DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-1087
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
BENITO ANORVE-CANDELA, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-178640-001 DT

The Honorable Andrew G. Klein, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

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Attorney for Appellant

I R V I N E, Presiding Judge

¶1 Benito Anorve-Candela ("Anorve-Candela") appeals his convictions and sentences for first degree murder, two counts of

attempted murder, and two counts of misconduct involving weapons. He argues that the State provided insufficient evidence of premeditation to support his conviction for first degree murder, and the trial court erred in denying his request for an instruction on lesser included offenses and his request for a new attorney because of an irreconcilable conflict. Because we conclude that the trial court erred in denying his request for an instruction on the lesser included offense of second degree murder, we reverse Anorve-Candela's first degree murder conviction and remand for retrial.

I. FACTS AND PROCEDURAL HISTORY

¶2 This case arises from a shooting outside a bar in central Phoenix. The evidence at trial showed that earlier in the night on October 7, 2007, a bartender ordered Anorve-Candela to leave a bar at 14th Street and Van Buren because he was harassing a female patron. At approximately 10:00 p.m., Anorve-Candela returned to a bar at 24th Street and Washington that he had been at earlier, and resumed harassing two female patrons at that bar. When they rebuffed him, he became angry, and said something to the effect of, "No women ever ignore me." Anorve-Candela left the bar through the rear doors at approximately 10:30 p.m., and asked a man standing outside smoking with two acquaintances to come with him to the first bar and help him fight. The man refused, explaining that "we weren't looking for

trouble, that we were just having a good time." Anorve-Candela made a derogatory comment to the men and they therefore asked Anorve-Candela to leave.

¶3 Anorve-Candela walked to an alley behind the bar and paced back and forth three or four times before he went to his car, drove it a few feet in reverse, and pointed it toward 23rd Street. He then got out of his car, "pulled his gun out," and went to the back of the car and said, "You in the white shirt, come over because I want to talk to you." The man saw that Anorve-Candela had a gun in his hand, told his two friends, and they started walking toward the bar. Anorve-Candela took a few steps toward them, pointed the gun at them, and started shooting. Anorve-Candela fired multiple shots at the group with a .22 caliber weapon, killing one of the three men and wounding the man who had refused to help him. The wounded victim told one of the female patrons at the time that the man who had been talking to her and her friend had shot him and his friends.

¶4 Police arrested Anorve-Candela two months later when the victim who had been wounded recognized Anorve-Candela drinking at the same bar. Anorve-Candela, whom the parties had stipulated was a prohibited possessor, had a .357 Magnum revolver tucked behind his belt. At trial, the victim who had been wounded identified Anorve-Candela as the shooter. Three other witnesses also identified Anorve-Candela as the person

whom they had seen in the bar that night talking to the female patrons shortly before the shooting. An expert concluded that a .22 caliber bullet found in Anorve-Candela's pocket when he was arrested had been misfired from the same weapon that was responsible for a shell casing recovered at the scene the night of the murder.

¶5 Anorve-Candela did not present any witnesses at trial; his attorney argued lack of evidence and mistaken identification.

¶6 The jury convicted Anorve-Candela of first degree murder and two counts of attempted murder, and found them to be dangerous offenses, and two counts of misconduct involving weapons. The judge sentenced Anorve-Candela to life imprisonment without possibility of release for twenty-five years on the murder conviction, aggravated terms of twelve years on the attempted murder convictions, and presumptive terms of two and one half years on the convictions for misconduct involving weapons. He ordered the sentences for murder and attempted murder of the victim who suffered injury to be served consecutively.

II. DISCUSSION

Sufficiency of Evidence of Premeditation

¶7 Anorve-Candela argues that the State provided insufficient evidence of premeditation to support his conviction

for first degree murder.[1] In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶8 Viewing the evidence and all reasonable inferences in the light most favorable to supporting the verdict, we conclude that the State offered sufficient evidence to prove that Anorve-Candela knew or intended to kill the victim, and actually reflected on it prior to shooting him, as required for the conviction. *See State v. Thompson*, 204 Ariz. 471, 479, ¶ 31, 65 P.3d 420, 428 (2003) (noting that rarely "will a defendant's reflection be established by direct evidence"). Premeditation is "more than just a snap decision made in the heat of passion." *Id.* at 478, ¶ 28, 65 P.3d at 427. Premeditation can rarely be proved by direct evidence; the State, however, "may use all the

