IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHNATHAN ANDREW DOODY,
Petitioner.

No. 2 CA-CR 2021-0012-PR
Filed March 2, 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NOT FOR PUBLICATION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 Maricopa County
No. CR1992001232
The Honorable Joseph Kreamer, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Allister Adel, Maricopa County Attorney
By Jeffrey L. Sparks, Deputy County Attorney, Phoenix
Counsel for Respondent

Law Office of Brent E. Graham PLLC, Dolores, Colorado
By Brent E. Graham
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Petitioner Johnathan Doody seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Doody has not sustained his burden of establishing such abuse here.

¶2 After a jury trial,[2] Doody was convicted of nine counts of first-degree murder, nine counts of armed robbery, and one count each of first-degree burglary and conspiracy to commit armed robbery or first-degree burglary, related to a 1991 incident at a Buddhist Temple (the temple murders). The trial court sentenced Doody to nine consecutive terms of life imprisonment without the possibility of parole for twenty-five years for the murder counts, and to a consecutive aggregate term of twelve years' imprisonment for the other counts. We affirmed Doody's

[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)).

[2] This was Doody's third trial in this matter. We affirmed his convictions and sentences after his first trial, *State v. Doody*, 187 Ariz. 363 (App. 1996), but the United States Court of Appeals for the Ninth Circuit reversed those convictions in *Doody v. Ryan*, 649 F.3d 986, 1023 (9th Cir. 2011), finding his confession to police was involuntary and in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). A second trial in 2013 resulted in a mistrial. For ease of reference, use of the term "trial" in this decision means Doody's third trial, which is the subject of this petition for review.

convictions and sentences on appeal. *State v. Doody*, No. 1 CA-CR 14-0218 (Ariz. App. Nov. 10, 2015) (mem. decision).

¶3 Doody then sought post-conviction relief, and after appointed counsel filed a notice of completion of post-conviction review noting he was "unable to find any claims for relief to raise" in a Rule 32 petition, the trial court permitted Doody to file a pro se petition. In that petition, filed in December 2016, Doody argued that trial attorney David Rothschild was ineffective for misadvising him that his confession to law enforcement admitting his involvement in the temple murders (the confession), which the Ninth Circuit had found to be involuntary, *Doody v. Ryan*, 649 F.3d 986, 1023 (9th Cir. 2011), would be admissible to impeach him if he testified at trial, as would his father's statements to police.[3] He also maintained that the lead attorney at trial, Maria Schaffer, had threatened to quit if he testified at trial, and that she had instructed his parents to "talk [him] out of" testifying.[4] He argued that his attorneys' erroneous advice, which deprived him of his right to testify at trial and to present alibi evidence, constituted ineffective assistance of counsel.

¶4 The trial court conducted an evidentiary hearing in June 2019,[5] which it limited to testimony regarding counsel's advice related to Doody's decision to testify and the admissibility of his confession if he did so. The court further explained that the purpose of the hearing was "to establish facts relating only to the first prong" of *Strickland v. Washington*, 466 U.S. 668 (1984), specifically, whether counsel's performance fell below prevailing professional standards, noting it would not hear evidence or

[3]After he was arrested, Doody told his father that he had been at the temple at the time of the murders, information his father voluntarily shared with the police, and which contradicted Doody's own statement to the police that he had been at the movies at the time of the murders. The father's statements are part of a documented police report, and the father testified about Doody's confession to him at both the sentencing hearing in Doody's first trial and at the evidentiary hearing in this matter.

[4]At a hearing held in December 2018, Doody orally amended his Rule 32 petition to include a claim that Schaffer likewise had told him that his confession would be admissible if he testified at trial.

[5]The trial court had also presided over the second two trials. Before the evidentiary hearing, the court reappointed Rule 32 counsel as attorney of record to represent Doody at the evidentiary hearing.

argument on the prejudice prong of that analysis.[6] Following that hearing, at which Doody, his father, his sister, his sister-in-law, and his trial attorneys testified, the court denied relief. This petition for review followed.

¶5 At the evidentiary hearing, Doody testified that when he had told Schaffer he wanted to testify, she had discouraged him from doing so, telling him she would "quit" if he testified, and that Rothschild would speak to him further in that regard. He added that Schaffer had never told him his confession would be admissible if he testified, only that he should not testify. Doody stated that Rothschild had advised him not to testify, and had told him that if he did, his confession would be admissible and his father could be called as a witness "to bring in the confession." He also testified that his father had told him that Schaffer had said if he testified at trial, his confession would be admissible and his father could be called as a witness.

