IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

QUINTON NUNN,
Petitioner.

No. 2 CA-CR 2022-0002-PR
Filed June 15, 2022

Petition for Review from the Superior Court in Pima County
No. CR20161707001
The Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

The Law Offices of Stephanie K. Bond P.C., Tucson
By Stephanie K. Bond
Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E R S T R O M, Presiding Judge:

¶1 Petitioner Quinton Nunn 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.[1] We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Nunn has shown no such abuse here.

¶2 Following a jury trial in absentia in 2018, Nunn was convicted of promoting prison contraband, possession of drug paraphernalia, and possession of a dangerous drug. The convictions were based on a 2015 incident in which Nunn, "then an inmate at a state prison, was observed on security video engaging in suspicious activity in a restroom in the prison's visiting area. After a corrections officer confronted him, Nunn produced 'a purple, log shaped item' that he had attempted to conceal in his body," which contained dangerous drugs. *State v. Nunn*, 250 Ariz. 366, ¶ 2 (App. 2020). The trial court sentenced Nunn to concurrent prison terms, the longest of which was fourteen years. On appeal, we vacated Nunn's conviction and sentence for possession of a dangerous drug, but otherwise affirmed his convictions and sentences.[2] *Id.* ¶ 17.

¶3 In his petition for post-conviction relief, filed in 2021, Nunn raised claims of ineffective assistance of trial and appellate counsel. He asserted that trial counsel should have requested a limiting instruction,

[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] Our ruling on appeal did not impact the overall length of Nunn's sentence.

objected, or moved for a mistrial when the prosecutor asked the corrections officer who had observed Nunn on the day the incident occurred if inmates housed in the prison are "individuals convicted of felonies," to which the officer responded affirmatively. Nunn also argued appellate counsel should have raised a claim of cumulative prosecutorial misconduct based on the prosecutor's remark during closing argument that the individuals at the correctional facility "are people that have been convicted of offenses, which matches with the definition you just heard in your jury instructions."[3]

¶4 Relying on *State v. Escalante*, 245 Ariz. 135, ¶¶ 16, 21 (2018), Nunn claimed that because the state's "repeated" assertions that he had prior "felonies" and "offenses" constituted an error "so egregious that he could not possibly have received a fair trial," *id.* ¶ 21, no separate showing of prejudice was required. Nunn attached to his petition an affidavit by attorney Thomas Jacobs opining that trial and appellate counsel had performed below the objectively reasonable standard of practice and that Nunn was prejudiced thereby.

¶5 The trial court summarily dismissed Nunn's petition, explaining that "[t]he Corrections officer, in the normal course of laying foundation, would have identified himself as an employee of the specific Prison Correctional Facility where he worked, thus imparting by implication the fact that his place of employment was populated by convicted felons." The court added, "While some lay people may interchange the word jail for prison, any member of the jury could have known that a prison—as distinct from a jail—by definition, is a facility that houses inmates who have been convicted of one or more felonies."

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[3]In her closing argument, the prosecutor stated:

> So [the corrections officer] explained to you that [Nunn] was an inmate there. He explained that it is a correctional facility because it's on the Arizona State Prison Complex here in Tucson, and that the people there are people that have been convicted of offenses, which matches with the definition you just heard in your jury instructions. So a correctional facility? Common sense, it's a prison, it's a correctional facility.

¶6 The trial court further explained that although it did not find trial counsel's conduct deficient, even if objections had been raised and granted, the prosecutor's conduct did not rise to the level of prosecutorial misconduct or error.[4] *See State v. Murray*, 250 Ariz. 543, ¶ 13 (2021) (to prevail on claim of prosecutorial error, defendant must demonstrate it "so infected the trial with unfairness as to make the resulting conviction a denial of due process" (quoting *State v. Morris*, 215 Ariz. 324, ¶ 46 (2007))). The court also concluded, "the evidence of [Nunn's] guilt was so overwhelming that no sanitization or limiting instruction would have changed the verdict in this case," explaining that the video showed Nunn "acting suspiciously in a restroom. When confronted immediately afterwards by a corrections officer," he "removed a balloon from his rectum. The contents of the balloon tested positive for a dangerous drug. No reasonable juror would have found [Nunn] Not Guilty when presented with this level of direct evidence." This petition for review followed.[5]

¶7 On review, Nunn reasserts trial counsel should have objected to the state's eliciting testimony that convicted felons were in the correctional facility where the incident occurred, pointing out that the statutes under which he was convicted do not require that he be a convicted felon or that he be in prison. *See* A.R.S. §§ 13-2501(2), 13-2505(A)(3). Nunn argues, as he did in his Rule 32 petition, that uncharged acts of misconduct are generally inadmissible, and that evidence of other acts are always prejudicial. Although Nunn argued below that he was not required to make a specific showing of prejudice, he specifically argues for the first time on review that because "'counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing,'" *United States v. Cronic*, 466 U.S. 648, 659 (1984), a presumption of prejudice applies regardless how overwhelming the evidence against him is.

