IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

HUMBERTO ACUNA VERA,
Appellant.

No. 2 CA-CR 2016-0352
Filed May 30, 2017

Appeal from the Superior Court in Pima County
No. CR20151740001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Joel Feinman, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Miller concurred.

E S P I N O S A, Judge:

¶1 Following a jury trial, appellant Humberto Vera was convicted of manufacturing, possessing, transporting, selling, or transferring a prohibited weapon and possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to enhanced, minimum, concurrent, eight-year prison terms. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing "he has reviewed the entire record and has been unable to find any arguably meritorious issue to raise on appeal." Counsel has asked us to search the record for fundamental error. In a supplemental, pro se petition Vera lists a number of actions he asserts counsel should have taken and contends he was deprived of his Sixth Amendment right to counsel based on irreconcilable conflicts with counsel.[1]

¶2 Although a criminal defendant is entitled to effective representation, he "is not 'entitled to counsel of choice, or to a meaningful relationship with his . . . attorney.'" *State v. Torres*, 208 Ariz. 340, ¶ 6, 93 P.3d 1056, 1058 (2004), *quoting State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998). The Sixth Amendment requires substitution of counsel when "there is a complete breakdown in communication or an irreconcilable conflict between a defendant

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[1] The majority of Vera's argument amounts to a claim of ineffective assistance of counsel. Such a claim may not be raised on appeal, and we therefore do not address it. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

and his appointed counsel," and a trial court must "inquire as to the basis of a defendant's request for substitution of counsel." *Id.* ¶¶ 6–7.

¶3 Quoting our supreme court's decision in *Moody*, Vera contends "[t]he record in this case is replete with examples of a deep and irreconcilable conflict." 192 Ariz. 505, ¶ 13, 968 P.2d at 580. But Vera does not cite any such examples, and our review of the record finds little support for the claim. At a hearing pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), Vera told the trial court he had discussed "making the decision of going to trial or taking [a] plea" with his attorney. Later, on the second day of trial Vera told the court "I don't feel like I'm getting proper counsel." The court indicated it thought counsel was "doing a fine job," and Vera explained, "I mean, there's questions that I have that I would think would help me and he's not asking them." The court told Vera that if counsel was not asking particular questions there was likely a good reason. Vera responded, "All right." He did not request new counsel based on an irreconcilable conflict.

¶4 Contrary to Vera's assertions, this record is not similar to that in *Torres*,[2] wherein the defendant "presented specific factual allegations" that suggested "an irreconcilable conflict with his appointed counsel." 208 Ariz. 340, ¶ 9, 93 P.3d at 1059. At most, Vera's complaints demonstrate a loss of confidence in counsel, which does not create an irreconcilable conflict. *See*, *e.g.*, *State v. Cromwell*, 211 Ariz. 181, ¶¶ 29-30, 119 P.3d 448, 453-54 (2005); *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 14, 154 P.3d 1046, 1051 (App. 2007) ("We,

[2]We also note that *Torres* was decided in the context of a petition for review filed pursuant to Rule 32, Ariz. R. Crim. P., and involved properly raised issues of ineffective assistance of counsel and a different procedural posture. Suggesting that *Torres* permits it, Vera has included an affidavit with his supplemental brief, attempting to present new facts for our consideration on appeal. That affidavit is not part of the record, and we therefore do not consider it. *See State v. Griswold*, 8 Ariz. App. 361, 363, 446 P.2d 467, 469 (1968). But, in any event, the affidavit would not affect our analysis of the issues properly presented on appeal.

however, do not agree a loss of trust, without more, requires a trial court to appoint new counsel.").

¶5 To the extent Vera contends his attorney had a conflict of interest that merited removal of counsel or reversal of the convictions, we reject that claim as well. The conflict Vera identifies is apparently his counsel's desire "to protect his State Bar License" and "to preserve his close relationship with prosecutors . . . [and] Judges," as well as other attorneys and his office. Vera has not explained the nature of his attorney's purported "close relationship" with the prosecutor, "Judges," or "all attorneys." Nor has he cited any authority to suggest that an irreconcilable conflict arises based merely on knowing other attorneys involved in a matter.

¶6 Vera also raises various claims of prosecutorial and judicial misconduct. Many of the instances of alleged prosecutorial misconduct, however, took place during the grand jury proceedings. "We have held Rule 12.9, [Ariz. R. Crim. P.,] is both '[t]he defendant's sole procedural vehicle for challenging grand jury proceedings' and 'the appropriate method to challenge prosecutorial misconduct before the grand jury.'" *State v. Merolle*, 227 Ariz. 51, ¶ 8, 251 P.3d 430, 431-32 (App. 2011), *as amended* (June 1, 2011), *quoting State v. Young*, 149 Ariz. 580, 585-86, 720 P.2d 965, 970-71 (App. 1986). A timely motion pursuant to that rule not having been made, we do not address the claims.

¶7 The remaining prosecutorial conduct which Vera alleges does not "demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Nor does his bald assertion that the trial court "never investigate[d] the conflict" establish judicial misconduct.[3]

[3]Because we find no basis for reversal of Vera's convictions, we need not address his remaining claims relating to possible double jeopardy issues that might arise were he to be retried.

¶8 Furthermore, viewed in the light most favorable to sustaining the verdict, the evidence was sufficient to support the jury's finding of guilt. *See State v. Delgado*, 232 Ariz. 182, ¶ 2, 303 P.3d 76, 79 (App. 2013). The evidence at trial showed that an officer found a "sawed-off shotgun," which was less than twenty-inches long with a barrel under twelve inches long, on the driver's side floorboard of the car Vera had been driving. Vera had been convicted of a felony and his right to possess a firearm had not been restored. We further conclude the sentence imposed is within the statutory limit. *See* A.R.S. §§ 13-703(C), (J), 13-3101(A)(8)(a)(iv), 13-3102(A)(3), (4), (M).

¶9 Pursuant to our obligation under *Anders*, we have considered the issues raised in Vera's supplemental brief and searched the record for fundamental, reversible error and have found none. Therefore, Vera's convictions and sentences are affirmed.