APPENDIX A

20CA0182 Peo v Zuniga 10-28-2021

COLORADO COURT OF APPEALS DATE FILED: October 28, 2021

Court of Appeals No. 20CA0182
Arapahoe County District Court No. 04CR1690
Honorable Michael Spear, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Genero Javon Zuniga,

Defendant-Appellant.

ORDER AFFIRMED

Division VI
Opinion by JUDGE FOX
Welling and Johnson, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 28, 2021

Philip J. Weiser, Attorney General, Lisa K. Michaels, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Genero Javon Zuniga, Pro Se

¶ 1 Defendant, Genero Javon Zuniga, appeals the trial court's denial of his Crim. P. 35(c) motion for postconviction relief. We affirm.

I. Background

¶ 2 The State charged Zuniga and a codefendant with multiple offenses stemming from an incident where someone in one vehicle fired a gun into the victims' vehicle. At a joint jury trial, the prosecution asserted that the evidence proved that Zuniga was the shooter and the codefendant was the driver but argued that, regardless of their roles, each defendant should be held liable for the other's actions under a complicity theory. Over Zuniga's objection, the trial court gave the jury the model complicity jury instruction.

¶ 3 The jury found Zuniga guilty of first degree murder – after deliberation, three counts of attempted first degree murder – after deliberation, conspiracy to commit first degree murder – after deliberation, and second degree assault. The jury was not asked to determine whether Zuniga was the principal actor or the complicitor. The trial court imposed an aggregate sentence of life in prison without the possibility of parole, plus 128 years.

¶ 4 Zuniga appealed and contended, among other things, that the model complicity jury instruction did not adequately inform the jury of the "dual state of mind requirement." Relying on the authority available at the time, a division of this court rejected that claim and affirmed the judgment of conviction. *See People v. Zuniga*, (Colo. App. No. 05CA1623, May 13, 2010) (not published pursuant to C.A.R. 35(f)) (*Zuniga I*). The Colorado Supreme Court denied certiorari, and the mandate issued in September 2010.

¶ 5 In 2010, Zuniga filed a Crim. P. 35(c) motion, which the postconviction court summarily denied. A division of this court affirmed the order denying the motion. *See People v. Zuniga*, (Colo. App. No. 11CA0072, Oct. 4, 2012) (not published pursuant to C.A.R. 35(f)) (*Zuniga II*).

¶ 6 Zuniga subsequently filed a federal action related to this criminal matter. While the federal case was pending, Zuniga sent letters to the Colorado state trial court requesting a status report on a second Crim. P. 35(c) motion that he purportedly filed in August 2016. No such motion is in the record. Zuniga's letters, which are in the record, state that the motion was based on "the new rule of law issued in *People v. Childress*, 2015 CO 65M."

¶ 7 In 2017, while the federal action was pending, the trial court issued an order finding that it lacked jurisdiction to consider the Crim. P. 35 motion filed on "August 15, 2016." In 2019, the court issued a second order stating that the court record was still with the federal court and that it would address Zuniga's motion once the record had been returned.

¶ 8 In 2020, after ostensibly receiving return of the record from the federal court, the trial court issued an order denying Zuniga's "August 05, 2016," motion. The court stated that Zuniga's motion argued that his convictions were obtained pursuant to a complicity theory in violation of the recent holding set forth in *Childress*.

¶ 9 The postconviction court first determined that Zuniga's motion was not successive. The court declined to address whether *Childress* announced a new rule of constitutional law and, instead, found that Zuniga's motion fell within an exception to the successiveness bar — the claim asserted therein "would have been impracticable to bring earlier, absent th[e] ruling [in *Childress*] which clarified how the court should interpret [the complicity statute]."

¶ 10 The postconviction court held that, contrary to Zuniga's position, *Childress* did not "'redefine[] what it takes to convict' under a complicity theory" and "d[id] not overturn preexisting case law or statute." Instead, the court found that *Childress* "clarifie[d] any ambiguity perceived in the [s]upreme [c]ourt's prior holdings regarding" the complicity statute. The trial court then determined that the model complicity jury instruction complied with the *Childress* standard.

II. Legal Authority and Standard of Review

¶ 11 We review a trial court's summary denial of a Crim. P. 35(c) motion for postconviction relief de novo. *People v. Gardner*, 250 P.3d 1262, 1266 (Colo. App. 2010). A defendant need not detail the evidentiary support for his or her allegations in a Crim. P. 35 motion, but instead need only assert facts that if true would provide a basis for relief. *White v. Denver Dist. Ct.*, 766 P.2d 632, 635 (Colo. 1988). A Crim. P. 35(c) motion for postconviction relief may be denied without an evidentiary hearing only where the motion, files, and record clearly establish that the defendant's allegations are without merit and do not warrant relief. *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003).