[1] Anorve-Candela's argument that the trial court erred in denying his motion for judgment of acquittal on this ground is misplaced because he did not ask for judgment of acquittal on this ground. We accordingly construe his argument more generally as insufficiency of the evidence to support the conviction, which we review for fundamental error. *See State v. Stroud*, 209 Ariz. 410, 412 n.2, ¶ 6, 103 P.3d 912, 914 n.2 (2005).

circumstantial evidence at its disposal in a case to prove premeditation." *Id.* at 479, ¶ 31, 65 P.3d at 428. Circumstantial evidence of premeditation "might include, among other things, threats made by the defendant to the victim, a pattern of escalating violence between the defendant and the victim, or the acquisition of a weapon by the defendant before the killing." *Id.*

¶9 As an initial matter, Anorve-Candela's reliance on *United States v. Begay*, 567 F.3d 540 (9th Cir. 2009), is misplaced. The Ninth Circuit Court of Appeals interpreted premeditation as used in the federal crime of first degree murder, which requires a showing in part that "the defendant acted with a 'cool mind' that is capable of reflection." *Id.* at 546. The court further suggested that proof of premeditation "typically" falls into at least one of three categories of evidence: "(1) facts about how and what the defendant did prior to the actual killing which show he was engaged in . . . *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed the victim according to a preconceived design." *Id.* at 547 (quoting 2 Wayne R. LaFave, *Substantive*

Criminal Law § 14.7(a), at 480 (2d ed. 2003)). In that case, the evidence had shown that defendant had flashed his lights to stop another vehicle, walked to the driver's side and exchanged words with the occupants, retrieved a rifle from his truck, walked back to the other vehicle and shot eight or nine times through the passenger window. *Id.* at 543-44. Strictly applying the aforementioned categories of evidence to the circumstances in that case, the court held that the evidence failed to demonstrate premeditation. *Id.* at 547-50. The Ninth Circuit, however, has since agreed to rehear the *Begay* case en banc and ordered that it not be cited as precedent by or to any federal court of the Ninth Circuit. *United States v. Begay*, 591 F.3d 1180 (9th Cir. 2010). We accordingly do not rely on *Begay* in analyzing the evidence in this case.

¶10 The evidence in this case shows that Anorve-Candela was kicked out of one bar for harassing a female patron, was rebuffed by two other female patrons in the bar where the shooting occurred, and was rebuffed by a group of three men smoking outside the bar in his requests for help in fighting the persons in the first bar. After insulting the group of three men for refusing his request for help, he paced the alley behind the bar three or four times before he moved his car to point it toward an exit, then pulled out a gun and asked the man who had refused to help him to come over to him. When this man and his

two friends instead turned their backs to him and walked back toward the bar, Anorve-Candela pointed his gun at them, walked a few steps toward them, and started shooting. He ultimately fired as many as eight shots at the men before getting in his car and leaving the scene. A reasonable jury could find under these circumstances that he was angry at being rebuffed by the females, and then the males, and thought about whether to shoot the victims when he paced the alley and moved his vehicle to point toward 23rd Street, before he started shooting at the victims. On this record, we conclude the evidence was sufficient to support the element of premeditation, and thus, Anorve-Candela's conviction for first degree murder.

Refusal to Instruct on Lesser included Offense

¶11 Anorve-Candela argues that the trial court erred in denying his request for an instruction on the lesser included offense of second degree murder, in light of the evidence that he was intoxicated and the absence of evidence of premeditation. The court refused an instruction on any lesser included offenses of first degree murder, reasoning as follows:

> What I said yesterday is in listening to the evidence, I had not heard any evidence to suggest that the defendant, whose defense, as I understand it, has been, "It wasn't me, I wasn't there, I didn't do it, you have the wrong guy" could validly take the position that "If it was me, it's only manslaughter or second-degree murder,"

> because at this point, it's been an all or nothing proposition, as I've heard it.
>
> . . . .
>
> I do not find, based upon what I've heard in this trial so far, that there is any evidence to support the giving of a second-degree murder or a manslaughter instruction, and therefore, I'm not going to give lesser-included offenses.

We review a trial court's decision to refuse a jury instruction on a lesser included offense for an abuse of discretion. *See State v. Wall,* 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). "An error of law committed in reaching a discretionary conclusion may, however, constitute an abuse of discretion." *Id.*

¶12 As an initial matter, Anorve-Candela's argument that his intoxication prevented him from engaging in premeditation prior to the shooting is misplaced. Arizona does not recognize voluntary intoxication as a defense to any criminal act or requisite state of mind. Ariz. Rev. Stat. ("A.R.S.") § 13-503 (2010).[2] Accordingly, intoxication cannot negate premeditation.

