IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TERRELL D. BROWN,
Petitioner.

No. 2 CA-CR 2023-0208-PR
Filed April 24, 2024

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NOT FOR PUBLICATION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. S1100CR202001397
The Honorable Daniel A. Washburn, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Respondent

Czop Law Firm PLLC, Higley
By Steven Czop
Counsel for Petitioner

MEMORANDUM DECISION

Judge Gard authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

G A R D, Judge:

¶1 Petitioner Terrell Brown seeks review of the trial court's order dismissing his petition for post-conviction relief, filed under 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. Ainsworth*, 250 Ariz. 457, ¶ 1 (App. 2021) (quoting *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007)). Brown has not carried his burden of establishing such abuse here.

¶2 After a jury trial, Brown was convicted of two counts of aggravated domestic violence and one count of aggravated assault by strangulation, also a domestic violence offense. The trial court sentenced him to concurrent prison terms, the longest of which was twelve years. This court affirmed his convictions and sentences on appeal. *State v. Brown*, No. 2 CA-CR 2021-0099 (Ariz. App. Nov. 8, 2022) (mem. decision).

¶3 Brown thereafter sought post-conviction relief, arguing in his petition that trial counsel had rendered ineffective assistance in regard to an expert witness. The trial court summarily denied relief.

¶4 On review, Brown argues the trial court abused its discretion by rejecting his ineffective assistance claim. "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); *State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *Kolmann*, 239 Ariz. 157, ¶ 9 (quoting *Hinton v. Alabama*, 571 U.S. 263, 273 (2014)). "To establish 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.'" *Id.* (quoting *Hinton*, 571 U.S. at 275).

¶5 Brown contends trial counsel was ineffective for failing to object to testimony from the state's witness, Jill Messing, who testified as a "cold expert" on domestic violence. Such an expert generally testifies "to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case." *State v. Salazar-Mercado*, 234 Ariz. 590, ¶ 9 (2014) (quoting Fed. R. Evid. 702, Advisory Committee Notes, 2000 amend.). Although Brown acknowledges that cold-expert testimony is generally admissible under Rule 702, Ariz. R. Evid., he argues Messing provided the type of "profile evidence" our supreme court found inadmissible in *State v. Ketchner*, 236 Ariz. 262 (2014) and *State v. Haskie*, 242 Ariz. 582 (2017).

¶6 In discussing her areas of research, Messing described her work on risk assessments and domestic-violence lethality assessments. Messing then testified about whether it was common for victims to follow through on services to which they are referred and her experience interviewing victims to determine if their abuse might be a defense to crimes of which they were accused.

¶7 Messing also testified specifically about conducting interviews "to determine if a victim is being honest about the abuse [he or she] suffered." She testified that, in evaluating a victim's honesty, she looks for the victim to give examples and for the presence of "controlling behaviors." The prosecutor asked Messing to give examples of those behaviors, and she explained they could include things like "controlling what somebody[] wears; who they talk to; when they see their friends; how . . . they use the car; how long they're gone for; controlling money." She also discussed other intimidating behaviors such as yelling, name calling, or "towering over" the victim. And she testified that she "would also look at severity of violence," for example whether there had been "threats with a weapon, threats to kill, things like strangulation." She explained that these behaviors are often followed by apologies.

¶8 The prosecutor also asked Messing about "red flags" that someone could look for to avoid "a domestic violence relationship." She replied that she would look for "controlling behaviors" and jealousy. Messing also testified that both victims and offenders tend to minimize the violence that has occurred and to blame substance abuse or the victim for it. She further addressed victims' failure to report domestic violence and how, although false reports of abuse are uncommon, it is common for

victims to recant or change their story. Defense counsel objected once, on the grounds of relevance, to a question about how children are affected by observing domestic violence.

¶9 As he did below, Brown argues that Messing's testimony was improper profile evidence and that trial counsel was ineffective for failing to object to it. In *Haskie*, our supreme court concluded that "[t]he state may not offer 'profile' evidence as substantive proof of the defendant's guilt." 242 Ariz. 582, ¶ 15. "Profile evidence tends to show that a defendant possesses one or more of an informal compilation of characteristics or an abstract of characteristics typically displayed by persons engaged in a particular kind of activity." *Id.* ¶ 14 (quoting *Ketchner*, 236 Ariz. 262, ¶ 15). It is "offered to implicitly or explicitly suggest that because the defendant has those characteristics, a jury should conclude that the defendant must have committed the crime charged." *Id.* (emphasis omitted).

¶10 But as the *Haskie* court explained, "Although expert testimony about victim behavior that also describes or refers to a perpetrator's characteristics has the potential to be 'profile' evidence, it is not categorically inadmissible." 242 Ariz. 582, ¶ 16. Evidence that "is relevant for a reason other than to suggest that the defendant possesses some of those characteristics and therefore may have committed the charged crimes," may be admitted, subject to Rule 403, Ariz. R. Evid. *Id.* ¶ 17. Thus, cold expert testimony that assists the jury in understanding the victim's "seemingly inconsistent behavior" is admissible. *Id.* ¶ 16.

¶11 In this case, the victim, T.D., with whom Brown had been in a romantic relationship and had two children, was asked about a 9-1-1 call she had made reporting that Brown had come to her home, refused to leave, and "grabbed" her neck or head, causing a scratch on her neck. She also told the dispatcher that Brown had picked her up and "slammed" her on the bed, causing scratches and bruising. And she reported that Brown had "choked" her. She acknowledged having made the call, but denied that Brown had caused the injuries, stating she had been "upset" and "must have said some stuff" as a result. She also said that her report of being strangled "was a misunderstanding."

¶12 On cross-examination, defense counsel asked T.D. whether Brown exhibited various controlling behaviors toward her. She responded negatively to each question. Brown has not directed us to any other evidence in the record depicting his behavior outside of the incident giving rise to the instant charges. *See* Ariz. R. Crim. P. 32.16(c)(2).

¶13 On the record before us, we agree with the trial court's determination that even if defense counsel had objected, "some, if not all, of Ms. Messing's testimony may have been allowed." Although Messing's testimony touched on things that a perpetrator of abuse might do, it did so in the context of evaluating a victim's conduct and how one might explain the victim's behavior. And in view of the absence of evidence about Brown's history of controlling behavior, we cannot say Messing's testimony encouraged jurors to view his behavior as consistent with that of the described abuser. *See State v. Escalante*, 245 Ariz. 135, ¶ 27 (2018) (defendant "fit the profile of a drug trafficker," increasing likelihood that jury would use profile evidence as substantive proof of guilt). Likewise, insofar as Brown specifically challenges Messing's testimony about lethality assessments and the risk of serious physical violence, including strangulation, that testimony went to Messing's experience and training in the field or was also discussed in the context of victim behavior.

¶14 Further, as detailed above, the record suggests that on cross-examination defense counsel decided to direct T.D.'s attention to Messing's testimony about controlling behavior to establish that Brown had not shown the behavior Messing described. Thus, we do not agree with Brown's claim on review that counsel could not have had a strategic reason to "justify the failure to object" to Messing's testimony. And such a strategic decision "will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis," which it did here. *State v. Meeker*, 143 Ariz. 256, 260 (1984).

¶15 Accordingly, Messing's testimony was admissible to explain the victim's behavior in recanting her original account of the incident and trial counsel had a reasonable strategic basis for failing to object. We therefore cannot say the trial court abused its discretion by finding that Brown had failed to prove deficient performance or prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21.

¶16 We grant the petition for review, but deny relief.