IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ADAM ABEL CHAVEZ,
Petitioner.

No. 2 CA-CR 2022-0058-PR
Filed November 9, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201302293
The Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Bureau Chief–Criminal Appeals
Counsel for Respondent

Attorneys for Freedom Law Firm, Chandler
By Marc J. Victor
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Petitioner Adam Chavez 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). Chavez has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Chavez was convicted of first-degree felony murder, armed robbery, kidnapping, aggravated assault, misconduct involving weapons, and unlawful flight from a law enforcement vehicle. The trial court sentenced him to a life term of imprisonment, followed by concurrent and consecutive terms totaling 43.75 years. This court affirmed his convictions and sentences on appeal. *State v. Chavez*, No. 2 CA-CR 2016-0197 (Ariz. App. May 6, 2019) (mem. decision).

¶3 Chavez thereafter sought post-conviction relief, arguing in his petition that "Arizona's felony murder rule is unconstitutional as applied" to him, that he had received ineffective assistance of trial counsel, that his due process rights had been violated because the state failed to present sufficient evidence of guilt, and that he was actually innocent. The trial court summarily dismissed the petition.

¶4 On review, Chavez contends the trial court denied him "due process of law" by determining his constitutional claim was precluded and abused its discretion in rejecting his claims of ineffective assistance of counsel and actual innocence. First, we agree with the court that Chavez's claims that the felony murder statute is unconstitutional as applied and that his due process rights were violated are precluded as they were waived by his failure to raise them at trial or on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant "precluded from relief under Rule 32.1(a)" if ground "waived *at trial* or on *appeal*, or in any previous post-conviction proceeding" (emphasis added)).

¶5 Chavez, however, argues that Rule 32.2(a)(3) does not apply because this is his first post-conviction proceeding. He suggests that "the second clause" of Rule 32.2 "exempts a claim raised in a first [post-conviction-relief] petition from the rule of preclusion." But, that clause merely provides a claim "finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding" is precluded, it does not address a claim waived in such an earlier proceeding. Ariz. R. Crim. P. 32.2(a)(2). Rather, Rule 32.2(a)(3) applies when a claim has been "waived at trial or on appeal, or in any previous post-conviction proceeding." Thus, when a claim could have been raised at trial or on appeal, but was not, it is precluded. Ariz. R. Crim. P. 32.2(a)(3); *State v. Macias*, 249 Ariz. 335, ¶ 20 (App. 2020) (defendant "waived the right to challenge the constitutionality of the statutes in [post-conviction] proceeding by failing to raise the argument at trial or on his direct appeal").[1]

¶6 Chavez also maintains the trial court abused its discretion in denying relief on his claims of ineffective assistance of counsel without an evidentiary hearing. "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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶7 Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586 (1984). "Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250 (1988).

¶8 A number of Chavez's claims relate to his assertion that counsel was ineffective for failing to present a causation defense to the

[1]A claim involving a constitutional right "that can only be waived knowingly, voluntarily, and personally by the defendant" is not subject to preclusion under this rule. Ariz. R. Crim. P. 32.2(a)(3). Although he asserts the claims are not precluded because they are constitutional in nature, Chavez has not argued his claim involved such a right.

felony murder charge. A person commits first-degree, felony murder if "[a]cting either alone or with one or more other persons the person commits or attempts to commit" a predicate felony "and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." A.R.S. § 13-1105(A)(2). "[W]here the killing 'emanates' from the crime itself, and is a natural and proximate result thereof, it is committed in furtherance of the felony within the meaning of the statute." *State v. Lopez*, 173 Ariz. 552, 555 (App. 1992). "The proximate cause of a death is a cause which, in natural and continuous sequence, produces the death, and without which the death would not have occurred." *State v. Smith*, 160 Ariz. 507, 510 (1989). In the criminal context, "an event is superseding only if unforeseeable and, with benefit of hindsight, abnormal or extraordinary." *State v. Pesqueira*, 235 Ariz. 470, ¶ 23 (App. 2014) (quoting *State v. Bass*, 198 Ariz. 571, ¶ 13 (2000)). As the trial court correctly determined, however, the use of deadly force by a law enforcement officer is a foreseeable consequence of armed robbery. *See Lopez*, 173 Ariz. at 555 ("It was reasonably foreseeable that the robbery attempt would meet resistance." (quoting *State v. Moore*, 580 S.W.2d 747, 752 (Mo. 1979))).

¶9 Chavez failed to demonstrate that trial counsel's having forgone such a defense lacked "some reasoned basis," *State v. Meeker*, 143 Ariz. 256, 260 (1984), or to show that he was prejudiced by the failure to pursue the defense. Further, to the extent Chavez asserts the trial court erred in "assigning reasonable purposes to trial counsel's actions," we disagree. There is "[a] strong presumption" that counsel "provided effective assistance." *State v. Febles*, 210 Ariz. 589, ¶ 20 (App. 2005). The court therefore properly rejected Chavez's claims when he failed to demonstrate counsel's actions were the result of "ineptitude, inexperience or lack of preparation." *Goswick*, 142 Ariz. at 586.

¶10 Likewise, the trial court properly rejected Chavez's claim that counsel was ineffective for failing to retain a use-of-force expert. Indeed, as the court pointed out, counsel sought to introduce evidence that the officer's use of force against Chavez's accomplice had been unreasonable. At trial, the court precluded that proposed testimony in part, as irrelevant or likely to confuse the jury. This court affirmed that decision on appeal. *Chavez*, No. 2 CA-CR 2016-0197, ¶¶ 12-13. In view of that decision, as well as the law relating to foreseeability discussed above, we cannot say the trial court abused its discretion in determining counsel was not ineffective in failing to call an alternative witness.

¶11 The trial court clearly identified Chavez's remaining claims of ineffective assistance and resolved them correctly in a thorough, well-reasoned ruling, which we adopt as to those issues. *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").

¶12 Finally, Chavez asserts the trial court erred in rejecting his claim that there was insufficient evidence to sustain his conviction for felony murder and that he was actually innocent. A claim of insufficient evidence is precluded based on Chavez's failure to raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). Instead, to be entitled to relief under Rule 32.1(h), Chavez was required to show "by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt."

¶13 Chavez's argument turns on the premise that he "did not cause" his accomplice's death and a jury "properly instructed on causation, agency/proximate cause, or the defense of superseding cause" would not have found him guilty. But, as discussed above, a defendant is guilty of felony murder if he commits armed robbery and he or another causes the death of another during or in immediate flight from the offense. § 13-1105(A)(2). The record before us establishes Chavez was involved in an armed robbery, in which a cashier was held at gunpoint. As Chavez and his accomplice fled the scene, a law enforcement officer pursued them and, believing the men were armed, fired at them, killing Chavez's accomplice. The trial court therefore correctly concluded that the evidence supported Chavez's guilt and rejected his claim of actual innocence.

¶14 We grant the petition for review but deny relief.