¶13 We find merit, however, in Anorve-Candela's argument that the trial court committed reversible error in refusing his request to instruct on the offense of second degree murder. Second degree murder is a lesser included offense of premeditated first degree murder, lacking only the element of

[2] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

premeditation. *See State v. Van Adams*, 194 Ariz. 408, 413-14, ¶ 11, 984 P.2d 16, 21-22 (1999); A.R.S. §§ 13-1104(A)(1)-(2) (2010) and -1105(A)(1) (2010). A defendant is entitled to a lesser included offense instruction if two conditions are met: "The jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Wall,* 212 Ariz. at 4, ¶ 18, 126 P.3d at 151. "It is not enough that, as a theoretical matter, the jury might simply disbelieve the state's evidence on one element of the crime because this would require instructions on all offenses theoretically included in every charged offense. Instead, the evidence must be such that a rational juror could conclude that defendant committed only the lesser offense." *Id*. (citation and internal quotations omitted).

¶14 We believe that a reasonable jury in this case could have found that Anorve-Candela intentionally or knowingly shot at the victims, but that he had not engaged in actual reflection before he did so. A reasonable juror could have found that Anorve-Candela shot the victims on impulse, or out of the heat of rage when they turned their back to him and walked toward the bar. Therefore, the evidence was sufficient to warrant a jury instruction on second degree murder as a lesser included offense of first degree murder. The court's ruling to the contrary,

moreover, appears to have been based on a misunderstanding of the governing law, that is, that Anorve-Candela's all-or-nothing defense precluded him from seeking an instruction on lesser included offenses. Although as a practical matter, when a defendant asserts an all-or-nothing defense, "there will 'usually be little evidence on the record to support an instruction on the lesser included offenses[,]" such is not always the case, and was not the case in this instance. *Id.* at 6, ¶¶ 25-31, 126 P.3d at 153; *but see Van Adams*, 194 Ariz. at 414, ¶ 14, 984 P.2d at 22 (holding that an instruction on second degree murder as a lesser included offense was not appropriate "when the 'defendant's theory of the case denies all involvement in the killing, and when no evidence provides a basis for a second degree murder conviction, . . . and the record is such that defendant is either guilty of the crime charged or not guilty'"). In this case, the jury could have interpreted Anorve-Candela's conduct, as described by the State's witnesses, as evidencing either premeditation or impulsive behavior. The judge thus committed reversible error in refusing to instruct the jury on the lesser included offense of second degree murder, and we accordingly vacate the conviction for first degree murder and remand for a new trial. *See Wall*, 212 Ariz. at 6, ¶¶ 31-32, 126 P.3d at 153.

Irreconcilable Conflict with Counsel

¶15 Anorve-Candela argues that the trial court erred by denying his request for new counsel because of an irreconcilable conflict, specifically, "no communication with [his] present attorney." Anorve-Candela contends that the court erred because the evidence failed to support its finding that Anorve-Candela had been unwilling to participate in any meaningful way with a lawyer, "whether [current counsel] or anyone else," and because his own counsel conceded that the relationship was "irretrievably broken."

¶16 Anorve-Candela filed a pro per form Motion to Change Counsel that did not provide any reason for the request.[3] At a hearing on the motion a week later, Anorve-Candela explained that he wanted a different lawyer because he had no communication with his present attorney. The judge noted that Anorve-Candela and his counsel had been in court together a number of times, and asked Anorve-Candela why he had not brought this problem to the court's attention sooner.[4] In response to the judge's inquiry, Anorve-Candela's defense counsel summarized his communications with his client as follows:

[3] Anorve-Candela filed the motion September 8, 2008, a week before trial was set to begin. Trial ultimately began on September 30.

[4] Anorve-Candela responded, "Because I wasn't aware."

> I've visited, with Chris, about four or five times, tried to discuss the matter with him. He either is not willing to have a relationship with me or doesn't -– doesn't care to tell me anything about what -- to answer the questions that I've -- that I -- that I pose to him. And there really is no relationship.
>
> But, you know, as far as any relationship with the client, there is none. I mean, it's just not -- he just won't do it, and he's not -- he's not willing to help or able to help, or -- you know, as I said at one point, Judge, I wasn't really sure whether it was a Rule 11 issue, which apparently it was not.
>
> He doesn't know what's going on. He doesn't, you know, care to talk to me.
>
> . . . .
>
> So I mean, I would say that I would have to say that the relationship, what there is of it, would be irretrievably broken.

