IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ARMANDO ANDRES ORTIZ,
Petitioner.

No. 2 CA-CR 2015-0286-PR
Filed December 2, 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NOT FOR PUBLICATION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. CR20114276001
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED, RELIEF GRANTED IN PART

COUNSEL

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

Armando Andres Ortiz, Yuma
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Armando Ortiz seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the reasons below, remand the case for an evidentiary hearing on one of Ortiz's claims that counsel rendered ineffective assistance at trial.

¶2 Relevant to Ortiz's claims, undisputed evidence established that Ortiz entered a convenience store with another man, took two cases of beer from the cooler, and left the store without paying. Two private security guards responded to the theft; J.W., in uniform, was inside monitoring video surveillance and alerted S.S., who was stationed in front of the store in plain clothes. S.S. told Ortiz to stop, and Ortiz dropped the beer.

¶3 Details of the struggle that followed between Ortiz and the two guards, however, were disputed. S.S. testified he told Ortiz to stop because he was under arrest, grabbed Ortiz's arm, and "immediately . . . started getting hit in the face." J.W. testified that when he came out of the store both Ortiz and his companion were punching and kicking S.S. J.W. said he deployed his mace and grabbed Ortiz, attempting to get him to the ground and handcuff him, when Ortiz "got into . . . a frenzy," attempting to bribe the guards and shouting, "I am not going back to jail," and began firing shots from a handgun before he was wrestled to the ground. S.S.

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

testified he had "pretty much jumped on top of [Ortiz]" after he was on the ground, when Ortiz fired another shot that struck S.S. in the hand. The two guards then held Ortiz down until the police officers arrived and placed him in handcuffs.

¶4 But J.B., a delivery person who had been outside the convenience store, recalled the events differently. He testified he had been about fifteen feet away when he heard S.S. tell Ortiz to "[s]top" and saw Ortiz stop and put the beer down on the ground while his companion ran away. He said the two guards told Ortiz "to go down," but Ortiz just stood and looked at them, and, after "they told him to go down again, but he wouldn't," J.W. "pulled out a pepper spray and start[ed] spraying [Ortiz] with it," and then J.W. and S.S. "both rushed him to take him down." J.B. said "they kind of like wrestled and . . . [Ortiz] tried to run away, but they took him down on his stomach," and "they were laying on top" of Ortiz, so J.B. assumed "they [had] him" and returned to his truck. J.B. said that he never saw Ortiz punch anyone and that Ortiz was "already on his stomach" when J.B. first heard shots fired. J.B. did not see the shots being fired because he had moved inside his truck to continue his delivery.

¶5 After a jury trial for first-degree burglary and two counts each of armed robbery, aggravated robbery, aggravated assault, and attempted first-degree murder, Ortiz was convicted of burglary and two counts each of aggravated assault and attempted second-degree murder, all dangerous offenses. He was sentenced to concurrent, maximum prison terms of twenty years for the burglary and aggravated assaults and twenty-eight years for the attempted-murder convictions. On appeal, this court vacated his convictions and sentences for attempted murder, as well as a criminal restitution order entered at sentencing, and affirmed his other convictions and sentences. *State v. Ortiz*, No. 2 CA-CR 2013-0157, ¶ 19 (memorandum decision filed May 16, 2014).

¶6 Ortiz then filed a notice of post-conviction relief. After appointed counsel notified the trial court that she could find no claim to raise, he filed a petition alleging trial counsel had been ineffective in (1) failing to challenge the indictment; (2) abandoning

his "duty of loyalty" to Ortiz by arguing he was guilty of burglary and aggravated assault, but not robbery or attempted murder, and by acquiescing in jury instructions that "intentionally excised" a statutory definition relevant to the charge of burglary; (3) failing to adequately investigate the law, develop evidence, or object to allegedly erroneous jury instructions with respect to self-defense; and (4) failing to object to a determination by the trial court, rather than by a jury, that he was on parole when the offenses were committed, for the purpose of sentence enhancement under A.R.S. § 13-708(B).