¶8 "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

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[4]Although the term "prosecutorial misconduct" has been commonly employed by litigants and courts, we "differentiate between 'error,' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical violation." *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020).

[5] We do not address Nunn's additional claims of ineffective assistance, which he has waived on review.

defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). 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." *Id*. ¶ 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. We review de novo the legal questions whether counsel fell below prevailing professional norms and whether the defendant was prejudiced. *State v. Smith*, 244 Ariz. 482, ¶ 9 (App. 2018).

¶9 Insofar as Nunn reasserts there were "multiple instances" of what he characterizes as prosecutorial misconduct, suggesting the prosecutor repeatedly referred to his "felonies" and "offenses," the record belies his claim—it appears the prosecutor used each of these terms only once. Moreover, the jury was necessarily aware that the events at issue had occurred inside a prison, and they were, in any event, provided with proper jury instructions, which we presume they followed. *See State v. Manuel*, 229 Ariz. 1, ¶ 24 (2011) ("Jurors are presumed to follow the court's instructions."). They were instructed that "[t]he crime of promoting prison contraband requires proof that the defendant knowingly possessed contraband while being confined in a correctional facility, or the grounds of such facility," and that a "[c]orrectional facility means any place used for the confinement or control of a person charged with or convicted of an offense." *See* §§ 13-2501(2), 13-2505(A)(3); *see also Inzunza-Ortega v. Superior Court*, 192 Ariz. 558, ¶ 14 (App. 1998) (persons confined to correctional facility operated by state department of corrections are normally also persons incarcerated as a result of a felony conviction). These elements of the crime charged made Nunn's status as an inmate a relevant fact showing that the crime occurred in a correctional institution. It also explained his motive to conceal the contraband. That relevant status would alert any juror that Nunn had committed some criminal offense. A juror would also infer that the offense was serious enough that it justified his incarceration at a prison facility.

¶10 While Nunn is correct that one's status as a convicted felon is not an element of promoting prison contraband under the relevant statutes, the prosecutor did not specifically characterize Nunn as a convicted felon, nor did she appear to use that information to attack Nunn's character. *State v. Schurz*, 176 Ariz. 46, 52 (1993) (not all harmful evidence is prejudicial); c*f. State v. Correll*, 148 Ariz. 468, 476 (1986) (evidence that defendant committed other bad acts generally not admissible to show defendant acted in conformity with other bad acts or that defendant is a bad person worthy of conviction); *see* Ariz. R. Evid. 404(b). Rather, although the prosecutor made

minimal, generalized references to convicted felons and offenses, she did not expressly refer to Nunn having been convicted once, let alone multiple times. Thus, even assuming arguendo that the prosecutor's implication that Nunn was a convicted felon was technically improper and not relevant for any purpose, that reference would have little effect on a jury which unavoidably knew Nunn was an inmate who had committed some crime justifying incarceration.

¶11 Additionally, to the extent Nunn's argument based on *Cronic*, 466 U.S. at 659, is properly before us on review, we conclude he has not established that this was the rare instance where his attorney entirely failed to subject his case to adversarial testing. Accordingly, even had appellate counsel challenged the prosecutor's conduct, because this issue was not argued at the trial court, we would have reviewed only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). To meet this burden, Nunn would have been required to show that "(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. Smith*, 219 Ariz. 132, ¶ 21 (2008). The error has caused prejudice if, "absent error, a reasonable jury could have reached a different result." *State v. Martin*, 225 Ariz. 162, ¶ 14 (App. 2010).

¶12 And, as the trial court correctly noted, overwhelming evidence of Nunn's guilt belied any claim of prejudice. Accordingly, even if a limiting instruction had been given, on the record before us, there is not a "reasonable probability" that the instruction would have changed the verdict. *Strickland*, 466 U.S. at 694; *Berghuis v. Thompkins*, 560 U.S. 370, 389-91 (2010) (finding, on de novo review, "not reasonably likely" counsel's failure to request limiting instruction "would have made any difference in light of all the other evidence of guilt"). We thus cannot say the court abused its discretion in dismissing Nunn's petition. *See Roseberry*, 237 Ariz. 507, ¶ 7 (reviewing court "will affirm a trial court's decision" on petition for post-conviction relief "if it is legally correct for any reason").

¶13 We grant review but deny relief.