IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RONNIE EUGENE HOLLAND,
Petitioner.

No. 2 CA-CR 2021-0085-PR
Filed January 11, 2022

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NOT FOR PUBLICATION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. CR20174792001
The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harold L. Higgins PC, Tucson
By Harold L. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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, Judge:

¶1 Ronnie Holland seeks review of the trial court's ruling following an evidentiary hearing denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Holland has not sustained his burden of establishing such abuse here. *See State v. Poblete*, 227 Ariz. 537, ¶ 1 (App. 2011).

¶2 After a jury trial, Holland was found guilty of two counts each of aggravated assault and discharge of a firearm within city limits, and one count each of discharge of a firearm at a residential structure, drive-by shooting, endangerment, fleeing from a law enforcement vehicle, and possession of a deadly weapon by a prohibited possessor, all committed while on probation.[1] The trial court sentenced Holland to concurrent

[1] The trial for weapons misconduct was bifurcated. Holland's convictions were based on the following facts, as set forth in our decision on appeal:

> In October 2017, Holland fired several bullets into an apartment with two occupants and pointed a gun at one of them. About two hours later, Holland confronted another victim at a convenience store, pursued him in his truck, rammed the victim's vehicle repeatedly, and fired two shots at it; at least one bullet struck the vehicle, causing the victim's arm and leg to be injured by exploding glass. Shortly thereafter, Holland led police on a vehicle pursuit that ended with his arrest.

prison terms, the longest of which is an aggravated, twenty-eight year sentence. We affirmed Holland's convictions and sentences on appeal. *State v. Holland*, No. 2 CA-CR 2018-0317 (Ariz. App. Mar. 17, 2020) (mem. decision).

¶3 Holland then sought post-conviction relief, raising numerous claims of ineffective assistance of trial and appellate counsel. Following an evidentiary hearing in May 2021, at which a forensic ballistics consultant, a forensic psychologist, and two police officers testified, the trial court denied relief.[2] This petition and amended petition for review followed.[3] On review, Holland reasserts all but one of the claims he raised below; we address each of his arguments in turn.

¶4 Both in his Rule 32 petition below and on review, Holland couches each of his claims as independent arguments he could have raised or did raise on appeal, and then adds language asking if counsel was ineffective in failing to raise that claim. In addition to generally finding that Holland had not established any claims of ineffective assistance of counsel, the trial court noted, "[t]hat the Defendant is unhappy with the rulings of the Court is not grounds for post-conviction relief. Had there been legal error, it could have and should have been brought as part of Defendant's appeal and [is] therefore now waived. Ariz. R. Crim. P. 32.2(a)." To the extent Holland's claims can be read as independent claims of legal error, they are precluded, *see* Rule 32.2(a)(3), a fact the trial court correctly noted and which he challenges on review. To the extent Holland also argues that all of the purported instances of counsel's deficient conduct, when considered together, amount to ineffective assistance that denied him due process and a fair trial, we note that our supreme court has not yet determined whether the cumulative error doctrine should be recognized in this context. *See State v. Pandeli*, 242 Ariz. 175, ¶¶ 69-70 (2017)

State v. Holland, No. 2 CA-CR 2018-0317, ¶ 3 (Ariz. App. Mar. 17, 2020) (mem. decision).

[2] In its Rule 32 ruling below, the trial court mistakenly stated Holland's sentences totaled forty-eight, rather than twenty-eight years.

[3] We note that although Holland's petition for review contains the relevant legal standard to establish a claim of ineffective assistance of counsel, he has failed to acknowledge that this court reviews the trial court's ruling in a post-conviction proceeding for an abuse of discretion. *Roseberry*, 237 Ariz. 507, ¶ 7.

(acknowledging the Ninth Circuit recognizes cumulative error may establish *Strickland* prejudice).

¶5 On review of the denial of post-conviction relief after an evidentiary hearing, 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.* Holland bore the burden of proving his factual allegations by a preponderance of the evidence, *see* Ariz. R. Crim. P. 32.13(c), and was required to establish "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)). Whether counsel's performance fell below reasonable standards requires consideration of the prevailing professional norms. *State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016). And a defendant establishes prejudice if he can show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bennett*, 213 Ariz. 562, ¶ 25 (quoting *Strickland*, 466 U.S. at 694). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* ¶ 21.

