IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
Respondent,

v.

ROBERTO LIZARDI JR.,
Petitioner.

No. 2 CA-CR 2020-0161-PR
Filed October 8, 2020

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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NOT FOR PUBLICATION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. 31.19(e).

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Petition for Review from the Superior Court in Maricopa County
No. CR2007150761001DT
The Honorable Jo Lynn Gentry, Judge

REVIEW GRANTED; RELIEF DENIED

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COUNSEL

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

Michael P. Denea PLC, Phoenix
By Michael P. Denea
Counsel for Petitioner

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   Roberto Lizardi Jr. seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.[1] We review the ruling for an abuse of discretion. *State v. Kolmann*, 239 Ariz. 157, ¶ 8 (2016). Lizardi has not met his burden of establishing such abuse here.

¶2   After a jury trial, Lizardi was convicted of armed robbery, aggravated assault, and theft of a means of transportation.[2] The trial court sentenced Lizardi to prison terms of 10.5 years for armed robbery and 7.5 years for aggravated assault, as well as a three-year term of probation for theft of a means of transportation—all to be served consecutively. On appeal, this court vacated Lizardi's sentence for aggravated assault and remanded for resentencing. *State v. Lizardi*, No. 1 CA-CR 13-0783, ¶ 1 (Ariz. App. Feb. 12, 2015) (mem. decision). On remand, the trial court resentenced Lizardi with the prison terms for armed robbery and aggravated assault running concurrently.

¶3   Lizardi initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she was unable to find a colorable Rule 32 claim to raise. Thereafter, Lizardi filed a pro se petition, but he later

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[1] Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The 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." *Id.* "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).

[2] Lizardi was also convicted of resisting arrest, but the trial court "terminally dispos[ed]" of that conviction.

sought to amend the petition after retaining new counsel. The trial court granted his request and accepted the amended petition.

¶4   In his petition, Lizardi asserted that trial counsel rendered ineffective assistance by failing "to elicit and argue the nature of the state's central witness's prior felony conviction." He pointed out that counsel agreed to sanitize the conviction and cautioned the trial court against answering juror questions concerning the nature of the offense. In addition, Lizardi asserted that trial counsel had rendered ineffective assistance by failing "to renew her successful objection" to the prosecutor's "repeated elicitation of evidence in its case-in-chief and argumentation about that evidence regarding Lizardi's post-*Miranda* invocation of the right to remain silent." [3]   Specifically, he opposed the officers' testimony—and the prosecutor's comments thereon—that, when asked about whether he had used a knife during the altercation underlying his convictions, Lizardi had said, "Well, if I tell you, you'll hold it against me."

¶5   The trial court summarily dismissed Lizardi's petition. It first observed that Lizardi "never raised the issues on appeal of whether it was error to sanitize the [witness's] prior or whether the prosecutor committed misconduct by eliciting evidence on and commenting on [Lizardi's] post-*Miranda* invocation of his right to remain silent." The court thus concluded those issues were precluded under Rule 32.2(a)(3). The court further determined that Lizardi's "current claims for post-conviction relief are precluded" because he "never raised these issues on appeal." However, the court also concluded, "Even if those claims are not precluded, trial counsel was not ineffective." With regard to the witness's prior conviction, the court found neither deficient performance nor prejudice because Rule 609(a)(1)(A), Ariz. R. Evid., allows a witness's prior conviction to be sanitized and "[p]recluding the nature of the prior did not hinder the defense attempts to discredit the [witness's] credibility based on the fact that he had previously been convicted of a felony." With regard to the prosecutor's comments and questioning, the court determined that Lizardi's "hold it against me" statement was not an effective invocation of his right to remain silent. In addition, the court observed that the comments and questioning were permissible "because, in context, they highlighted [Lizardi's] evasive answer to the officer's question." This petition for review followed.

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[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

¶6   On review, Lizardi first contends the trial court "improperly invoked Rule 32.2(a)(3), the rule of preclusion, to bar review of claims alleging that Lizardi's conviction was obtained in violation of the United States or Arizona constitutions" under Rule 32.1(a). He maintains that "the provisions of Rule 32.2(a)(3) do not operate as a procedural bar to preclude review" of his claims of ineffective assistance of counsel. We agree.

¶7   Rule 32.2(a)(3) provides that a defendant is precluded from post-conviction relief based on any ground under Rule 32.1(a) that has been "waived at trial or on appeal, or in any previous post-conviction proceeding." However, claims of ineffective assistance of counsel, which fall under Rule 32.1(a), *see State v. Petty*, 225 Ariz. 369, ¶ 11 (App. 2010), can only be raised in post-conviction proceedings, not on direct appeal, *State v. Spreitz*, 202 Ariz. 1, ¶ 9 (2002).