¶ 12 A trial court is required to deny any claim that could have been raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant, except for

> (a) [a]ny claim based on events that occurred after initiation of the defendant's prior appeal or postconviction proceeding;
>
> . . .
>
> (c) [a]ny claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review;
>
> . . .
>
> (e) [a]ny claim where an objective factor, external to the defense and not attributable to the defendant, made raising the claim impracticable.

Crim. P. 35(c)(3)(VII). Similarly, a postconviction court shall deny any claim that was raised and resolved in a prior postconviction proceeding or appeal, except for "[a]ny claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied retroactively by the United States Supreme Court or Colorado appellate courts." Crim. P. 35(c)(3)(VI)(b).

¶ 13 Further, a Crim. P. 35(c) motion must be filed within three years of a defendant's conviction for an offense other than a class 1

felony. § 16-5-402(1), C.R.S. 2020; Crim. P. 35(c)(3)(I). Where, as here, a defendant has filed a direct appeal, "the meaning of the word 'conviction' in section 16-5-402(1) refers to a conviction after a defendant's appeal has been exhausted." *People v. Hampton*, 876 P.2d 1236, 1240 (Colo. 1994); *see also People v. Alexander*, 129 P.3d 1051, 1056 (Colo. App. 2005).

¶ 14 But, a postconviction claim shall be excluded from the time limitation period where a trial court finds that the "failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect." § 16-5-402(2)(d). As relevant here, a claim based on a new rule of substantive constitutional law can constitute justifiable excuse for the failure to timely file a postconviction motion. *See People v. Rainer*, 2013 COA 51, ¶¶ 24-29, *rev'd on other grounds*, 2017 CO 50; *see also People v. Gardner*, 55 P.3d 231, 232 (Colo. App. 2002).

III. Analysis

¶ 15 Zuniga contends that *Childress* created a more onerous standard for obtaining a conviction based on a complicity theory and that *Childress* accordingly overturned the authority *Zuniga I*

relied upon to reject his challenge, on direct appeal, to the model complicity jury instruction given at his trial. He argues that, consequently, his current challenge to the complicity jury instruction is exempted from the successiveness bar pursuant to Crim. P. 35(c)(3)(VII)(a) and (c) and that he is entitled to a new trial because the complicity instruction given to the jury was deficient.

¶ 16 We conclude that Zuniga's claim is successive and untimely. *See People v. Vondra*, 240 P.3d 493, 494 (Colo. App. 2010) (applying Crim. P. 35(c)(3)(VII) on appeal to preclude a successive claim even though the postconviction court did not rely on that provision); *see also* § 16-5-402(1.5) (an appellate court may deny relief if it determines that a collateral attack is untimely, regardless of whether the trial court considered timeliness).

¶ 17 We are not convinced that newly announced legal authority that would support a successive postconviction claim constitutes an "event" for purposes of Crim. P. 35(c)(3)(VII)(a) or an "objective factor" under Crim. P. 35(c)(3)(VII)(e). Indeed, as discussed below, a successive claim based on changes in the law is governed by other legal provisions.

¶ 18 Because Zuniga concedes that defense counsel argued the standard ultimately adopted in *Childress* at his trial and that appellate counsel asserted in *Zuniga I* that the jury instruction was deficient, we are not persuaded that the claim he presently raises was based on an event that occurred after *Zuniga I* and *Zuniga II* or that timely raising the claim was impracticable.

¶ 19 Thus, we conclude that Crim. P. 35(c)(3)(VII)(a) or (e) do not apply to exempt Zuniga's motion from the successiveness bar.

¶ 20 Next, we agree with the postconviction court that *Childress* did not announce a new, retroactive rule of constitutional law so as to trigger the successiveness exceptions in Crim. P. 35(c)(3)(VII)(c) or — to the extent the claim was raised and rejected in *Zuniga I* — Crim. P. 35(c)(3)(VI)(b). *See Teague v. Lane*, 489 U.S. 288, 301 (1989) (an opinion "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government[;]a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final") (citations omitted); *Edwards v. People*, 129 P.3d 977, 981-83 (Colo. 2006).