¶7 The trial court summarily denied relief and dismissed his petition, and this petition for review followed. On review, Ortiz argues the trial court erred in ruling that he was precluded from claiming counsel rendered ineffective assistance with respect to allegedly erroneous jury instructions on burglary and self-defense. He also maintains he stated colorable claims that counsel (1) "abandoned [his] duty of loyalty by conceding guilt without investigating" available defenses, thereby "assisting the state in [ob]taining a conviction" and becoming "complicit with prosecutorial misconduct" and (2) rendered ineffective assistance at sentencing.[2]

Discussion

¶8 We review a summary denial of post-conviction relief for an abuse of discretion, which may include an error of law, and we review questions of law de novo. *See State v. Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d 637, 639 (App. 2010); *see also State v. Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d 98, 100-01 (App. 2013) (performance and prejudice components of ineffective assistance claim present mixed questions

[2]Ortiz does not challenge the trial court's ruling that he failed to state a colorable claim of ineffective assistance with respect to the indictment. He therefore has waived our review of this issue. *See* Ariz. R. Crim. P. 32.9(c)(1) ("Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.").

of fact and law subject to de novo review). A trial court "shall" summarily dismiss a Rule 32 petition if all claims are precluded or if, with respect to non-precluded claims, it finds there is no "material issue of fact or law which would entitle the defendant to relief." Ariz. R. Crim. P. 32.6(c). But a defendant is entitled to a hearing if a non-precluded claim for post-conviction relief "is colorable." *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). A colorable claim is one that has "the appearance of validity," *State v. Boldrey*, 176 Ariz. 378, 380, 861 P.2d 663, 665 (App. 1993), meaning "one that, if the allegations are true, might have changed the outcome," *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶9 "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." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on such a claim, a defendant must overcome the "strong presumption" that counsel performed "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and must show counsel's errors or omissions were not the result of reasoned tactical decisions but "of 'ineptitude, inexperience or lack of preparation.'" *Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101, *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). To establish prejudice, a defendant must "show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 69, *quoting Strickland*, 466 U.S. at 694.

Preclusion

¶10 We review de novo whether a claim is precluded by waiver pursuant to Rule 32.2(a)(3). *See Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d at 639. In its order denying relief, the trial court first reasoned that Ortiz's claims that counsel had been ineffective with respect to jury instructions were precluded by his failure to challenge those instructions on appeal. Rule 32.2(a)(3) precludes relief on a claim

that has been "waived at trial, on appeal, or in any previous collateral proceeding." But although Ortiz is precluded from claiming the trial court erred in instructing the jury—a claim that could have been raised on appeal—he is not precluded from claiming his attorney was constitutionally ineffective in failing to object to allegedly erroneous instructions. This is Ortiz's first Rule 32 proceeding and his first opportunity to raise claims of ineffective assistance of counsel. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20, 153 P.3d 1040, 1044 (2007) (holding "defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding—not before trial, at trial, or on direct review"). Because Ortiz was not permitted to raise such claims on direct appeal, they are not precluded by waiver for his failure to do so.[3] *See State v. Spreitz*, 202 Ariz. 1, ¶¶ 4, 9, 39 P.3d 525, 526-27 (2002) (stating "basic rule" that ineffective assistance claims precluded only if previously "raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*"). "The preclusion rules exist to prevent multiple post-conviction reviews, not to prevent review entirely." *State v. Rosales*, 205 Ariz. 86, ¶ 12, 66 P.3d 1263, 1267 (App. 2003). Thus, we agree with Ortiz that these claims are not precluded.

Summary of Claims of Ineffective Assistance at Trial

¶11 In essence, Ortiz alleges the following. First, he contends that, due to a lack of preparation or legal research, trial counsel failed to recognize that the evidence did not support a conviction for burglary, because his conduct fell within a statutory exception to the definition pertaining to whether he entered or remained unlawfully in a structure, an element of burglary. *See* A.R.S. §§ 13-1501(2), 13-1506(A)(1). He argues counsel not only

[3] We recognize that Ortiz also might have argued, in his petition below, that appellate counsel was ineffective in failing to raise the challenged instructions as an issue of trial error on appeal. But his failure to do so does not affect a waiver of his separate claim of ineffective assistance of trial counsel. *Cf. State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (noting "[a]ppellate counsel is not ineffective for selecting some issues and rejecting others").

failed to object when the trial court instructed the jury with an incomplete definition of this element, but also told the jury in closing argument that the state had proven all elements of the burglary, asserting that, in contrast, the state had not proven the offense of robbery.