Show-Up Identification

¶6 Holland raises multiple challenges to the show-up identification by two witnesses, M.G. and O.A., which was the subject of an unsuccessful motion to suppress.[4] He asserts that trial counsel was ineffective by failing to adequately present his argument to suppress the show-up identification at the suppression hearing and maintains the out-of-court and in-court identifications by M.G. and O.A. were unduly suggestive. *See Neil v. Biggers*, 409 U.S. 188, 199-201 (1972).

¶7 During the show-up, a light was shining on Holland, who was the only suspect present, and was handcuffed in view of his white truck. However, even if a pretrial identification procedure is unduly suggestive, a subsequent identification is admissible if it is reliable. *State v. Moore*, 222 Ariz. 1, ¶ 16 (2009). To determine reliability, Arizona courts consider the five factors articulated by the United States Supreme Court in *Biggers*, 409 U.S. at 199-201, which our state supreme court reiterated in *State v. Lehr*, 201

[4]Holland did not challenge the denial of his motion to suppress on appeal.

Ariz. 509, ¶ 48 (2002). *Moore*, 222 Ariz. 1, ¶ 16. These five factors are: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention at the time; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the identification. *Id.*

¶8 At trial, M.G. testified that he had been paying attention to Holland's truck, which was fifteen feet or less away from him during the initial interaction. He described Holland's clothing and his truck in detail, and he was "a hundred percent" certain that the individual he had identified at the show-up, which occurred the same night as the incident, was Holland. O.A. likewise described Holland's clothing and identified his truck, testified that Holland had followed him in the truck and had shot at him, and participated in the show-up the night the incident occurred. Holland points out that O.A. had "poor eyesight," suggesting trial counsel failed to sufficiently emphasize this fact at the suppression hearing. However, at trial, when asked if he has "bad vision," O.A. responded, "it's moderate" and "it's bad," and explained that although he has "corrective lenses," he is not required to wear them for driving and was not wearing them at the time of the incident with Holland.

¶9 Further, the officer who conducted the show-up reported that M.G. had said, "yeah, that's him," and O.A. had said, "yes that is definitely him" at the show-up. At the conclusion of the suppression portion of the hearing, the judge, who was the same judge who presided over the trial and the Rule 32 proceeding, concluded based on the factors set forth in *Biggers*, there was "sufficient reliability . . . under the circumstances" to identify Holland at trial. The trial court thus denied the motion to suppress, a ruling the record fully supports, and accordingly denied Holland's related claims of ineffective assistance of counsel. Because Holland has not shown that the result of the suppression hearing would have been different had counsel presented the arguments now made, we cannot say the court abused its discretion in rejecting his claim of ineffective assistance on this point.

In-Court Identification

¶10 Holland next argues that, although the trial court had granted his motion precluding an in-court identification of him by victims/brothers JH.Z. and JS.Z., it nonetheless permitted them to identify him at trial. He asserts that trial counsel's failure to object to that testimony constituted ineffective assistance. However, as the court noted in its ruling below,

because the brothers were victims, they were permitted to be in the courtroom before they testified. Just before he testified, JS.Z. told the prosecutor and defense counsel he recognized Holland as the person he had seen in the hallway holding a gun shortly after shots were fired into his apartment.[5] Accordingly, JS.Z. was permitted to testify that after having seen Holland on the first day of trial, he realized he was the same individual who had pointed a gun at him in the hallway outside of his apartment, after shots had been fired through the door of his apartment. JH.Z. also identified Holland as an individual he had previously seen at his apartment complex visiting a neighbor and testified he knew Holland drove a white truck. JH.Z. also explained that he could identify Holland because he was sitting at the defense table.[6]

¶11 In its ruling below, the trial court reasoned that trial counsel's failure to object to JH.Z. and JS.Z.'s identification of Holland at trial was "tactical and/or strategic," based on a decision to challenge the witnesses' credibility rather than claiming a denial of due process. *See State v. Goswick*, 142 Ariz. 582, 586 (1984) ("Unless the defendant is able to show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience or lack of preparation . . . we will not find that counsel acted improperly."). Noting that the record supported a finding that Holland had been in the vicinity of JH.Z. and JS.Z.'s apartment before the shooting and that the identification was not the result of any unduly suggestive show-up procedure,[7] the court stated it would have overruled an objection to the in-court identification, even if one had been made. Accordingly, we find no abuse of discretion in the court's denial of this claim of ineffective assistance of counsel.

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[5]JS.Z. testified he did not know who had fired the shots into his apartment.

[6]Although Holland suggests JH.Z. was only able to identify him because he was sitting at the defense table, the record suggests otherwise; JH.Z. testified that he had previously seen the individual he now knew to be Holland at his apartment complex, believed he had spoken to him from his balcony the night of the shooting, associated him with a white truck, and had told the police about that person the night the shooting had occurred.

