IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEPHEN JAY MALONE JR.,
Petitioner.

No. 2 CA-CR 2022-0001-PR
Filed March 30, 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NOT FOR PUBLICATION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. CR20132518001
The Honorable Renee T. Bennett, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jill E. Thorpe, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Stephen Malone Jr. seeks review of the trial court's ruling summarily dismissing 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). Malone has shown no such abuse here.

¶2 Following a jury trial, Malone was convicted of first-degree murder, aggravated assault, and two counts of endangerment.[1] The trial court sentenced Malone to natural life in prison for the murder, to be followed by consecutive prison sentences totaling 13.5 years for the other offenses. On appeal, we affirmed Malone's convictions and sentences, *State v. Malone*, 245 Ariz. 103 (App. 2018), *vacated*, 247 Ariz. 20 (2019), in an opinion our supreme court subsequently vacated, *State v. Malone*, 247 Ariz. 29, ¶ 28 (2019). The supreme court addressed, in relevant part, the general proposition that, "apart from insanity, Arizona does not permit a defendant to introduce evidence of a mental disease or defect as either an affirmative defense or to negate the mens rea element of a crime." *Id.* ¶¶ 1, 8, 21; *see also State v. Mott,* 187 Ariz. 536, 541 (1997). The court affirmed Malone's convictions and sentences, concluding, "[T]he trial court correctly precluded [psychologist] Dr. [James] Sullivan from testifying that Malone suffered from brain damage even if that impairment made it more likely that he had a character trait for impulsivity." *Malone*, 247 Ariz. 29, ¶¶ 3, 21, 28; *cf. State v. Christensen*, 129 Ariz. 32, 35 (1981) (defendant may introduce evidence of character trait for impulsivity as evidence "that he did not premediate the homicide").

[1]Malone's convictions arose from an incident in which he fatally shot his ex-girlfriend, wounded her sister, and shot at two of his children. As Malone acknowledges in his petition for review, he confessed to shooting his "ex-[girlfriend] and her sister, so the issue was not who committed the crime but why."

¶3 Malone then sought post-conviction relief, raising several claims of ineffective assistance of trial and appellate counsel. He asserted that trial counsel had been ineffective in failing to: 1) present lay witnesses in addition to Malone's mother to testify about his character trait for impulsivity; 2) provide collateral records to Dr. Sullivan documenting his history, or ask Sullivan to perform further tests and a forensic interview; and 3) present offers of proof to preserve trial counsel's objection to the trial court's preclusion of hypothetical questions based on his mother's testimony. Malone also claimed trial counsel failed to obtain a mitigation report and present additional mitigating evidence regarding his "dysfunctional upbringing," substance abuse issues, and that he suffered from post-traumatic stress disorder. He argued the court may have imposed mitigated, concurrent sentences on the non-homicide counts had it been presented with such information. Malone further maintained appellate counsel was ineffective by failing to file a motion to reconsider this court's determination that the state had not challenged testimony that Malone had a character trait for impulsivity at trial.[2]

¶4 In December 2021, the trial court summarily dismissed Malone's petition for post-conviction relief, concluding he had failed to raise a colorable claim of ineffective assistance of counsel. On review, Malone argues the court erred in summarily dismissing his petition, reasserting the arguments he raised in his petition below. He also maintains the court's findings that trial counsel's conduct was reasonable and based on trial strategy are not supported by the record. Malone asks us to "reverse [his] conviction[s] and sentence[s], but a[t] a minimum remand this case for an evidentiary hearing."[3]

¶5 "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below

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[2]Our supreme court agreed with our determination, noting, "Thus, the parties have not addressed whether the defense can introduce mental disease or defect evidence to corroborate behavioral-tendency evidence when the prosecution challenges the latter. We leave that issue for a future case." *Malone*, 247 Ariz. 29, ¶ 20.

[3]We note that, although the trial court stated Malone bore "the burden of proof by a preponderance of the evidence," which does not apply to summary dismissal, it also referred to the correct standard in concluding Malone's claims were not colorable, and it does not appear it improperly weighed the evidence in dismissing his petition.

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)). In a proceeding for post-conviction relief, a defendant is entitled to an evidentiary hearing upon establishing a colorable claim—that is, one that, if the allegations are true, probably would have changed the verdict or sentence. *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016). Whether counsel's performance fell below objectively 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).

¶6 The trial court clearly identified the claims Malone had raised and resolved them correctly in a thorough, well-reasoned ruling, which we adopt. *See State v. Whipple*, 177 Ariz. 272, 274 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision"). Although we adopt the court's ruling, we note that we do not necessarily agree that counsel's conduct was based on strategy in each of the instances in which the court so found. Importantly, however, we agree with the court that Malone failed to establish he had been prejudiced by counsel's conduct in any of the asserted instances of ineffective assistance of counsel. *Bennett*, 213 Ariz. 562, ¶ 21 ("Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim."). Finally, insofar as Malone points out that the court did not specifically refer to the affidavit by attorney Harold Higgins, in which Higgins opined that counsel's representation did not meet prevailing professional norms, based on the detailed ruling before us, we infer the court considered that affidavit along with the entire record.

¶7 Accordingly, we grant review but deny relief.