¶12 His second claim is that, although counsel requested a self-defense instruction, he failed to adequately research issues of self-defense and request an instruction appropriately tailored to the evidence, and failed to argue Ortiz's conduct was justified, instead telling the jury Ortiz was guilty of aggravated assault, but not attempted murder. Specifically, he maintains that had counsel researched the issue, and had he understood the evidence supported his conviction for shoplifting only, counsel would have requested an instruction that identified a shopkeeper's privilege to use force to detain a shoplifter, as stated in *Gortarez v. Smitty's Super Valu, Inc.*, 140 Ariz. 97, 680 P.2d 807 (1984).

Claims Related to Burglary

¶13 As the trial court recognized in its order, Ortiz maintained throughout his petition that he "should have been charged with shoplifting, not burglary, and that counsel was ineffective for failing to raise this argument." In denying relief on this claim, the court cited *State v. Madrid*, 113 Ariz. 290, 291-92, 552 P.2d 451, 452-53 (1976), in which our supreme court found the defendants properly were convicted of burglary after they stole products from a market, rejecting the defendants' argument that burglary is not a "proper charge against a person who has stolen items after making a legal entry into a commercial establishment." Citing *In re Maricopa County Juvenile Action No. J-75755*, 111 Ariz. 103, 105, 523 P.2d 1304, 1306 (1974), the court in *Madrid* noted, "The elements of breaking and unlawful entry are not essential to statutory burglary in Arizona," and stated, "Burglary may be distinguished from the crime of theft and shoplifting in that the intent to commit a theft or any felony must be formed at the time of entry." *Madrid*, 113 Ariz. at 291, 552 P.2d at 452; *see also Maricopa Cty. No. J-75755*, 111 Ariz. at 105, 523 P.2d at 1306 (identifying definition of burglary then in effect, under former A.R.S. § 13-

302(A), as "'entering a building, dwelling house . . . with intent to commit grand or petty theft, or any felony'") (alteration in *Maricopa Cty. No. J-75755*).

¶14 Similarly, when the definition of non-residential burglary was expanded in 1977 to include "[e]ntering *or remaining* unlawfully" in a non-residential structure "with the intent to commit any theft or any felony therein," 1977 Ariz. Sess. Laws, ch. 142, § 69 (emphasis added), this court relied on some of the same authority cited in *Madrid* to conclude a person could commit burglary from a retail business that was open for business even if the intent to commit a theft was formed after he entered the store. *State v. Embree*, 130 Ariz. 64, 66-67, 633 P.2d 1057, 1059-60 (App. 1981). In the instant case, the court concluded sufficient evidence supported a finding that Ortiz, like the defendants in *Madrid*, had intended to commit a theft when he entered the store, and so supported his conviction for burglary.

¶15 Section 13-1506(A)(1) continues to define burglary as "[e]ntering or remaining unlawfully" in a non-residential structure "with the intent to commit any theft or any felony therein." But Ortiz argues an exception found in the current definition of "[e]nter or remain unlawfully" applies to the facts of his case and should have been included in the jury's instructions. § 13-1501(2). Specifically, after *Madrid* and *Embree* were decided, the legislature amended the definition, which now provides as follows:

> "Enter or remain unlawfully" means an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged *except* when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

Id. (emphasis added); *see also* 1994 Ariz. Sess. Laws, ch. 236, § 7; 1993 Ariz. Sess. Laws, ch. 255, § 30.[4] As Ortiz points out, the trial court's instruction omitted the exception found in the definition, informing the jury only that "'[e]nter or remain unlawfully' means an act of a person who enters or remains on premises when such person's intent for so entering or remaining is not licensed, authorized or otherwise privileged," and counsel did not object to the omission. With respect to his conviction for burglary, Ortiz argues his conduct fell within the statutory exception that was omitted from the instruction because the beer he stole had been displayed for sale in the convenience store, which was open for business, and no evidence suggested he entered any unauthorized area of the store.