[7]It appears that neither JH.Z. nor JS.Z. participated in a photographic lineup or show-up to identify Holland.

Motion to Sever

¶12 Holland also argues his motion to sever the counts related to JH.Z. and JS.Z. from those related to O.A. should have been granted because of the risk of "identification spillover from one incident to another." He suggests trial counsel was ineffective by failing to "present case law to bolster . . . the rationale for severance,"[8] and contends that appellate counsel failed to raise this issue. The trial court correctly determined Holland failed to establish that trial counsel was ineffective on this basis. The record does not suggest counsel's conduct at the motions hearing was deficient, nor has Holland established that fact or meaningfully explained how the court erred by denying this claim.

Accomplice Liability Jury Instruction

¶13 Holland further contends the evidence did not support giving a jury instruction based on accomplice liability, trial counsel was ineffective by failing to object to the instruction, and appellate counsel should have raised this issue on appeal. He asserts "there was no evidence of any agreement between the suspect and any other person to assist the suspect in these crimes." However, Holland acknowledges the record contains evidence of "several instances where the witnesses saw a second person, or claimed that the original suspect was not the person they saw committing the crime," an assertion the record supports.

¶14 In response to the state's request for an accomplice liability instruction, defense counsel requested mere presence and third-party culpability instructions; the trial court granted the former. In its ruling denying the Rule 32 petition below, the court found trial counsel's failure to object to the accomplice instruction "not only strategic, but also legally sound." Based on the record before us, including evidence that other individuals may have been involved and the arguments trial counsel presented to the court in this regard, we find no abuse of discretion in the court's denial of this claim of ineffective assistance.

[8]Citing an unpublished memorandum decision from this court, *State v. Martinez*, No. 2 CA-CR 2016-0385 (Ariz. App. June 8, 2018) (mem. decision), Holland apparently suggests counsel also was deficient for failing to cite this case.

Ballistics Evidence

¶15 Thomas Murphy, the firearms examiner for the Tucson Police Department, testified that his examination of the bullets fired during test fires from the subject gun he analyzed and those collected at the victims' apartment and at the scene of the police chase were inconclusive. Notably, however, Murphy also testified that none of the bullets examined, both those retrieved at the crime scenes and those in his test fire, contained any rifling, something he had never seen before. Ronald Scott, the ballistics expert who testified on Holland's behalf at the evidentiary hearing, opined that Murphy incorrectly left the jury with the impression that "the gun being exhibited in the courtroom was most likely the gun that fired the bullets" during the offenses, although "it could be the gun here in the courtroom or it could be any other gun that's capable of firing these types of bullets." Scott also testified that, although the subject gun is "common," he had "only seen one or two of them in the last 15 years" in his work as an independent forensic consultant. He added that, although he did not disagree with Murphy's examination of the weapon, he disagreed with his conclusions.

¶16 Holland asserts on review that trial counsel failed to adequately challenge Murphy's testimony at trial and that he should have retained a ballistics expert to point out the errors in that testimony. In its ruling denying this claim below, the trial court concluded, "it is pure speculation that the opinions proffered by [Holland's] expert . . . would have reasonably changed the outcome at trial. No prejudice has been shown." The court also found, "while [Murphy] testified that his comparison of the bullets collected from the . . . apartment with the test fires from the Makarov [pistol] were inconclusive, it was in large part because both the test fires and the collected bullets had no rifling on them to compare." The court also noted that Murphy "further testified that the gun appeared to have a polished barrel bore that would not impart rifling on fired ammunition."

¶17 Because the trial court's findings are supported by substantial evidence, we find no fault with its ruling. When "the trial court's ruling is based on substantial evidence, this court will affirm." *Sasak*, 178 Ariz. at 186. And, "[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.* Nor do we find persuasive Holland's suggestion that, by failing to address each of his claims individually, including his ballistics claim, the court somehow erred or failed to consider all of the evidence

presented. Holland has not expressly argued, much less established, that the court's ruling did not comply with Rule 32.13(d)(1) (following evidentiary hearing, court required to "make specific findings of fact and expressly state its conclusions of law relating to each issue presented").

Willits Instruction

¶18 The trial court denied Holland's request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964), based on the state's failure to preserve video surveillance from a convenience store. Appellate counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and Holland filed a supplemental pro se brief claiming the state had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose video and impeachment evidence and that he was entitled to an instruction pursuant to *Willits*, based on the loss of that video evidence.