¶ 21 In *Childress*, the supreme court acknowledged that its prior pronouncements on the complicity theory were "difficult to reconcile" and repeatedly stated its intent to "clarify [the] reach and requirements" of complicitor liability. *Childress*, ¶¶ 2, 10, 27, 33, 37, 39; *see also People v. Sandoval*, 2018 COA 156, ¶¶ 15-16 (*Childress* "clarified" prior interpretations of the complicity statute); *People v. Hunt*, 2016 COA 93, ¶ 18 n.4 (*Childress* "altered" a prior pronouncement's requirement regarding complicitor liability).

¶ 22 Importantly, because complicitor liability is governed by statute, *Childress* did not address a matter of constitutional law. *See* § 18-1-603, C.R.S. 2020; *Childress*, ¶ 7. Contrary to Zuniga's assertion, Crim. P. 35(c)(3)(VI)(b) and (VII)(c) do not allow for exceptions to a successive claim based on purported nonconstitutional changes to the law.

¶ 23 Instead, Crim. P. 35(c)(1) and section 18-1-410(1)(f)(I), C.R.S. 2020, permit defendants to seek postconviction review of their conviction based on an allegation that there has been a "significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard." However, defendants may not seek relief

based on a significant change in the law "if, prior to filing for relief[,] . . . a judgment of conviction has been affirmed upon appeal." § 18-1-410(1)(f)(II); *see also* Crim. P. 35(c)(1) (Defendants may apply for relief due to a significant change in the law "[i]f, prior to filing for [such] relief . . . , [the] person has sought appeal of a conviction within the time prescribed therefor and if judgment on that conviction has not then been affirmed upon appeal.").

¶ 24 Thus, to the extent Zuniga seeks retroactive application of *Childress*' purported change in the law governing the complicity statute, he is barred from obtaining such relief.

¶ 25 Lastly, we conclude that Zuniga's claim is also untimely because it was filed more than three years after the mandate from *Zuniga I* issued and, as noted, *Childress* did not announce a new rule of constitutional law so as to constitute justifiable excuse or excusable neglect for the failure to timely file the claim. *See* § 16-5-402(1); Crim. P. 35(c)(3)(I); *Hampton*, 876 P.2d at 1240; *see also Rainer*, ¶¶ 24-29.

IV. Conclusion

¶ 26 The order is affirmed.

JUDGE WELLING and JUDGE JOHNSON concur.

APPENDIX B

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 26, 2022
Certiorari to the Court of Appeals, 2020CA182 District Court, Arapahoe County, 2004CR1690	
Petitioner: Genero Javon Zuniga, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2021SC857
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 26, 2022.
JUSTICE HOOD does not participate.

APPENDIX C

COLORADO COURT OF APPEALS

Court of Appeals No. 05CA1623
Arapahoe County District Court No. 04CR1690
Honorable Timothy L. Fasing, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Genero Javon Zuniga,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE GRAHAM
Loeb and Miller, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced May 13, 2010

John W. Suthers, Attorney General, John J. Fuerst III, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Ridley, McGreevy & Weisz, P.C., Kevin McGreevy, Denver, Colorado, for Defendant-Appellant

Defendant, Genero Javon Zuniga, was convicted of first degree murder after deliberation, three counts of attempted first degree murder after deliberation, conspiracy to commit first degree murder after deliberation, and second degree assault. He challenges his convictions, arguing that the trial court erred in denying his motion for severance, excusing a juror mid-trial, and tendering the pattern complicity instruction to the jury. He also contends that the evidence was insufficient as a matter of law to convict him of crimes requiring deliberation. We disagree, and affirm.

I. Background

According to the prosecution, Zuniga and his codefendant, Antonio Stancil, drove into a 7-Eleven parking lot and noticed a group of high school age boys in another car. Zuniga displayed a gang sign identifying him as a member of the Bloods to the boys. In response, one of the boys, a self-described "wannabe" gangster, displayed the sign for a rival Crips gang. The defendants' car left the 7-Eleven, made a U-turn, and waited for the boys to leave. The defendants then followed them for two miles down a residential

street, pulled alongside of their car, and opened fire. The driver was killed, and one passenger was wounded.

The next morning, police officers responding to an unrelated call discovered a car matching the description of the shooters'. Zuniga and Stancil were arrested that morning at the residence of K.W., the owner of the car.

Zuniga and Stancil were tried jointly. Zuniga now appeals his convictions.

II. Severance

Zuniga argues that the trial court abused its discretion in denying his motion for severance. We disagree.