¶16 We appreciate the trial court's determination that it might be "a common trial tactic" to concede a client's guilt of a less serious offense "where the evidence on [that offense] is overwhelming," in order to focus on obtaining an acquittal on more serious charges. *See Strickland*, 466 U.S. at 690 (stating "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"); *State v. Freeland*, 176 Ariz. 544, 551, 863 P.2d 263, 270 (App. 1993) (counsel's "acquiescing to conviction on lesser charges" appeared to be "reasonable strategic choice[]" in light of "overwhelming evidence" of guilt on lesser charge). But based on Ortiz's argument and our review of the record, the evidence that he committed burglary was not "overwhelming," in light of the exception found in the definition of "[e]nter or remain unlawfully." § 13-1501(2).

¶17 Although counsel may have regarded his argument as a trial tactic, "'[t]he label of "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.'" *Patterson v. Dahm*, 769 F. Supp. 1103, 1110 (D. Neb. 1991), *quoting Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984). And "[t]he consequences of inattention rather than reasoned strategic decisions are not entitled to the presumption of

[4]*Madrid* and *Embree* appear to have been abrogated by this amendment.

reasonableness." *Mosley v. Atchison*, 689 F.3d 838, 848 (7th Cir. 2012). Under these circumstances, we conclude Ortiz has stated a colorable claim that counsel's actions, in failing to challenge the instruction's omission and in telling the jury Ortiz was guilty of every element of burglary, cannot be considered a "reasonable strategic choice[]." *Freeland*, 176 Ariz. at 551, 863 P.2d at 270.

Claims Related to Justification Defense to Aggravated Assaults

¶18 Ortiz maintains that, despite counsel's general request for self-defense instructions, counsel was ineffective in failing to adequately investigate or develop a justification defense to the aggravated-assault charges and in acquiescing to allegedly misleading instructions given by the trial court. In addressing this argument, the trial court noted that "[a]fter [Ortiz] was sprayed with pepper spray, [he] yelled 'I am not going back to jail' and 'I am going to f---ing kill you' at the guards, and pulled out a gun and fired several shots." The court then found that "[t]hese facts do not support a self-defense theory, and . . . that trial counsel's failure to pursue this defense does not fall below objective standards of reasonableness."

¶19 We understand the trial court's ruling to encompass both the alleged deficiency in counsel's performance and the absence of prejudice under *Strickland*. Ortiz argues the facts surrounding his altercation with the guards were disputed and maintains counsel should have asked the court to instruct the jury about the amount of force the security guards could lawfully use to detain him, as relevant to a determination of whether "a reasonable person would believe that [the] physical force" Ortiz used was "immediately necessary to protect himself" against the security guards' "use or attempted use of unlawful physical force." A.R.S. § 13-404(A). He also appears to argue that counsel should have asked the court to omit from the instructions statutory language that limits self-defense, when used to "resist an arrest . . . being made by a peace officer," to occasions when "the physical force used by the peace officer exceeds that allowed by law," § 13-404(B)(2), because

the security guards were not peace officers, *see* A.R.S. § 13-105(29),[5] and were without authority to "arrest" him under our supreme court's decision in *Gortarez*.

¶20 In *Gortarez*, our supreme court stated that a shopkeeper has no privilege to "arrest" someone for misdemeanor shoplifting, but may only "'detain'" him "'in a reasonable manner and for a reasonable time'" for the purpose of "'questioning or summoning a law enforcement officer.'" 140 Ariz. at 101-03, 680 P.2d at 811-13, *quoting* A.R.S. § 13-1805(C) (emphasis in *Gortarez* omitted); *see also id.*, ¶¶ 13-14 (addressing Ortiz's claim that evidence established only misdemeanor shoplifting). Finding this portion of § 13-1805 "is essentially a codification of the common law shopkeeper's privilege," the court in *Gortarez* adopted the following Restatement comment:

> Reasonable force may be used to detain the person; but . . . the use of force intended or likely to cause serious bodily harm is never privileged for the sole purpose of detention to investigate, and it becomes privileged only where the resistance of the other makes it necessary for the actor to use such force in self-defense. In the ordinary case, the use of any force at all will not be privileged until the other has been requested to remain; and it is only where there is not time for such a request, or it would obviously be futile, that force is justified.

140 Ariz. at 104-05, 680 P.2d at 814-15 (alteration in *Gortarez*), *quoting* Restatement (Second) of Torts § 120A cmt. h (1965).

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[5]"'Peace officer' means any person vested by law with a duty to maintain public order and make arrests and includes a constable." § 13-105(29).