¶19 On review, Holland contends trial counsel failed to question one of the officers sufficiently about the contents of the video, asserting it must have been "at least marginally relevant," and that he should not be required to establish the evidence might have exonerated him. *Cf. State v. Hernandez*, 250 Ariz. 28, ¶ 10 (2020) (to obtain *Willits* instruction, defendant must prove: "(1) the state failed to preserve obviously material and reasonably accessible evidence that could have had a tendency to exonerate the accused; and (2) there was resulting prejudice"). Here, the officer testified that the video showed O.A.'s vehicle entering the parking lot of the convenience store, as well as the officer's vehicle and a white truck. The officer "believe[d]" he had viewed and requested a copy of the video; the officer also stated "[i]f" the video had been given to him, he would have entered it into evidence.

¶20 In its ruling below, the trial court noted not only that Holland previously had raised the underlying *Willits* issue on appeal, and therefore cannot raise it again, but that this court found no reversible error in our review pursuant to *Anders*. *See Holland*, No. 2 CA-CR 2018-0317, ¶ 5. Not only does Holland's argument appear to be a repeated attempt to challenge the court's denial of his request for a *Willits* instruction, but it does not, in any event, establish that he was denied effective assistance of trial or appellate counsel.

Holland's Conduct

¶21 Holland also asserts his "bizarre" behavior should have been presented as a defense at trial and as a mitigating factor at sentencing.[9] Acknowledging that trial counsel described his mental health issues and his long-term drug use in the sentencing memorandum and at the sentencing hearing, Holland nonetheless asserts counsel should have provided documentation of these conditions and offered relevant expert testimony.

¶22 At the evidentiary hearing, forensic psychologist Alicia Pellegrin testified that Holland's post-traumatic stress disorder (PTSD) diagnosis, which may have been "the primary source of the violent behavior," should have been considered as a mitigating factor at sentencing. She also reported, "[I]t is certainly possible that, given Mr. Holland's [PTSD], combined with possible drug ingestion, he was suffering from a psychotic episode, rendering an impairment in his ability to understand that what he was doing was wrong, given the false belie[f] that he and his non-existent child were in danger." Notably, however, on cross-examination Pellegrin also testified:

> Q. Not everyone that has PTSD will involve law enforcement in a pursuit?
> A. That is correct.
> Q. And you're aware I note in your report that you are aware that Mr. Holland has a history of heavy substance abuse that includes heroin and methamphetamines, correct?
> A. Yes, ma'am.
> Q. And you described a certain number of symptoms that you testified seem to evidence that he—that Mr. Holland did not seem to understand what he was doing was wrong, things such as statements that he believed he had his child with him or engaging in acts of violence.
>
> My question for you is would you see perhaps similar type of behavior in extreme meth use?

[9]By way of example, Holland refers to his having asked about his "kids" when no child was present and his telling JS.Z. that the "purge" was happening.

> A. Yes.
> Q. Would you see similar type of behavior such as paranoia, believing that there's danger when there is none in extreme meth use?
> A. Yes.
> Q. Is there any way for you to distinguish extreme meth use from the PTSD based on what you have read of Mr. Holland's behavior during this incident?
> A. Definitively without examining him at the time of the crime as I sit here, no.

¶23 In its ruling denying this claim, the trial court stated, "It is true that during the commission of the crimes, Defendant's actions and statements seemed odd to the witnesses, but Defendant's own expert agrees that his behaviors could have been caused by a combination of the Defendant's claimed PTSD and his drug ingestion." The court added, "The voluntary ingestion of drugs is not a defense to any criminal act under the Arizona criminal code, and that includes the claim of insanity. To assert a guilty except insane defense, an individual must not be under the influence of any drug or mind-altering substance. A.R.S. [§] 13-502(A)."

¶24 And, although the trial court did not expressly address Holland's sentence mitigation claim in its ruling below, that claim was squarely presented to and rejected by the court in its denial of all his claims. In the sentencing memorandum, trial counsel provided a detailed history of Holland's mental health and substance abuse history, submitting them as non-statutory and statutory mitigating factors respectively. And, at sentencing counsel again reminded the court of Holland's mental health, addiction, and family issues. Based on the record before us, including Pellegrin's testimony, summarized above, Holland has not established that the testimony of a mental health expert at sentencing would have changed the outcome. *See Bennett*, 213 Ariz. 562, ¶ 25. Accordingly, we cannot find the court abused its discretion in denying this claim.

Disposition

¶25 Although we grant review, relief is denied.