IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JEFFREY EUGENE STIERLEY,
Petitioner.

No. 2 CA-CR 2020-0223-PR
Filed March 15, 2021

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NOT FOR PUBLICATION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 Gila County
Nos. S0400CR201700324 and S0400CR201800228
The Honorable Timothy M. Wright, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Bradley D. Beauchamp, Gila County Attorney
By Diana L. Kanon, Deputy County Attorney, Globe
Counsel for Respondent

Law Office of Emily Danies, Tucson
By Emily Danies
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Espinosa authored the decision of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

E S P I N O S A, Presiding Judge:

¶1 Petitioner Jeffrey Stierley 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). Stierley has not sustained his burden of establishing such abuse here.

¶2 After a jury trial on charges in two causes consolidated for trial, Stierley was convicted of aggravated domestic violence, criminal damage, and influencing a witness. This court affirmed his convictions and sentences on appeal. *State v. Stierley*, Nos. 2 CA-CR 2018-0358, 2 CA-CR 2018-0360 (Ariz. App. Nov. 15, 2019) (consol. mem. decision).

¶3 Stierley thereafter sought post-conviction relief, arguing in his petition that trial counsel had been ineffective for failing to object to the consolidation of the two causes. Concluding that counsel could not have been ineffective because the causes had been properly consolidated, the trial court dismissed the petition.

¶4 On review, Stierley contends the trial court abused its discretion in dismissing his petition. He maintains that the motion to consolidate should not have been granted because the conduct underlying the two causes took place nearly a year apart and "stemmed from separate

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. 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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

domestic disputes." Thus, "[b]y failing to object to this improper consolidation, trial counsel provided deficient performance." He further asserts that a recording introduced in relation to the charge of influencing a witness would not have been properly admitted in a separate trial on the assault charge and that he was therefore prejudiced by counsel's failure to object.

¶5 "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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶6 In May 2018, the state filed a motion to consolidate CR 2017-324, in which Stierley was charged with assaulting his girlfriend, D.S., in December 2016 and CR 2018-228, in which he was charged with influencing a witness, based on his having threatened D.S. in May 2018, demanding she change her account of the earlier incident. The motion was discussed at a hearing on May 29, and defense counsel indicated he had no objection to it. The court noted that "the same information in the new case would probably be admissible in the prior case" and that "therefore, there would be no prejudice even though they are independent time frames." In ruling on Stierley's petition for post-conviction relief, the court stated it was "still of the opinion that the evidence presented at the consolidated trial would have been admissible in each case if the matters were tried separately" and it therefore would have granted the motion to consolidate even had counsel opposed the motion.

¶7 We agree with the trial court that Stierley cannot establish counsel's performance was deficient if it properly consolidated the two cases. If the consolidation was proper, we cannot say "the result of the proceeding would have been different" had counsel performed differently. *Id.* Offenses may be joined in one proceeding "if they: (1) are of the same or similar character; (2) are based on the same conduct or otherwise connected together in their commission; or (3) are alleged to have been part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). In addition, if such offenses "are charged in separate proceedings," they may be joined in whole or in part by the court or upon motion of either party, "in the interests

of justice." Ariz. R. Crim. P. 13.3(c). However, the rules governing joinder and severance must be read together. *State v. Curiel,* 130 Ariz. 176, 183 (App. 1981). Thus, when offenses are joined only by virtue of Rule 13.3(a)(1), a defendant is entitled to have the offenses severed as a matter of right "unless evidence of the other offense or offenses would be admissible if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

¶8 Here, the cases were "connected together in their commission." Ariz. R. Crim. P. 13.3(a)(2). D.S. testified that the argument giving rise to the charge of influencing a witness had started because Stierley wanted her "to come in and say that [she] had made the whole thing up." "Evidence that a criminal defendant sought to suppress evidence adversely affecting him is relevant to show a consciousness of guilt." *State v. Williams*, 183 Ariz. 368, 375 (1995). As such, evidence of the argument would have been admissible to prove the assault and criminal damage charges.

¶9 Stierley argues, however, that a recording D.S. made during the argument would not have been admissible because it "only capture[d] Mr. Stierley yelling and cursing at" D.S. and not expressly asking her "to lie for him." He contends the evidence in *Williams* is distinguishable from that at issue here because the recording "had absolutely no probative value for the original domestic violence charge" and would have been precluded under Rule 403, Ariz. R. Evid., in a separate proceeding. We disagree, however, that the recording had no probative value. D.S. testified that the recording contained part of an argument with Stierley about his wanting her to say she made up the assault to "get him out of" the charges. Indeed, on the recording Stierley tells D.S. she will be "sorry" if she does not go to Payson with him, says he has told his trial attorney she would come, asks if she will at least talk to the attorney on the phone, and repeatedly berates D.S. for failing to help him. The extent to which the conversation on the recording showed Stierley tried to have D.S. change her account of the assault or to which it might have "possible alternative explanations," concerns "the weight of the evidence, not . . . its admissibility." *Williams*, 183 Ariz. at 376. The evidence therefore was admissible in both cases, and the trial court did not abuse its discretion in consolidating the two cases. That being so, we agree with the trial court that Stierley did not establish his claim of ineffective assistance of counsel.

¶10 Although we grant the petition for review, relief is denied.