¶21 Ortiz contends a question from the jury during deliberations suggests the jury was "left to speculate" about whether the guards' use of force had been lawful, and, citing J.B.'s testimony at trial, he maintains evidence about his altercation with the guards was disputed. But a claim of self-defense depends not only on a determination that some response to unlawful physical force was justified; a jury also must consider whether a reasonable person would believe the extent of force used by a defendant was necessary. *See* § 13-404(A) (use of physical force in response to another's unlawful use or attempted use of physical force justified "when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself"). Thus, even if a different instruction or argument might have caused the jury to consider whether the guards' use of force was unlawful, in order to acquit Ortiz of assault, it would have been necessary for the jury to find the state had failed to prove unreasonable the extent of Ortiz's response—firing several shots from a handgun in front of a convenience store.[6]

¶22 The trial court was required to "consider the totality of the evidence" in assessing prejudice under *Strickland*. 466 U.S. at 695. In its ruling, the court appears to have considered the evidence in light of the jury's charge to determine whether the extent of force used by Ortiz was justified. We find no abuse of discretion in its determinations that there was no reasonable probability Ortiz would have been acquitted of the aggravated assaults had counsel performed differently and that counsel had not been ineffective in failing to pursue a claim of self-defense. *See id.* at 690-91 ("[S]trategic choices made after less than complete investigation are

[6]We note that the jury also was instructed, with respect to deadly physical force, that "[a] defendant may use deadly physical force in self-defense only to protect against another's use or apparent attempted or threatened use of deadly physical force," *see* A.R.S. § 13-405(A), with "[d]eadly physical force" defined to include force used in a manner "capable of creating a substantial risk of causing death or serious physical injury," *see* § 13-105(14).

reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

Claim Relating to Sentencing

¶23 We agree with Ortiz that the trial court did not specifically address his claim that counsel rendered ineffective assistance by failing to object to a determination by the court, rather than by a jury, that Ortiz was on parole for a "serious offense" when he committed what the jury found were dangerous offenses, requiring the court to impose a maximum, flat-time term of imprisonment pursuant to A.R.S. § 13-708(B).[7] But we agree with the court below that Ortiz failed to state a colorable claim with respect to this issue.

¶24 We recognize that in *State v. Large*, 234 Ariz. 274, ¶¶ 1, 12, 16, 321 P.3d 439, 441, 443-44 (App. 2014), a case on direct appeal, we held a defendant is entitled to a jury determination of his release status before a flat-time, mandatory-minimum sentence may be imposed pursuant to § 13-708, in light of the Supreme Court's decision in *Alleyne v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2151, 2163 (2013). But both *Large* and *Alleyne* were decided after Ortiz was sentenced and would have been unavailable to counsel. *See Large*, 234 Ariz. 274, ¶ 18, 321 P.3d at 445 (noting *Alleyne* "negat[ed]" contrary Arizona authority).

¶25 Moreover, the court in *Large* found the error harmless based on "undisputed [evidence] that [the defendant] was on parole when he committed the offense." 234 Ariz. 274, ¶ 1, 321 P.3d at 441.

[7] Ortiz incorrectly suggests the trial court found "no [aggravating] factors to justify the imposition" of a maximum term of imprisonment. According to the sentencing minute entry, the court sentenced him as a repetitive offender who had two historical prior convictions and also found his "criminal history" to be an aggravating factor; these findings were sufficient for the court to impose maximum terms of imprisonment. *See* A.R.S. § 13-703(C), (J); *State v. Bonfiglio*, 231 Ariz. 371, ¶ 10, 295 P.3d 948, 950-51 (2013).

Similarly here, Ortiz does not dispute that he was on parole at the time of the offense and does not dispute the evidence the court considered in determining his release status. We thus conclude Ortiz has failed to state a colorable claim of prejudice under *Strickland* with respect to this claim.

Disposition

¶26 For the foregoing reasons, we grant review and grant relief in part. We vacate the trial court's summary dismissal of Ortiz's petition for post-conviction relief and direct the court to appoint counsel for Ortiz and to conduct an evidentiary hearing, limited to his claim that counsel rendered ineffective assistance at trial with respect to the charge of burglary. We deny relief for Ortiz's other claims of ineffective assistance of counsel.