickland*, 466 U.S. at 694 (Defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

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different”; “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.”); *State v. Nash*, 143 Ariz. at 398.

CONCLUSION

¶11 For the foregoing reasons, we grant review but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA