IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEVEN RAY BOLTON,
Petitioner.

No. 2 CA-CR 2015-0122-PR
Filed May 20, 2016

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NOT FOR PUBLICATION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 Maricopa County
No. CR2011130444002DT
The Honorable William L. Brotherton Jr., Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

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By Lisa Marie Martin, Deputy County Attorney, Phoenix
Counsel for Respondent

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By Natalee Segel
Counsel for Petitioner

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Judge Vásquez and Judge Espinosa concurred.

H O W A R D, Judge:

¶1 Steven Bolton seeks review of the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. He asks that we remand the case for an evidentiary hearing on his claim that trial counsel rendered ineffective assistance by failing to request a jury instruction related to his alibi defense, "the only theory of defense presented at trial." We grant review and, for the following reasons, we grant relief.

Background

¶2 After a jury trial, Bolton was convicted of second-degree burglary, committed between noon, April 23, and noon, April 24, 2011. The trial court suspended imposition of sentence and placed Bolton on probation for a three-year term. We affirmed his conviction and probation disposition on appeal. *State v. Bolton*, No. 1 CA-CR 12-0360, ¶ 21 (memorandum decision filed July 9, 2013).

¶3 As detailed in our decision, the evidence established that D.B. and C.B. were loading their recreational vehicle for an overnight trip when D.B. noticed a small, black vehicle with tinted windows parked approximately five hundred feet from their driveway. When they returned the following day, they realized their home had been burglarized and property valued at more than $12,000 had been stolen, including some valuable coins taken from their home office.

¶4 A criminalist arrived and took impressions of different shoeprints found outside the home, and several items from the victims' home office were retained for fingerprinting. One set of shoeprints was later identified as belonging to Bolton's co-defendant, Robert Neese, after he had been arrested the following month for an unrelated offense. Bolton was then arrested in June, after a crime laboratory analyst matched two latent prints on a plastic bag, which had been moved away from coins taken from the victims' home office, to Bolton's fingerprints.[1] In addition to the fingerprint analysis, the state presented evidence at Bolton's trial that he worked within two miles of the victims' home and had access to a small, black vehicle with tinted windows that belonged to his girlfriend's father.

¶5 After the state rested, Bolton testified he did not know the victims, had never been in their home, and did not know Neese. He and several other witnesses also testified about his whereabouts during the twenty-four-hour period when the burglary was known to have occurred, accounting for his movements from 7:50 a.m. on April 23 until 8:00 p.m. on April 24. Bolton's attorney did not ask the trial court to give the jury an alibi instruction, and the court did not do so. The jury found Bolton guilty as charged.

¶6 In Bolton's petition for post-conviction relief, he relied on *State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998), and other authorities to argue his trial counsel had rendered ineffective assistance by presenting alibi evidence but then failing to request a jury instruction related to his alibi defense, "the only theory of defense presented at trial." According to Bolton, neither his attorney nor the state said anything in closing arguments "to clarify the issue of who bore the burden of proof with regard to [Bolton's] alibi

[1]Both Neese and Bolton were indicted for the burglary, the trial court granted the state's motion to sever the co-defendants' cases for trial, and Neese pleaded guilty to second-degree burglary and possession of burglary tools. *See Bolton*, No. 1 CA-CR 12-0360, n.2.

defense," and, "[i]nstead, the State simply argued [his] alibi witnesses were contradictory," and his own attorney "focused primarily on the contention that the . . . fingerprint analysis [was] unreliable."

¶7 The trial court summarily dismissed Bolton's petition, finding he failed to state a colorable claim of ineffective assistance of counsel because he failed to show he had been prejudiced by counsel's alleged error. In its decision denying relief, the court noted jurors had been instructed correctly "with regard to presumption of innocence and/or the State's burden of proof" in several instructions. It reasoned that "the alibi instruction is in reality a reiteration of the reasonable doubt instruction that was already reiterated several times in the jury instructions that were given," and it found "nothing was presented" to suggest the jury had failed to follow the court's instructions. Stating it "must presume that the jury followed the instructions," the court concluded it could not "find actual prejudice" as a result of counsel's failure to request an alibi instruction because the evidence was sufficient to support the jury's verdict. This petition for review followed.

Discussion

¶8 We review a summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Although we defer to a trial court with respect to its findings of fact, we review its legal conclusions de novo. *State v. Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d 98, 101 (App. 2013).

Preclusion

¶9 The state argues preliminarily that Bolton's claim of ineffective assistance is precluded by his failure to argue, on direct appeal, that the omission was fundamental error. Pursuant to Rule 32.2(a)(3), a defendant is precluded from relief on "any ground" that has been waived on appeal or in any previous collateral proceeding.

¶10 The state has cited no legal authority to support its suggestion that an assertion of error by the trial court and an allegation of ineffective assistance of counsel are the same "ground" or claim, and we find no basis for finding the claim precluded. A claim of ineffective assistance of counsel may not be raised on appeal; it must be raised in a post-conviction proceeding pursuant to Rule 32. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Accordingly, it has not been waived.[2]

Ineffective Assistance of Counsel for Failure to Request Alibi Instruction

¶11 A defendant is entitled to a hearing if his claim for post-conviction relief "is colorable." *Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67. "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." *Id.*, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). Although a defendant is not required to establish proof by a

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[2]We recognize that Bolton ordinarily could have raised a claim of ineffective assistance of appellate counsel in this first Rule 32 proceeding. But he is represented by the same attorneys who represented him on appeal, and it would have been improper for them to assert their own ineffectiveness. *See Bennett*, 213 Ariz. 562, ¶¶ 14-15, 146 P.3d at 67 (claim of ineffective assistance of appellate counsel not precluded by omission in first Rule 32 proceeding if Rule 32 counsel also represented defendant on appeal). In recognition of the policy "that all post-conviction claims be raised promptly" and "be consolidated in one petition," *State v. Shrum*, 220 Ariz. 115, ¶¶ 11-12, 203 P.3d 1175, 1178 (2009), we remanded the case for appointment of new counsel to supplement Bolton's petition below with a claim of ineffective assistance of appellate counsel, and we stayed this matter pending "any petition for review of the trial court's actions in those further proceedings." Newly appointed counsel filed a supplemental petition for post-conviction relief as directed, and, after the court denied relief, she declined to file a supplemental petition for review of that decision.

preponderance through his petition alone, in order to state a colorable claim, he "must offer some demonstration that the attorney's representation fell below that of the prevailing objective standards . . . [and] some evidence of a reasonable probability that, but for counsel's unprofessional errors, the outcome of the [proceeding] would have been different." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999).

Deficient Performance[3]

¶12 Bolton acknowledges that no Arizona case-law authority addresses whether an attorney's failure to request an alibi instruction may constitute deficient performance, but he cites decisions from several other states that have recognized such a claim. *See Triggs v. State*, 803 So.2d 1229, ¶ 29 (Miss. Ct. App. 2002); *Reliford v. State*, 186 S.W.3d 301, 305 (Mo. Ct. App. 2005); *Riddle v. State*, 418 S.E.2d 308, 309 (S.C. 1992); *Commonwealth v. Mikell*, 729 A.2d 566, 570-71 (Pa. 1999). He also relies on our supreme court's conclusion, in *Rodriguez*, that a trial court's refusal to give an alibi instruction, when requested and warranted by the evidence, may be reversible error. 192 Ariz. 58, ¶¶ 26-27, 961 P.2d at 1011 (finding error not harmless). He argues "the trial court's reliance on the other burden of proof instructions runs counter to established Arizona precedent on the need for an alibi instruction."

¶13 In addressing whether an attorney's performance was deficient, a court must presume his conduct fell "'within the wide

[3]In its ruling, the trial court correctly noted it was not required to consider whether counsel's performance was deficient, in light of its determination that Bolton failed to state a colorable claim of prejudice. *See Strickland*, 466 U.S. at 697. Because the court's analysis of prejudice was inconsistent with our supreme court's decision in *Rodriguez*, we address both components of the *Strickland* test. *See Bennett*, 213 Ariz. 562, ¶¶ 24, 26, 28-29, 146 P.3d at 68-69 (addressing both deficiency and prejudice components of colorable claim where trial court failed "to apply the correct legal standard" to issue of prejudice).

range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101, *quoting Strickland*, 466 U.S. at 689. Thus, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

¶14 In *Rodriguez*, our supreme court explained that, although a party "is entitled to an instruction on any theory reasonably supported by the evidence," a trial court "generally is not required to give a proposed instruction when its substance is adequately covered by other instructions." 192 Ariz. 58, ¶ 16, 961 P.2d at 1009. It rejected the argument that an alibi instruction may properly be refused based on the belief that "other instructions," such as general instructions about the state's burden of proof, suffice to "adequately instruct the jury that it must acquit if the state fails to prove the defendant's presence at the crime."[4] *Id.* ¶¶ 23-26.

¶15 The supreme court emphasized that "[a] defendant is not required to prove an alibi; rather, the jury must acquit a defendant if the alibi evidence raises a reasonable doubt about whether the defendant committed the crime." *Id.* ¶ 25. And, the court concluded, "[a]bsent an alibi instruction, . . . , the jury may be mistaken about this crucial point"; "jurors may incorrectly assume that the defendant bears the burden of proving his alibi" and "may interpret [his] failure to prove his alibi as proof of guilt." *Id.* Thus, according to *Rodriguez,* "standard instructions about the burden of proof" fail to readdress the "fundamental risk" of "burden shifting engendered by alibi evidence" and "provide a poor substitute for a properly supported alibi instruction." *Id.* ¶¶ 25-26.[5] Noting that the

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[4]*See State v. Hess*, 9 Ariz. App. 29, 33, 449 P.2d 46, 50 (1969), *abrogated by Rodriguez*, 192 Ariz. 58, ¶¶ 23-26, 961 P.2d at 1011.

[5]Although not raised by the state, we recognize that our supreme court may have reached a different conclusion with respect to the defense of third-party culpability. *State v. Parker*, 231 Ariz. 391, ¶¶ 51-56, 296 P.3d 54, 67-68 (2013). In *Parker*, the court concluded no reversible error occurred when a trial court denied the

only evidence linking Rodriguez to the crime had been a palm print on the murder weapon and that "the defense relied exclusively on the alibi theory," the supreme court reversed Rodriguez's conviction, stating, "Given the lack of overwhelming proof of guilt and the importance of the alibi defense, we cannot say, beyond a reasonable doubt, that the error did not affect this verdict." *Id.* ¶ 27.

¶16 In light of our supreme court's decision in *Rodriguez* and counsel's clear intent to rely on an alibi defense, as reflected in his notice of defenses and the testimony he elicited from Bolton and three alibi witnesses, we conclude Bolton has raised a colorable claim that counsel's performance was deficient. *See Reliford*, 186 S.W.3d at 305 (notice of intent to allege alibi defense and defendant's testimony about an alibi "sufficient . . . to warrant" evidentiary hearing on alleged deficiency in failing to request alibi instruction); *Mikell*, 729 A.2d at 570-71 & n.4 (absent evidentiary hearing or record evidence of strategic decision, court could "discern no reasonable basis" for "counsel's inexplicable failure" to request alibi instruction); *cf. Bennett*, 213 Ariz. 562, ¶ 24, 146 P.3d at 69 (appellate

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defendant's request for a jury instruction that provided, in part, "'Defendant does not need to prove beyond a reasonable doubt that the third party is guilty of the charged offenses.'" *Id.* ¶ 52. The court cited *Rodriguez* for the proposition that "[a] trial judge . . . need not give a proposed jury instruction when its substance is adequately covered by other instructions or it incorrectly states the law." *Id.* ¶ 54. Rejecting the defendant's argument "that the proposed instruction was needed to prevent the jury from improperly shifting the burden of proof from the State," the court further found "the substance of the instruction was adequately covered" by the trial court's burden of proof and presumption of innocence instructions. *Id.* ¶ 56. We acknowledge some difficulty in reconciling the court's decisions in *Parker* and *Rodriguez*, but *Rodriguez* has never been overruled. Accordingly, we adhere in this decision to the court's conclusions in *Rodriguez*. *See State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004) (appellate court bound by decisions of supreme court and lacks authority to modify or disregard its rulings).

counsel's failure to challenge sufficiency of evidence to prove fundamental element of offense "at least suggests" deficient performance, entitling defendant to evidentiary hearing).

