

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

VICTOR KYLE LIZARDI,  
*Petitioner.*

No. 2 CA-CR 2016-0381-PR  
Filed January 25, 2017

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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NOT FOR PUBLICATION  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. CR20123396001  
The Honorable Deborah Bernini, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Harold L. Higgins PC, Tucson  
By Harold Higgins  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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ECKERSTROM, Chief Judge:

¶1 Victor Lizardi seeks review of the trial court’s denial, after an evidentiary hearing, of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court’s determination unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Lizardi has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Lizardi was convicted of first-degree murder and armed robbery. The jury found that Lizardi was guilty of first-degree murder on both a felony-murder theory and a premeditation theory. We affirmed Lizardi’s convictions and sentences on appeal, but vacated an improper criminal restitution order. *State v. Lizardi*, No. 2 CA-CR 2013-0243 (Ariz. App. July 11, 2014) (mem. decision). In our decision on appeal, we described the facts as follows:

Lizardi was a passenger in a vehicle driven by M. when he saw P.’s parked car. After instructing M. to turn around and stop, Lizardi approached P.’s car on foot to see if there was anything he could steal. Lizardi was armed with a handgun. P. then approached and confronted Lizardi. Lizardi returned to M.’s car and she drove away, but P. followed in his car, yelling for them to pull over. M. eventually did so, and Lizardi and P. both got out of their respective vehicles as P. taunted Lizardi

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and accused him of trying to steal from him.

P. retrieved his car keys from his vehicle and dangled them in front of Lizardi, saying: “[H]ey homie, you want to take my car[?]” Lizardi then drew his pistol and shot P. six times, killing him. Lizardi took the keys and drove away in P.’s car after he and M. found and took some money from the car.

¶3 Lizardi sought post-conviction relief raising numerous claims of ineffective assistance of trial and appellate counsel, specifically: (1) trial counsel failed to “properly argue” for the admission of evidence that the victim had threatened two women with a gun shortly before confronting Lizardi, and appellate counsel was ineffective for “fail[ing] to present an argument on appeal as to preclusion of that evidence”; (2) trial counsel did not present testimony from a percipient witness who would have “buttressed” Lizardi’s self-defense claim; (3) trial counsel improperly advised him not to testify; (4) trial counsel failed to object to the prosecutor’s misstatement of the law regarding self-defense during summation; (5) trial counsel failed to object to the prosecutor’s purported comment on Lizardi’s failure to testify, and appellate counsel was ineffective for failing to raise that claim on appeal; and (6) trial counsel was ineffective in failing to request an instruction that the victim had not been legally permitted to use deadly force in defense of property, and appellate counsel was ineffective in failing “to raise any issue as to the adequacy of the jury instructions.”<sup>1</sup>

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<sup>1</sup> Lizardi also appeared to raise several of these issues independent of his claims of ineffective assistance. The independent claims are precluded because they could have been raised on appeal but were not. Ariz. R. Crim. P. 32.2(a)(3). Accordingly, we limit our analysis to Lizardi’s claims of ineffective assistance.

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¶4 The trial court summarily rejected several of Lizardi's claims. It concluded he had not demonstrated ineffective assistance based on purportedly improper comments by the prosecutor because the prosecutor did not comment on Lizardi's failure to testify and correctly stated the law pertaining to self-defense. The court also summarily denied Lizardi's claim that trial counsel should not have encouraged him to forgo testifying. The court, however, determined an evidentiary hearing was warranted on Lizardi's remaining claims. After that hearing, the court denied Lizardi's claims, noting that "much of what [Lizardi] argues in his petition falls under the heading of trial strategy" and that, in any event, Lizardi had not shown resulting prejudice. This petition for review followed.

¶5 On review, Lizardi repeats his claims of ineffective assistance. To prevail on these claims, Lizardi was required to demonstrate both that counsel's performance was deficient and that he was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016), *quoting Hinton v. Alabama*, \_\_\_ U.S. \_\_\_, \_\_\_, 134 S. Ct. 1081, 1088 (2014). "To establish prejudice, a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, *quoting Hinton*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 1089.