¶6 Doody's father testified that Schaffer had been "extremely agitated and upset" when she had spoken to the family (outside Doody's presence) about Doody's desire to testify, and had stated that if he testified at trial, his confession and the father's statement to the police would be admissible and she would quit. She "told" him to "try and talk [Doody] out of testifying," which he did because he was "really nervous and scared" she would quit; Doody ultimately agreed not to testify. Doody's sister similarly testified that Schaffer had been a "little aggressive" when she had met with the family to discuss Doody's desire to testify, and had said that Doody was not "ready" to testify and that she would "walk out on the case" if he did. Doody's sister-in-law testified that Schaffer had appeared "flustered, irritated, [and] kind of angry" when she had spoken with the family, she had "sounded demanding" when she had asked the father to convince Doody not to testify, she had stated Doody's confession would be admissible at trial if he testified and she would quit if he did.

¶7 Schaffer testified as follows: it was the law of the case that Doody's confession could not be used to impeach him if he testified at trial; it was not in his best interest to testify, nor would it add anything to his defense; she had explained to Doody that he would have a "hard time" answering certain questions if he testified, and when asked, she

[6] Before the evidentiary hearing, Doody nonetheless filed a Supplemental Petition [for Post-Conviction Relief] re Prejudice, the state filed a response to that petition, and after the hearing, Doody filed a reply.

acknowledged that he would "get chewed up" if he testified; she was concerned Doody's father could be called to impeach him if he testified; and, she had solicited others, including Doody's father, to persuade him not to testify. Notably, Schaffer acknowledged that she had affirmatively told Doody multiple times that he could testify, and even if the state felt he was lying, it could not impeach him with the suppressed confession. Schaffer also testified that she had never told Doody's family his confession would be admissible if he testified, or that she would quit if he did so, adding that she "would never . . . threaten to abandon a client in the middle of a trial."

¶8 Rothschild testified that he was aware of the Ninth Circuit opinion in this case and of the fact that Doody's confession, therefore, was inadmissible at trial. He also testified that he generally wrote and approved of any motions he filed, including the motion in limine he had filed regarding Doody's confession to the police admitting his involvement in the murders, a motion the state had not opposed. In his motion, which the trial court granted, Rothschild had specifically requested that "any evidence of this confession or inference thereto cannot be used by the state at trial of this matter for any purpose, including impeachment should Mr. Doody testify." Rothschild also testified that although he could not recall having advised Doody not to testify, he could not say it did not happen.[7]

¶9 In its written ruling denying post-conviction relief, the trial court provided a detailed summary of the procedural history of the case and of the witnesses' testimony at the evidentiary hearing. The court stated it "accept[ed] Ms. Schaffer's testimony that the inadmissibility of [Doody's] confession to law enforcement was clearly communicated to [Doody] on more than one occasion and that she never advised anyone that [Doody] could be impeached with his confession." The court also found that it "doubt[ed] that Mr. Rothschild, whatever state he was in because of the loss of his father, misstated what was the law of the case to [Doody]." The court further found "unconvincing" Doody's argument that Schaffer had *not* affirmatively advised him that his confession would be inadmissible at trial (in contrast to allegedly telling him it *would* come in), reiterating that it accepted Schaffer's testimony "that she actually did affirmatively tell [Doody] that if he testified at trial his confession to law enforcement could not be used against him."

[7]Rothschild testified that his recollection was "fuzzy" because his father had passed away during the relevant time period.

¶10 In addition, the trial court found it did not believe that Schaffer had threatened to quit or "otherwise fell below the standard" in her response to Doody's request to testify. Acknowledging that Schaffer was "clearly forceful and perhaps angry in her communication," and that she had elicited the father's help to convince Doody not to testify, the court nonetheless believed Schaffer that she had not threatened to quit and found that there was "nothing wrong" with her "adamant[]" assertion that Doody not testify. The court concluded, therefore, that Doody had failed to show that his attorneys had fallen below an objective standard of reasonable conduct.[8]

¶11 On review, Doody reasserts his claim that his trial attorneys rendered ineffective assistance by misadvising him his confession could be used to impeach him if he testified at trial and by threatening to quit, essentially "coerc[ing] him into waiving his right to testify in his own defense." He thus argues the trial court erred by denying his claims of ineffective assistance of counsel.[9] Doody maintains the record does not support the court's ruling, specifically pointing to the family's testimony regarding Schaffer's aggressive demeanor when she discussed his desire to testify with the family, the absence of any reference in her case notes of having affirmatively advised him that his confession would be inadmissible to impeach him if he did testify, and Rothschild's unclear recollection of what he had told Doody.

