

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05-18-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0617
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RAYMOND GABRIEL CABRERA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-165044-001 SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Raymond Gabriel Cabrera (Defendant) appeals his conviction for one count of robbery, a class four felony, and the sentence imposed.

¶2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded an opportunity to file a supplemental brief *in propria persona*, but he did not do so. Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031, and -4033.A.1 (2010).¹ Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 On the night of October 2, 2008, S.H. was withdrawing money from a bank ATM when a Cadillac pulled up behind him. As S.H. was returning to his car, a male exited the passenger side of the Cadillac, approached him, and demanded his wallet. S.H. testified at trial that when he initially hesitated in giving

¹ Unless otherwise specified, we cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

Defendant his wallet, Defendant "gestured to his belt line and either grabbed something or just kind of flattened his shirt out" revealing the silhouette of a gun tucked into his waistband. Believing that Defendant was armed, S.H. immediately surrendered his wallet to Defendant. The wallet contained cash, credit cards, and other identifying information. Defendant returned to the Cadillac and left the scene.

¶4 S.H. secured himself inside his vehicle, called the police, and proceeded to follow the Cadillac. He stopped his pursuit when police arrived and began pursuing the Cadillac. The chase ended when the Cadillac crashed into a parked SUV in an apartment complex. The police found the Cadillac abandoned. S.H. was brought to the scene where he identified the Cadillac as the get-a-way vehicle.

¶5 During the investigation, the police discovered one of S.H.'s credit cards in the back seat of the Cadillac, and a latent fingerprint from the Cadillac's right rear exterior window that matched Defendant's fingerprint. S.H. identified Defendant's picture from a photo line-up and at trial.

¶6 The police arrested Defendant and charged him with one count of robbery. Before trial, Defendant filed three motions to change counsel. Defendant alleged in his first and second motions to change counsel that he had "been in jail for three and a half months with-out [sic] a visit from [his attorney]"

and that his attorney refused "to put motions in for [him] and [forgot] all [their] talks on the phone." In his third motion to change counsel, Defendant alleged he had "been in jail for 7 months with only one visit from [his attorney]" and his attorney still refused "to put motions in for [him]," schedule hearings, and "[didn't] ever advise [him] of what rights [he had]." Defendant also stated in all three motions that his family was in the process of filing a bar complaint against his attorney for violations of the Arizona Rules of Professional Conduct 1.1, 1.3, and 1.4. The trial court never ruled on these motions.

¶7 At trial, the State presented testimony from S.H. and law enforcement officers involved in the chase and investigation. After the State rested, Defendant moved for a directed verdict pursuant to Arizona Rule of Criminal Procedure 20 for lack of substantial evidence. The trial court denied the motion.

¶8 The jury found Defendant guilty of one count of armed robbery. The jury also found that the State proved beyond a reasonable doubt four aggravating factors: (1) "[t]he offense involved the presence of an accomplice;" (2) "[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;" (3) "[t]he defendant evaded the police;" and (4) "[t]he defendant left on scene [sic] of the crime."

¶9 Prior to sentencing, the trial court held a hearing concerning the State's allegation of prior convictions. The trial court found that the State proved beyond a reasonable doubt that Defendant had a prior felony conviction for aggravated assault. The trial court sentenced Defendant to an aggravated term of six years' imprisonment and awarded Defendant 279 days of presentence incarceration credit.

DISCUSSION

Motions to Change Counsel

¶10 Before trial, Defendant filed three motions to change counsel. The trial court neither inquired into nor ruled on these motions. We review the trial court's failure to conduct an inquiry into Defendant's motions to change counsel for an abuse of discretion.² *State v. Torres*, 208 Ariz. 340, 343, ¶ 9, 93 P.3d 1056, 1059 (2004). There is an abuse of discretion when the reasons given by the trial court for its decision "are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

² Appellate counsel did not raise this issue because he believed that Defendant failed to bring this matter to the trial court's attention thereby waiving any error. See *State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983). Defendant, however, repeatedly filed motions to substitute counsel on January 30, 2009, February 6, 2009, and May 12, 2009, respectively. This indicates that Defendant neither abandoned his motions nor waived any error on the part of the trial court for failure to inquire.

¶11 The Sixth Amendment guarantees a criminal defendant the right to be represented by counsel. *Torres*, 208 Ariz. at 342, ¶ 6, 93 P.3d at 1058. To protect this constitutional right, the trial court has a "duty to inquire as to the basis of a defendant's request for substitution of counsel." *Id.* at 343, ¶ 7, 93 P.3d at 1059. "The nature of [this] inquiry will depend upon the nature of the defendant's request." *Id.* at 343, ¶ 8, 93 P.3d at 1059. If the defendant makes a *colorable claim* of irreconcilable conflict or complete breakdown of communication, then the trial court must conduct a hearing into the complaint. *Id.* A colorable claim is established if the defendant makes sufficiently specific, factually based allegations in support of an irreconcilable conflict or a complete breakdown of communication. *Id.* at 343, ¶¶ 8-9, 93 P.3d at 1059.

¶12 In *Torres*, the defendant alleged a complete breakdown of communication. *Torres* stated that he did not trust his attorney and felt threatened and intimidated by his attorney. 208 Ariz. at 342, ¶ 2, 93 P.3d at 1058. The trial court denied *Torres'* motion to substitute counsel based on the assumption that it lacked authority to appoint new counsel. *Id.* The Arizona Supreme Court held that the trial court abused its discretion by not conducting an inquiry into *Torres'* request because "Torres presented 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.

¶13 In this case, Defendant failed to allege specific facts in his motions to change counsel that raised either a colorable claim of irreconcilable conflict or a complete breakdown of communication. Defendant only claims that his attorney failed to visit him in jail and "refus[ed] to put motions in for [him]" or schedule hearings. "[D]isagreements over defense strategies do not constitute an irreconcilable conflict." *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 29, 119 P.3d 448, 453 (2005). Accordingly, the trial court did not err by failing to inquire into Defendant's motions to change counsel.

Sufficiency of the Evidence

¶14 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). We "will not disturb the jury's decision if there is substantial evidence to support its verdict," because "[t]he finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶15 To uphold the conviction of one count of robbery, we must find substantial evidence that Defendant took S.H.'s

property against his will, and threatened or used force against S.H. with intent either to coerce surrender of S.H.'s property or to prevent S.H.'s resistance. See A.R.S. § 13-1902 (2010).

¶16 At trial, S.H. testified that Defendant took his property, a wallet that contained cash, credit cards, and other identifying information. See A.R.S. §§ 13-1901.3, -1801.A.12 (2010). S.H. testified that he did not want to give Defendant his wallet, but did so "because [he] felt [his] life was threatened" after Defendant demanded his wallet and "gestured to his belt line and either grabbed something or just kind of flattened his shirt . . . [a]nd to [S.H.], it looked like a gun." See A.R.S. § 13-1901.4. Thus, we conclude the State presented substantial evidence to support the jury's verdict.

CONCLUSION

¶17 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶18 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.³

¶19 For the foregoing reasons, Defendant's conviction and sentence are affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSON, Judge

/S/

JON W. THOMPSON, Judge

³ Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of his decision.