Prejudice

¶17 In summarily dismissing Bolton's claim for post-conviction relief, the trial court relied on the presumption "the jurors followed the jury instructions" and the instruction on proof beyond a reasonable doubt. But Bolton does not suggest the jury failed to follow the court's instructions. Rather, he maintains those instructions were inadequate to guide the jury's deliberations, due to counsel's failure to request an alibi instruction. *See Rodriguez*, 192 Ariz. 58, ¶¶ 25-26, 961 P.2d at 1011; *see also Henderson v. United States*, 619 A.2d 16, 19 (D.C. 1992) (absent alibi instruction, "there is a danger that the jury may simply weigh the defendant's . . . claim against the government's evidence and convict on a mere preponderance of the evidence"); *Mikell*, 729 A.2d at 571 ("counsel's inexplicable failure" to request alibi instruction found constitutionally ineffective assistance; because jury "never informed how to assess [defendant's] alibi evidence," defendant "effectively deprived of a substantive defense").

¶18 And our supreme court has rejected the "minority view" in holding a trial court must give an alibi instruction when it is supported by the evidence and requested by the defense. *Rodriguez*, 192 Ariz. 58, ¶¶ 23-26, 961 P.2d at 1011. We conclude the court abused its discretion in relying on a conclusion of law that has been expressly rejected by our supreme court. *See State v. Petty*, 225 Ariz. 369, ¶ 7, 238 P.3d 637, 639 (App. 2010) (error of law constitutes abuse of discretion).

¶19 To prevail on his claim, Bolton "need not show that counsel's deficient conduct more likely than not altered the outcome in the case" because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 693-94. Rather, "[a] reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* at 694. As applied here, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

¶20 In making this assessment of *Strickland* prejudice, a court "must consider the totality of the evidence" before the jury, as well as how the alleged error may have affected the jury's findings. *Id.* at 695-96 (noting "a verdict . . . weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *see also Berghuis v. Thompkins*, 560 U.S. 370, 389-91 (2010) (finding, on de novo review, "not reasonably likely" counsel's failure to request limiting instruction "would have made any difference in light of all the other evidence of guilt"). In evaluating on appeal whether an omitted or incomplete jury instruction has prejudiced a defendant, or instead was harmless, a reviewing court considers the omission "in context and in conjunction with the closing arguments of counsel." *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003) (harmless error review on appeal). Such considerations appear equally relevant in determining whether a defendant has been prejudiced, as defined in *Strickland*, by counsel's failure to request a jury instruction to which he was entitled.[6] *See United States v. Ortiz*, 281 F. App'x 750, 752-53 (9th Cir. 2008) (defendant not prejudiced by counsel's failure to request misidentification jury instruction when "instructions adequately covered his defense" and counsel focused jury's

[6] The trial court noted that Bolton's counsel "elicit[ed] testimony from [Bolton], his mother, his sister and his ex-girlfriend as to [his] whereabouts" during the twenty-four-hour period when the offense occurred. To be entitled to an alibi instruction, a defendant must present "[e]vidence tending to show that [he] had no opportunity to commit the crime because he was at another place when the crime occurred." *Rodriguez*, 192 Ariz. 58, ¶ 17, 961 P.2d at 1010. Based on our review of the record, we agree that Bolton presented evidence which could have supported that conclusion and would have been entitled to an alibi instruction, had one been requested.

attention on potential misidentification "throughout trial and in closing argument").[7]

¶21 In *Rodriguez*, the supreme court determined that the lack of an alibi instruction was not harmless error. In order to prevail in a harmless error analysis, the state is required to prove beyond a reasonable doubt that the error did not affect the verdict. *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 239 (2009). In his Rule 32 proceeding, Bolton is required to raise a colorable claim that, under the facts of his case, he was prejudiced. *Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d at 67. *Rodriguez* therefore does not mandate that Bolton has established a colorable prejudice claim. This decision should be made in the first instance by the trial court using the correct standard.

Disposition

¶22 For the foregoing reasons, we vacate the trial court's order dismissing Bolton's Rule 32 proceeding. We remand the case for the court to determine if Bolton has established a colorable claim of prejudice. If he has, the court shall conduct an evidentiary hearing and determination of Bolton's claim in a manner consistent with this decision.

[7] In this case, Bolton contends some of the state's closing arguments may have suggested he was required, and had failed, "to prove up his alibi."