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[8]Although the trial court also briefly addressed and rejected Doody's assertion that he had been prejudiced by counsel's conduct, we do not address that portion of the court's ruling. Based on our determination that the court correctly concluded that Doody had not established that counsel's conduct fell below prevailing professional norms, we need not address his claim of prejudice. *See State v. Salazar*, 146 Ariz. 540, 541 (1985) ("In deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one.").

[9]Doody also challenges the trial court's finding that he failed to show he was prejudiced by counsel's conduct, including a claim he raised for the first time at the evidentiary hearing, that his confession to his father would have been inadmissible at trial as the fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471 (1963). To the extent Doody characterizes this as an argument based on the prejudice prong under *Strickland,* 466 U.S. at 687, rather than one based on deficient conduct, as previously noted, we decline to address the prejudice portion of his claim.

¶12 "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*, 466 U.S. at 687). And a "[f]ailure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id*.

¶13 Based on the evidence previously summarized, including Schaffer's testimony that she had affirmatively told Doody his confession was inadmissible at trial, the record simply does not support Doody's assertion that "the evidence adduced at [the] hearing showed that, more probably than not, Doody was mis-advised by trial counsel as to the use of his illegal confession should he elect to testify." Our review of the trial court's factual findings after an evidentiary hearing "is limited to a determination of whether those findings are clearly erroneous"; 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." *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* "Evidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding). We thus find unavailing Doody's argument that the trial court erred by relying on Schaffer's testimony that she had told Doody his confession could not be used against him if he testified at trial, a representation he urges us to reject because it "is not supported by any evidence other than [Schaffer's] word."

¶14 Doody also challenges the trial court's finding that the discrepancy between the testimony of the family and the attorneys may have been based on a "disconnect" regarding what counsel actually told them and what they believed they heard regarding Doody's confession to law enforcement as opposed to his confession to his father. He argues that Doody only told his father what he had told the police, and thus asserts the court's theory is "not supported by the testimony" at the evidentiary hearing. However, at the hearing, when the state asked the father, "My question to you is that your son did tell you he was at the Temple at the time of the murders," the father responded, "Yes," a response further corroborated by the police report containing the father's statement. Accordingly, because the court's findings are supported by substantial evidence, we find no fault with its legal analysis.

¶15 Nor does the record support Doody's assertion that Schaffer improperly delegated her responsibility as Doody's attorney to the father when she urged him to help persuade Doody not to testify. The trial court expressly accepted Schaffer's testimony that she had told Doody from the beginning of the case that his confession could not be used at trial, even if he testified, and that she had told his family the same thing. The fact that she also solicited help from others to persuade him not to testify does not establish that she somehow shirked her responsibility to Doody.

¶16 Finally, Doody asserts that his father, sister, and sister-in-law all testified that Schaffer said she would quit if he testified, conduct he characterizes as coercive and deficient. However, Doody also acknowledges that the family's testimony was contradicted by Schaffer's testimony that she had not threatened to withdraw, testimony the trial court expressly accepted as true.[10] Again, we defer to the trial court with respect to credibility determinations and will not reweigh the evidence. *State v. Rodriguez*, 205 Ariz. 392, ¶ 18 (App. 2003). It was for the trial court, not this court, to resolve the conflicts in the testimony presented, and the court's factual determinations here were supported by evidence presented at the evidentiary hearing.

¶17 On the record before us, we agree with the trial court's assessment that Doody failed to establish a claim of ineffective assistance of counsel. Therefore, although we grant the petition for review, we deny relief.

[10]Doody correctly points out that the trial court erroneously stated that his sister-in-law did not testify that Schaffer had threatened to quit. Despite this apparent misstatement, and viewing the record as a whole, we nonetheless conclude the court did not abuse its discretion in ruling as it did.