¶8   Although an underlying claim may be raiseable on direct appeal, a claim of ineffective assistance of counsel is independent from the claim upon which it is based. Consequently, the trial court erred when it found Lizardi's claims of ineffective assistance of counsel precluded because they were based on issues that were not raised on appeal. Nevertheless, the court did not abuse its discretion in summarily dismissing Lizardi's petition because his claims were not colorable.

¶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." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* Under the first prong of *Strickland*, "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 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). To show prejudice under the second prong, a defendant must establish there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶10   As he did below, Lizardi contends that he "received ineffective assistance of counsel from trial counsel's failure to elicit and argue the nature of the State's central witness' prior felony conviction." He argues that the trial court's ruling was "clearly unreasonable and contrary to decisions of both the Supreme Court of the United States and the Arizona

Supreme Court." He suggests that Rule 609(a)(1)(A), Ariz. R. Evid., mandated introduction of the prior conviction. But he misapprehends the rule.

¶11 As relevant here, Rule 609(a)(1)(A) provides that "a witness's character for truthfulness by evidence of a criminal conviction" that was punishable by imprisonment for more than one year "must be admitted, subject to Rule 403, [Ariz. R. Evid.,] . . . in a criminal case in which the witness is not a defendant." And Rule 403 allows the trial court to exclude evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Arizona caselaw "has consistently approved of sanitization as a means of limiting prejudicial effect." *State v. Montaño*, 204 Ariz. 413, ¶ 66 (2003).

¶12 Trial counsel's decision to sanitize the witness's prior conviction was consistent with these rules and our caselaw. And, as the trial court pointed out, counsel was still able to impeach the witness with the existence of the prior conviction. *See State v. Smith*, 244 Ariz. 482, ¶ 9 (App. 2018) ("[T]actical or strategic decisions rest with counsel."). Accordingly, we cannot say the court abused its discretion in concluding that Lizardi had failed to establish that counsel's performance fell below reasonable standards.

¶13 In addition, Lizardi has not meaningfully challenged the trial court's additional determination that he failed to establish prejudice. Although he correctly notes that the jury asked questions about the witness's prior conviction, he has not identified any likelihood that the jury would have reached a different result had it learned the details of the conviction. Accordingly, we deem any such argument waived. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (claim waived on review when defendant cites no relevant authority and does not develop argument in meaningful way); *see also* Ariz. R. Crim. P. 32.16(c)(2)(D) (petition for review must contain citations to legal authorities).

¶14 Lizardi also repeats his claim that trial counsel rendered ineffective assistance by failing to object to the prosecutor's "repeated elicitation of [his] post-*Miranda* invocation of the right to remain silent even though the trial court had sustained defense objections to the tactic."[4] But

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[4]As the state points out, although Lizardi claims that trial counsel "made a 'successful objection' to the 'hold it against me' statement that she was ineffective for failing to renew," he misconstrues the record. After the

the trial court correctly determined that Lizardi's statement, "If I tell you, you'll hold it against me," was not an effective invocation of his right to remain silent.

¶15   "A prosecutor may not comment on a defendant's invocation of his Fifth Amendment rights." *State v. Parker*, 231 Ariz. 391, ¶ 64 (2013). Although "[i]nvocation of the right to remain silent need not be made with precision," *State v. Cota*, 229 Ariz. 136, ¶ 26 (2012), it "must be unequivocal and unambiguous, as judged from the perspective of a reasonable officer under the totality of the circumstances," *State v. Payne*, 233 Ariz. 484, ¶ 40 (2013); *see Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010).

¶16   Viewed in context, Lizardi's conditional and evasive statement cannot be construed as an unequivocal and unambiguous invocation of the right to remain silent. *Cf. Parker*, 231 Ariz. 391, ¶ 65 (defendant's statement, "If I tell you that I took them, . . . [t]hen you're going to think I did it," was not invocation of right to remain silent, and prosecutor could thus comment on defendant's statements).   The prosecutor's questions and comments thereon were therefore permissible, and trial counsel was not ineffective for failing to object. *See id.* The trial court thus did not abuse its discretion in concluding that Lizardi had failed to establish his counsel's performance fell below reasonable standards.

¶17   Accordingly, we grant review but deny relief.

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officer testified that Lizardi had made the statement, the prosecutor asked, "Did you interpret that as an incriminating statement?"   At that point, counsel objected based on speculation and because "it calls for a legal conclusion," and the court sustained the objection.