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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TIMMY JAMES WARE, Appellant.	)	2 CA-CR 2008-0293 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071385

Honorable Paul E. Tang, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Timmy Ware was convicted of aggravated assault with a deadly weapon, disorderly conduct involving a firearm, and discharge of a

firearm within city limits. The trial court sentenced him to concurrent, mitigated prison terms, the longest of which is five years. On appeal, Ware argues the court abused its discretion when it denied his request to change counsel on the first day of trial and further maintains the evidence was insufficient to support his conviction for aggravated assault. For the following reasons, we affirm.

Motion to Change Appointed Counsel

¶2 From the time of his arraignment in April 2007, Ware had been represented by appointed counsel—first by the Pima County Public Defender and, after that office discovered a conflict five months later, by the Pima County Legal Defender. On the first day of trial in April 2008, private counsel also appeared and told the court he had just been retained by Ware's family, and Ware asked that this attorney be substituted for his appointed counsel. Although the attorney told the court he was ready to proceed to trial, he also explained that he was subject to an impending suspension from the practice of law. Ware withdrew his request to substitute retained counsel after the court determined the trial might not be completed before the suspension took effect. Ware then asked instead that the trial be continued and new counsel appointed.

¶3 When asked about his reasons, Ware said only that he felt his assigned attorney "wasn't going to argue for [him]" because counsel had strongly urged him to accept a plea agreement previously offered by the state. Counsel agreed Ware appeared to have lost confidence in his representation, possibly as a result of his advice during plea negotiations. He told the court there had been "a loss of civility" at a hearing the previous week and

suggested that his advice and Ware's wishes were "almost antagonistic." Counsel stated he had become concerned that Ware did not understand the state's theory of the case after Ware had asked him to call witnesses whose trial testimony would have been detrimental to his defense.

¶4 Citing *State v. Moody*, 192 Ariz. 505, ¶ 23, 968 P.2d 578, 582 (1998), the trial court found the disagreements between Ware and his counsel had not resulted in a "completely fractured relationship" requiring the appointment of new counsel. After weighing Ware's stated reasons for requesting new counsel, its observations of Ware and counsel at the hearing, an already assembled jury panel waiting for jury selection to begin, and a previous postponement of the trial for other reasons, the court denied Ware's motion.

¶5 On appeal, Ware argues the trial court violated the Sixth Amendment to the United States Constitution by denying his request for a change of appointed counsel. He contends this was structural error requiring reversal of his conviction. According to Ware, he had demonstrated an irreconcilable conflict through statements counsel made at the hearing, and he cites his efforts to retain private counsel as proof of "a complete breakdown in the attorney/client relationship." The state maintains Ware had simply misinterpreted counsel's advice to accept the plea agreement the state had offered as evidence that he would not receive a zealous defense at trial. Quoting *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 14, 154 P.3d 1046, 1051 (App. 2007), the state argues that Ware's "'general loss of confidence or trust in his counsel, standing alone, is not sufficient to require the appointment of new counsel.'"

¶6 Although an indigent criminal defendant charged with a serious offense has a right to effective representation by appointed counsel, 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 Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580. The Sixth Amendment does require substitution of counsel when "there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel," and a trial court must conduct an "inquiry on the record to determine whether a defendant's request is based on such conditions." *Id*. ¶¶ 6-7.

¶7 When lesser conflicts exist between a defendant and counsel, however, the court must "balance the rights and interests of the defendant against the public interest in judicial economy, efficiency and fairness" by considering such factors as "'whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.'" *State v. Cromwell*, 211 Ariz. 181, ¶¶ 29, 31, 119 P.3d 448, 453-54 (2005), *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). We will not disturb a trial court's denial of a request to substitute counsel absent a clear abuse of discretion, *Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580, and we must defer to the court's factual findings if they are supported by the record. *Paris-Sheldon*, 214 Ariz. 500, ¶ 13, 154 P.3d at 1051.

