IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

EASTON COURTNEY MURRAY,
Petitioner.

No. 2 CA-CR 2020-0129-PR
Filed October 19, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20170096001
The Honorable James E. Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Easton C. Murray, San Luis
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Petitioner Easton Murray seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.[1] "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Murray has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Murray was convicted of aggravated assault. The trial court sentenced him to a five-year prison term. This court affirmed his conviction and sentence on appeal. *State v. Murray*, 247 Ariz. 447 (App. 2019).

¶3 Murray thereafter sought post-conviction relief, arguing in his petition that the indictment against him had been "obtained by misrepresentation and fraud"; that the prosecutor had committed prosecutorial misconduct, including withholding evidence in violation of the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963); that he had received ineffective assistance of trial and appellate counsel; and that he was "factually innocent." The trial court summarily denied relief, and likewise denied Murray's subsequent motion for rehearing.

¶4 On review, Murray contends the trial court abused its discretion by "failing or refusing to reach the merits of errors" he had

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

raised.[2] But as the court correctly determined, Murray's claims relating to the indictment and prosecutorial misconduct are precluded because they could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). Murray argues his claims about the indictment go to the court's jurisdiction or may only be personally, voluntarily, and knowingly waived and therefore are exempt from preclusion. But claims related to deficiency of an indictment are not matters of jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[D]efects in an indictment do not deprive a court of its power to adjudicate a case."). And we cannot say Murray has established the issue here is one of sufficient constitutional magnitude to require a personal waiver. *See* Ariz. R. Crim. P. 32.2(a)(3); 32.16(c)(2)(D).

¶5 Murray further asserts that the trial court erred in rejecting his claims of ineffective assistance of counsel because it applied the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and required that he show prejudice to state a colorable claim. He argues, however, that the court thereby ignored the United States Supreme Court's ruling in *United States v. Cronic*, 466 U.S. 648 (1984), which he maintains applies to his case.

¶6 In *Cronic*, the Supreme Court determined that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." 466 U.S. at 659. While the Court concluded that such a denial had not occurred in *Cronic*, it nonetheless provided that the defendant could assert a claim of ineffective assistance of counsel "by pointing to specific errors." *Id.* at 666. Similarly, here, Murray was not denied the right to counsel. The record shows that Murray had trial counsel, who filed various pleadings and argued on his behalf.

¶7 As the trial court correctly pointed out, *Strickland* describes the standard for claims of ineffective assistance of counsel. To state a colorable claim, a defendant must establish that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced

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[2]Murray does not address his claims relating to the motion pursuant to Rule 20, Ariz. R. Crim. P., nor his claim that he is factually innocent. We therefore do not address them. *See* Ariz. R. Crim. P. 32.16(c)(2)(D); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (defendant waived claim when he did not "develop the argument in any meaningful way" on review); *State v. Rodriguez*, 227 Ariz. 58, n.4 (App. 2010) (declining to address argument not raised in petition for review).

the defendant. *Strickland*, 466 U.S. at 687; *see also State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Bennett*, 213 Ariz. 562, ¶ 21.

¶8 Murray argues trial counsel was ineffective in failing to challenge the grand jury proceeding, to investigate the ownership of marijuana found at the scene, to obtain an expert witness on the victim's injury, and to object to an accomplice theory. But his arguments go to tactical decisions made by counsel, and we will presume "that the challenged action was sound trial strategy under the circumstances." *State v. Stone*, 151 Ariz. 455, 461 (App. 1986). Murray's defense at trial was essentially that the state had failed to prove he or his brother had intended to shoot the victim—that the gun had discharged during a fight, possibly even fired by the victim himself. We cannot say counsel's decision to focus on the uncertainty of the shooting itself rather than attempting to establish ownership of the marijuana or the exact mechanics of the shooting was unreasonable, particularly as the victim's involvement in marijuana sales or use would not necessarily preclude Murray's own involvement. *See State v. Kolmann*, 239 Ariz. 157, ¶ 10 (2016) (defendant overcomes presumption of sound strategy "by showing that counsel's decisions were not tactical or strategic in nature, but were instead the result of 'ineptitude, inexperience, or lack of preparation.'" (quoting *State v. Goswick*, 142 Ariz. 582, 586 (1984))).

¶9 Murray further contends trial counsel was ineffective in failing to object to an accomplice theory. He also asserts appellate counsel was ineffective in failing to challenge the lack of notice of an allegation of accomplice liability. But as the trial court correctly pointed out, "In Arizona, being an accomplice is not a separately chargeable offense; it is merely a theory that the state may utilize to establish the commission of a substantive criminal offense." *State v. Woods*, 168 Ariz. 543, 544 (App. 1991) (citing A.R.S. § 13-303).

¶10 Furthermore, Murray provided no affidavits or other evidence in the trial court suggesting that his trial or appellate counsel's conduct fell below reasonable standards. *See* Ariz. R. Crim. P. 32.7(e) ("The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition."). His bald assertions that counsel erred are insufficient to sustain his burden of proof. *See State v. Donald*, 198 Ariz. 406, ¶ 21 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). We therefore cannot say the court abused its discretion in dismissing the proceeding.

¶11 We grant the petition for review, but we deny relief.