IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

VICTOR KYLE LIZARDI,
Petitioner.

No. 2 CA-CR 2017-0135-PR
Filed July 12, 2017

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NOT FOR PUBLICATION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. CR20112911001
The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harold L. Higgins, P.C., Tucson
By Harold L. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Victor Lizardi 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 that order 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, after a separate bench trial, possession of a deadly weapon by a prohibited possessor. *State v. Lizardi*, 234 Ariz. 501, ¶¶ 1, 3, 323 P.3d 1152, 1153 (App. 2014). The trial court sentenced him to concurrent prison terms, the longest of which was life in prison without the possibility of release for twenty-five years. *Id.* ¶ 3. We affirmed his convictions and sentences on appeal. *Id.* ¶ 24.

¶3 Lizardi sought post-conviction relief, arguing his trial counsel had been ineffective in failing to: (1) adequately impeach a witness "with his prior felony convictions" and inconsistencies between his testimony and previous statements; (2) present evidence of test results that did not link him to the murder as well as expert testimony concerning "mistakes" in the police investigation; (3) object to a statement by the prosecutor during closing purportedly commenting on Lizardi's decision not to testify; (4) move to suppress his statement to police and "bring to the attention of the

[1]The Hon. Joseph W. Howard, 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.

jury" his "mental and physical condition at the time" of his statement. He also claimed appellate counsel had been ineffective in failing to argue the prosecutor's statement was improper. The trial court summarily denied relief. This petition for review followed.

¶4 On review, Lizardi repeats his arguments and asserts he was entitled to an evidentiary hearing. A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11, 368 P.3d 925, 927-28 (2016) (emphasis omitted). "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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). In evaluating whether a claim is colorable, we are required to treat the defendant's factual allegations as true. *See State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004). However, we must presume counsel's decisions "'fall[] 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. Therefore, "disagreements 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).

¶5 Lizardi first argues his trial counsel was ineffective in failing to impeach a witness based on his prior convictions and some of his previous inconsistent statements. The decision whether to present impeachment evidence is a strategic decision to be made by counsel. *See State v. Pandeli*, 242 Ariz. 175, ¶¶ 15, 17, 394 P.3d 2, 9, 10 (2017). Although Lizardi argues counsel's decision could have no reasoned basis, he cites no affidavit or evidence supporting that claim. As the trial court noted, the witness appeared in jail garb and acknowledged he was incarcerated for theft, and counsel impeached the witness during cross-examination with several previous

statements. Counsel may have decided that further impeachment would have distracted, bored, or confused the jury and thus decided to forgo it. In the absence of contrary evidence, we are required to presume counsel's decision was sound. *See Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101. The trial court did not err in summarily rejecting this claim.

¶6 Lizardi next repeats his argument that counsel was deficient in failing to point out purported defects in the police investigation and to elicit testimony that forensic examinations did not implicate him. But, again, Lizardi has cited no evidence or authority suggesting that counsel fell below prevailing professional norms—that is, that any competent defense attorney would have acted differently. *See id.* Thus, he has not established the trial court erred in rejecting this argument.

¶7 Similarly, Lizardi has not demonstrated that counsel fell below prevailing professional norms by failing to object to the prosecutor's statement purportedly commenting on his decision to remain silent. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Defense counsel's decision whether to object to an arguably improper statement is plainly tactical. *See State v. Webb*, 164 Ariz. 348, 353, 793 P.2d 105, 110 (App. 1990). Objections, even if sustained, may draw unwanted attention to the improper remark.

¶8 And, in any event, Lizardi has not established the prosecutor's statement was improper. During closing, the prosecutor stated:

> There was some interaction between the victim . . . and the defendant. Because the words were used as water under the bridge. Well, what does water under the bridge mean? Something happened but we're going to get past it. We know what that means.
>
> Now, we don't know what the interaction was or that issue that happened with them,

> only two people probably know, and one of them is [the victim], but you can consider that when you're considering the evidence.

¶9 Lizardi argues the prosecutor's comment is "exactly like that made by the prosecutor" in *State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997), "that only two individuals knew detailed information of the crime: 'One is [the victim] and the other one is sitting right here at the table asking you not to hold him accountable through his lawyer.'" In *Trostle*, our supreme court concluded that statement was "an impermissible comment on defendant's failure to testify," but that the error was harmless. *Id.* "[A]n impermissible comment upon a defendant's invocation of his right not to testify occurs when 'the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *State v. Bracy*, 145 Ariz. 520, 535, 703 P.2d 464, 479 (1985), *quoting United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir. 1984).

¶10 Unlike the prosecutor in *Trostle*, the prosecutor here did not refer directly to Lizardi's failure to testify or suggest Lizardi had some unique information about the murder itself that he chose to keep from the jury. Thus, we cannot conclude that the jury necessarily would have concluded the prosecutor had commented on Lizardi's decision to remain silent. Accordingly, Lizardi has established neither that competent counsel would have objected nor that an objection would have been sustained. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. His related claim that appellate counsel was ineffective in failing to raise this issue therefore also fails.

¶11 Lizardi next repeats his claim that counsel was ineffective in failing to file a motion to suppress his statement to police. The interview transcript suggests Lizardi was asleep at the beginning of the interview. And, in an affidavit included with his petition for post-conviction relief, Lizardi asserted he had slept no more than "several hours" in the preceding "two weeks" before the interview due to his use of "large amounts of methamphetamine." Thus, he claimed, he was not "clear minded" during the interview,

his "memory was impaired," and he was unable to answer questions "clearly and carefully."

¶12 Statements to law enforcement are presumed involuntary and are admissible only upon proof from the state that they were freely and voluntarily made and not the product of coercion. *State v. Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d 111, 121 (2008). However, for a statement to be involuntary, there must be "both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *Id.* "Statements are not automatically inadmissible if given under the influence of drugs or alcohol." *State v. Cota*, 229 Ariz. 136, ¶ 24, 272 P.3d 1027, 1035 (2012). A statement by an intoxicated defendant is involuntary only if he "could not understand the meaning of his statements." *Id.*, *quoting State v. Tucker*, 157 Ariz. 433, 446, 759 P.2d 579, 592 (1988). Lizardi has provided only an excerpt of his statement to police. Nothing in that statement suggests he did not understand the questions or the meaning of his answers, and he did not claim otherwise in his affidavit. And Lizardi does not assert, and the transcript does not show, the interviewer engaged in any coercive conduct. Thus, even if we agreed counsel should have filed a motion to suppress, Lizardi has not demonstrated any likelihood it would have been granted. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶13 Lizardi also asserts counsel was deficient in failing to provide "context" to his statement by providing evidence of his "sleep deprivation and drug use up to the time the statement was taken." But counsel's decision to avoid testimony about Lizardi's methamphetamine use is obviously a reasoned, tactical decision that cannot support a claim of ineffective assistance. *See Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d at 101.

¶14 We grant review but deny relief.