¶8 As an initial matter, we conclude the record supports the trial court's finding that Ware's differences of opinion with counsel about the merits of a plea agreement or the

advisability of calling certain witnesses did not amount to an irreconcilable conflict or a complete breakdown of communications between lawyer and client. *See Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d at 453 ("[D]isagreements over defense strategies do not constitute an irreconcilable conflict."). To establish a total breakdown in communication, "'a defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible.'" *Paris-Sheldon*, 214 Ariz. 500, ¶ 12, 154 P.3d at 1051, *quoting United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002).[1]

¶9 In considering the other factors relevant to a request to change appointed counsel, *see LaGrand*, 152 Ariz. at 486-87, 733 P.2d at 1069-70, we agree with the state that substantial evidence supports the trial court's exercise of its discretion. Ware acknowledges that his assigned counsel "was competent and prepared to try the case" and that he might have faced the same conflicts with newly appointed counsel. Although he admits "the timing of the motion could have been better," he argues it was not until the week before trial that he had decided to seek other representation. According to Ware, the age of the case was not a factor in the court's decision, and the record contained no evidence that witnesses

[1]Notwithstanding Ware's argument, his attempt to retain private counsel does not "prove[]" that communications with his appointed counsel had completely broken down; it only suggests he would have preferred to proceed with the attorney he had hired. *See State v. Aragon*, No. 2 CA-CR 2008-0149, ¶ 4, 2009 WL 1451442 (Ariz. Ct. App. May 26, 2009) (indigent criminal defendant has constitutional right "'to choose representation by non-publicly funded private counsel'"), *quoting Robinson v. Hotham*, 211 Ariz. 165, ¶ 16, 118 P.3d 1129, 1133 (App. 2005). When his retained counsel realized he would likely be unable to serve throughout the trial and withdrew from representation, Ware asked the court for a change of appointed counsel. It is the denial of this request that he appeals.

subpoenaed for trial would have been inconvenienced by its postponement. But the court made a point of reviewing the history of the case, and thus its age, in considering the motion, which Ware made a year after he had been charged and on the morning of a trial that had already been continued once. And the court appears to have considered the inevitable inconvenience a trial postponement would have caused for witnesses and potential jurors alike. We cannot say the court abused its discretion in denying Ware's request.

Sufficiency of the Evidence

¶10 Viewed in the light most favorable to sustaining the jury's verdicts, *see State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005), the evidence established that, in the early morning hours of March 31, 2007, Ware recognized Monique M. as she and her friend, Debra W., sat waiting in an automobile for another friend, Nyghdra F. After greeting the women, Ware told them to leave and began shooting a handgun into the air. When Nyghdra arrived at the vehicle, Ware told her the three women should leave before he "unload[ed] his other clip." He then fired several more shots into the air as the women drove away.

¶11 Ware argues that the evidence was insufficient to support the jury's guilty verdict for the aggravated assault of Debra and that the trial court therefore abused its discretion in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. We review the denial of a Rule 20 motion for an abuse of discretion. *Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056. We will not reverse a conviction for insufficient evidence as long as the record contains "such proof that 'reasonable persons

could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Roseberry*, 210 Ariz. 360, ¶ 45, 111 P.3d 402, 410-11 (2005), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990).

¶12 Ware argues the state failed to prove that he placed Debra in reasonable apprehension of imminent physical injury or that he had intended to do so. *See* A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2).[2] As for his intent, Ware testified he had fired seven to ten bullets into the air because he wanted to make Debra and the other women leave the area. A reasonable jury could conclude that Ware, by those actions, intended to cause the women to fear that future bullets might be directed toward them if they did not depart as he demanded. Moreover, Ware conceded that he understood bullets fired into the air were capable of striking someone as they fell. Ware's argument on appeal that he did not intend to place the women in fear but fired the shots as "an emphasis to his statement that they needed to leave" merely raises an issue of fact that was resolved by the jury in this case. Their implicit finding that Ware had intended to frighten the women was supported by substantial evidence.

¶13 Similarly, ample evidence supported the jury's finding that Ware had placed Debra in reasonable apprehension of imminent harm. Debra testified Ware had been

[2]Although certain provisions of our aggravated assault statute have changed, § 13-1204(A)(2) has remained the same since Ware committed his offense in March 2007. *See* 2005 Ariz. Sess. Laws, ch. 166, § 3.

standing about six feet from her as he was firing the handgun. She said she was afraid she would be would be hit by a falling bullet and felt her "life [was] on the line."[3]

Conclusion

¶14 We find no error or abuse of discretion in the trial court's denial of either Ware's motion for new counsel or his motion for judgment of acquittal. We further conclude sufficient evidence supported the jury's verdict finding him guilty of the aggravated assault of Debra W. Accordingly, we affirm Ware's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
J. WILLIAM BRAMMER, JR., Judge

_____
GARYE L. VÁSQUEZ, Judge

[3]Ware cites no authority for his argument that Debra's fear was not reasonable, and she therefore was not assaulted, because the potential for being struck by a falling bullet was "remote."