¶6 We must presume counsel's conduct "'falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland*, 466 U.S. at 689. "[D]isagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis,' even if the tactics counsel adopts are unsuccessful." *Id.*, *quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

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¶7 Our review of the trial court’s factual findings made after an evidentiary hearing “is limited to a determination of whether those findings are clearly erroneous.” *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). We “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *Id.*

¶8 First, Lizardi asserts trial counsel did not argue “properly” for admission of evidence that, shortly before his initial confrontation with Lizardi, the victim had threatened his two girlfriends with a gun during an argument, and that appellate counsel was ineffective for failing to raise the issue on appeal. At trial, counsel sought to admit the evidence to show the victim’s “frame of mind” and “aggressiveness,” but the trial court precluded it on relevance grounds.

¶9 Lizardi asserts the evidence was admissible pursuant to Rules 404(a)(1) and 405, Ariz. R. Evid., to show the victim’s “character trait . . . of someone who, when angered, becomes belligerent and displays a weapon.” But those rules would, at most, allow reputation or opinion evidence regarding the victim’s character, *see* Ariz. R. Evid. 405(a); under Arizona law, a defendant raising self-defense “may not introduce evidence of specific acts unknown to the defendant at the time of the alleged crime to show that the victim was the initial aggressor.” *State v. Fish*, 222 Ariz. 109, ¶ 35, 213 P.3d 258, 270 (App. 2009); *see also* Ariz. R. Evid. 405. And, although Lizardi asserts this evidence could “buttress[]” the testimony of other witnesses, he cites no authority suggesting that fact alone would require the evidence to be admitted. Because Lizardi has identified no basis upon which the evidence would be admissible, his claims of ineffective assistance fail.

¶10 Lizardi next claims trial counsel was ineffective in failing to call a witness who allegedly heard the victim say he would “cap” Lizardi and M. The decision whether to call a particular witness is generally a strategic decision. *See Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102. That same witness stated Lizardi had shot the victim because he had called Lizardi demeaning names. Counsel might have reasonably concluded that testimony would not be

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helpful to his client. And, notably, Lizardi did not question counsel at the evidentiary hearing about why he did not present the witness at trial. Thus, he has not overcome the presumption that counsel's decision was strategic. *See id.* ¶ 7.

¶11 For much the same reason, we reject Lizardi's claim that counsel was ineffective for discouraging him from testifying. As Lizardi acknowledged in his affidavit, had he testified, he would have been subject to cross-examination regarding a previous felony conviction. This is obviously a reasoned basis for counsel to recommend that he forgo testifying. *See id.* Thus, counsel's advice cannot support a claim of ineffective assistance.

¶12 Lizardi also repeats his claim that counsel should have objected to the prosecutor's statement of the law of self-defense. The trial court instructed the jury that "a person may use deadly physical force in self-defense only to protect against another's use or threatened use of deadly physical force." During argument, the prosecutor stated only "that deadly force can be used against deadly force and then you're justified in using that deadly force if deadly force is used against you." Lizardi argues counsel should have objected to the prosecutor's omission of the word "threatened." The decision whether to object is, again, often strategic. *See State v. Davis*, 226 Ariz. 97, ¶ 20, 244 P.3d 101, 106 (App. 2010). Even assuming the statement was objectionable, counsel might have foregone objecting to avoid drawing attention to it. For the same reason, we reject Lizardi's claim that counsel was ineffective for failing to object to the prosecutor's alleged comment on his failure to testify.<sup>2</sup>

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<sup>2</sup>Although Lizardi claims "[a]ppellate counsel did not raise an issue as to either plain or fundamental error," he has not developed any argument the issue would have warranted relief on appeal. Thus, we do not address it further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

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¶13 Finally, Lizardi repeats his claim that counsel was ineffective for failing to request a jury instruction that the victim was not permitted to use deadly force to prevent “attempted auto theft” pursuant to A.R.S. §§ 13-407 and 13-411(A), (D). Counsel admitted, at the evidentiary hearing, that he had not considered requesting such an instruction. Lizardi’s claim nonetheless fails because he has identified no evidence and cited no authority suggesting the failure to request the instruction fell below prevailing professional norms. Nor has he developed any argument that the jury convicted him because it believed the victim was legally justified in pursuing and confronting him. Thus, he has established neither deficient performance nor prejudice.<sup>3</sup> See *Strickland*, 466 U.S. at 687-88.

¶14 We grant review but deny relief.

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<sup>3</sup>Again, Lizardi has developed no argument that he would have prevailed had appellate counsel raised this issue on appeal. Thus, we do not address that issue. See *Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d at 683.