IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARCUS J. DICKSON,
Petitioner.

No. 2 CA-CR 2022-0043-PR
Filed August 18, 2022

Petition for Review from the Superior Court in Pima County
No. CR20173289001
The Honorable Casey F. McGinley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Curry, Pearson & Wooten PLC, Phoenix
By Kristen Curry
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Petitioner Marcus Dickson seeks review of the trial court's order dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. "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). Dickson has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Dickson was convicted of manslaughter, and the trial court imposed a nine-year prison term. This court affirmed Dickson's conviction and sentence on appeal. *State v. Dickson*, No. 2 CA-CR 2018-0232 (Ariz. App. Sept. 11, 2019) (mem. decision).

¶3 Dickson thereafter sought post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel based on counsel's failure to "request a key jury instruction," specifically an instruction on justification for crime prevention pursuant to A.R.S. § 13-411. The trial court concluded he had raised a colorable claim and ordered a hearing on the matter. After the hearing, the court determined trial counsel had "made a tactical, strategic decision to not consider or argue alternate theories given the strength of their chosen theory," and had not fallen "below objectively reasonable standards" in doing so. It also determined Dickson had failed to establish prejudice resulting from the decision not to request the instruction because Dickson had not been entitled to the instruction and, even had it been given, there was "not a reasonable probability" it would have changed the jury's verdict.

¶4 On review, Dickson argues the trial court abused its discretion in concluding that he would not have been entitled to the crime-prevention instruction and in finding that trial counsel had made an objectively reasonable tactical decision to solely defend on the basis of self-defense justification under A.R.S. § 13-405. He further challenges the

court's conclusion that he was not prejudiced by the decision not to seek the instruction.

¶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.* Dickson 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" him, *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.

¶6 In this case, even accepting arguendo that, as Dickson contends, the trial court erred in determining that he was not entitled to the instruction and that counsel's performance was not deficient as a matter of strategy, we cannot say the court abused its discretion in concluding he had not been prejudiced. In support of a contrary conclusion, Dickson cites Rule 32.13(c). That rule provides that "[i]f [a] defendant proves a constitutional violation, the State has the burden of proving beyond a reasonable doubt that the violation was harmless." Ariz. R. Crim. P. 32.13(c).

¶7 Dickson argues he "met his burden . . . of proving that trial counsel fell below the objective standard of reasonableness," the state "failed to prove beyond a reasonable doubt that the violation was harmless," and he is therefore entitled to relief. But in order to establish a constitutional violation in relation to ineffective assistance of counsel, a defendant must meet *both* prongs of the *Strickland* test. *See Bennett*, 213 Ariz. 562, ¶ 21. Thus, the state would be required to meet a harmless error standard in that context only after the defendant had initially established prejudice under *Strickland* by showing 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).

¶8 The trial court determined there was not a reasonable probability of a different result, explaining,

> there is not a reasonable probability that a jury [would] find it reasonable to believe that [the victim] intended to do anything other than engage in an argument and subsequent fight. There is certainly not sufficient evidence for a juror to conclude that Mr. Dickson reasonably believed that [the victim] was imminently going to commit kidnapping or aggravated assault, and that Mr. Dickson's actions were aimed to prevent those crimes.

We agree.

¶9 Despite the presumption provided in § 13-411, a defendant's "subjective belief that an aggravated assault was about to occur" does not give him "*a priori* immunity from prosecution." *Korzep v. Superior Court*, 172 Ariz. 534, 540 (App. 1991). Rather, it allows "merely an initial presumption of acting reasonably under A.R.S. § 13-411(C)," which the state may rebut "under A.R.S. § 13-411(A) 'if and to the extent' [the] chosen degree of force is unreasonable to prevent the crime in question." *Id.* Thus, "the reasonableness of the conduct used to prevent crime . . . must be measured not exclusively by a defendant's self-assertion but also by objective standards of proportionality to the criminal . . . threat presented."[1] *Id.* On the record before us, the trial court did not abuse its discretion by

[1]In *Korzep,* the court interpreted subsections (A) and (C) together to reach this conclusion. 172 Ariz. at 540. The legislature subsequently amended subsection (C) to add the phrase "what the person reasonably believes." 2011 Ariz. Sess. Laws, ch. 353, § 2. The House Bill Summary related to that change explained that the new legislation would "[r]edefine[] acting reasonably as it applies to the justification of the use of force in crime prevention as acting to prevent what the person reasonably believes is the imminent or actual commission of any of the offenses." H. Summary of S.B. 1469, 50th Leg., 1st Reg. Sess. (Ariz. Apr. 25, 2011). Thus, the legislature has now applied an objective standard of reasonableness to both subsections.

concluding that there was not a reasonable probability that the jury, which rejected Dickson's justification defense under A.R.S. §§ 13-404 and 13-405, would have accepted that Dickson's conduct was reasonable in response to the threat presented—a fist fight with a smaller man—even if instructed as to the presumption in § 13-411.

¶10 We grant review but deny relief.