The judge commented:

> [I]t strikes me, though, that this is an issue that started from the very beginning, it sounds like. And frankly, I haven't heard anything that's unique to you. It sounds like whether it's you or someone else, he has been unwilling to participate in any meaningful way with a lawyer, whether you or anyone else. And that was part of the reason, perhaps, that you felt his failure to communicate was rooted in perhaps a mental health Rule 11 type issue, and that's why that was explored.

Defense counsel agreed with the judge's comment. The prosecutor noted that if Anorve-Candela "thinks by getting another lawyer he's going to somehow get a plea agreement out of me, that's not

happening." Anorve-Candela subsequently acknowledged that his counsel had been to see him "a couple of times." He said, however, that his counsel had told him that he should proceed to trial, "And I asked him, 'What are we going to do?,' and he answers me saying that he doesn't know. So how do we -- does he expect me to go to trial with him?" The court denied the Motion to Change Counsel.

¶17 We review the trial court's decision to deny a request for new counsel for abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 27, 119 P.3d 448, 453 (2005). The Sixth Amendment guarantees a criminal defendant the right to be represented by competent counsel. U.S. Const. amend. VI; *State v. Moody,* 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998). "A defendant is not, however, entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *Id.* A trial court is generally required to appoint new counsel if there exists "an irreconcilable conflict or a completely fractured relationship between counsel and the accused." *Cromwell,* 211 Ariz. at 186, ¶ 29, 119 P.3d at 453. "A single allegation of lost confidence in counsel does not require the appointment of new counsel, and disagreements over defense strategies do not constitute an irreconcilable conflict." *Id.* "[T]o prove a total breakdown in communication, a defendant must put forth evidence . . . that he had such minimal contact with

the attorney that meaningful communication was not possible." *State v. Torres,* 208 Ariz. 340, 343, ¶ 8, 93 P.3d 1056, 1059 (2004) (quoting *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002)). "[A] trial judge has the duty to inquire as to the basis of a defendant's request for substitution of counsel." *Torres,* 208 Ariz. at 343, ¶ 7, 93 P.3d at 1059. "The nature of the inquiry will depend upon the nature of the defendant's request." *Id.* at ¶ 8.

¶18 We find no abuse of discretion in either the extent of the judge's inquiry into the nature of the conflict between Anorve-Candela and his appointed counsel, or the denial of the Motion to Change Counsel. The facts of this case distinguish it from the facts in *Torres*. In *Torres*, the defendant claimed "that he could no longer speak with his lawyer about the case, he did not trust him, he felt threatened and intimidated by him, there was no confidentiality between them, and his counsel was no longer behaving in a professional manner." *Id.* at 341-42, ¶ 2, 93 P.3d at 1057-58. The judge summarily denied Torres's motion for new counsel, suggesting only that defendant contact the public defender's office. *Id.* Our supreme court held that the court abused its discretion in denying the motion without inquiring into the aforementioned "specific factual allegations that raised a colorable claim that he had an irreconcilable

conflict with his appointed counsel." *Id.* at 343, ¶ 9, 93 P.3d at 1059.

¶19 Here, Anorve-Candela alleged only that his attorney had failed to meet with him as much as he wanted, and that his attorney told him he did not know what they were going to do at trial. Unlike the facts in *Torres,* these facts did not raise a "colorable claim" that Anorve-Candela had an irreconcilable conflict with his attorney or "such minimal contact with the attorney that meaningful communication was not possible." *Id.* at ¶ 8 (citing *Lott*, 310 F.3d at 1249)*; Cromwell,* 211 Ariz. at 187, ¶ 30, 119 P.3d at 454 ("To constitute a colorable claim . . . a defendant must allege facts sufficient to support a belief that an irreconcilable conflict exists warranting the appointment of new counsel in order to avoid the clear prospect of an unfair trial."). Anorve-Candela's complaints in this case did not rise to the level requiring an evidentiary hearing, or any more specific inquiry than the court conducted on the record. Moreover, during the trial court's inquiry, Anorve-Candela's attorney informed the court that, from the very beginning of the case, Anorve-Candela had refused to speak to him and had refused to participate in his defense. Subsequently, the court appropriately concluded that new counsel would not resolve the issue. The court also stated that Anorve-Candela would be "unwilling to participate in any meaningful way with a lawyer,

whether you or anyone else." On this record, Anorve-Candela "could have reconciled the relationship had he participated in good faith in his defense." Therefore, we conclude the trial court did not abuse its discretion in refusing to appoint a new attorney.

III. CONCLUSION

¶20 For the foregoing reasons, we reverse Anorve-Candela's first degree murder conviction and remand for retrial. We affirm his convictions for attempted murder and misconduct involving weapons.

/s/
_____
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
DONN KESSLER, Judge