Severance is to be granted as a matter of right if there is material evidence against one but not all of the parties, and admission of that evidence is prejudicial to the party against whom the evidence is not admissible. § 16-7-101, C.R.S. 2009; Crim. P. 14; *People v. Johnson*, 30 P.3d 718, 724-25 (Colo. App. 2000). Zuniga does not argue that severance was mandatory here; instead, he contends that the failure to sever was an abuse of discretion.

If a defendant is not entitled to severance as a matter of right, "a motion for severance is addressed to the sound discretion of the trial court, whose decision will be affirmed absent a showing of abuse of discretion and actual prejudice to the moving party." *Johnson*, 30 P.3d at 725. Factors to be considered in determining whether a denial of severance constitutes an abuse of discretion include (1) whether the number of defendants or the complexity of the evidence is such that the jury will confuse the evidence and the law applicable to each defendant; (2) whether, despite admonitory instructions, evidence admissible against one defendant will improperly be considered against another; and (3) whether the defenses are antagonistic. *Id.* at 725-26; *People v. Montoya*, 942 P.2d 1287, 1292 (Colo. App. 1996).

Here, Zuniga does not argue that the evidence was unduly complex, or that any evidence was admissible against one defendant but not against the other. He claims that the defendants' defenses were so antagonistic that they required severance.

Simply because codefendants who both participated in the alleged crime have conflicting defenses does not necessarily mean

that the defenses are so antagonistic that they require severance. Mutual participation of defendants in an offense is a logical basis for refusing to sever. *People v. Vigil*, 678 P.2d 554, 557 (Colo. App. 1983). "[T]he courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses. The low rate of reversal may reflect the inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses." *Zafiro v. United States*, 506 U.S. 534, 538 (1993) (citations omitted).

"Defenses are not antagonistic where they do not specifically contradict each other." *Johnson*, 30 P.3d at 726. Mere argument by counsel suggesting that a codefendant was solely responsible for the charged crime does amount to an antagonistic defense. *People v. Wandel*, 713 P.2d 398, 400 (Colo. App. 1985).

In *People v. Maass*, 981 P.2d 177 (Colo. App. 1998), the trial court granted severance, but not until after a jury was empanelled. The defendant contended that the refusal to sever from the outset was an abuse of discretion and a mistrial was warranted so he could select an untainted jury. Relying on the analysis in *United*

States v. McClure, 734 F.2d 484 (10th Cir. 1984), *Maass* recognized that a mere attempt by one codefendant to cast blame on the other is not a sufficient reason to require separate trials, but a showing of "irreconcilable differences" may require severance. 981 P.2d at 184. Establishing an irreconcilable difference would require the party requesting severance to show "that the acceptance of one defense would tend to preclude the acquittal of the other defendant. Conversely, such a showing would also seemingly require that the guilt of one defendant would tend to establish the innocence of the other." *Id.*

In *Maass*, both defendants maintained that they were innocent, and the division noted that that "[w]hile some evidence was to be introduced indicating that defendant may have committed the murder, the jury was not *required to find defendant guilty in order to find the codefendant was not involved.*" *Id.* at 185 (emphasis added). The division held that the defenses were not so antagonistic that the trial court abused its discretion by initially refusing to sever. *Id.*

In *Montoya*, 942 P.2d 1287, both defendants admitted their presence at or near the murder scene, but argued that they did not aid or abet the shooting. Neither attempted to place blame on the other. A division of this court therefore concluded that the trial court did not abuse its discretion in denying severance. 942 P.2d at 1292.

Conversely, in *Eder v. People*, 179 Colo. 122, 498 P.2d 945 (1972), two codefendants shared a bedroom where police found hashish. Each contended that the other owned the drugs. The court found an abuse of discretion in a denial of severance where several factors weighed in favor of severance. Among these were the unfairness the court discerned in permitting inferences in favor of one defendant based on the silence of the other and the potential exculpatory evidence one defendant might provide the other in separate trials. Although one of the factors was that the defendants' defenses were antagonistic, *id.* at 125, 498 P.2d at 946, the court noted that "antagonistic defenses may not always demand a severance," and that "[a]ny single one of the factors . . . might not make denial of the severance an abuse of discretion." *Id.* at 124-25,

498 P.2d at 946; *but see People v. Anaya*, 545 P.2d 1053, 1059-60 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (distinguishing *Eder* where every inference strengthening the case against one codefendant does not necessarily weaken the case against the other).

A review of these decisions leads us to the conclusion that, in order to be so antagonistic as to warrant severance, codefendants' defenses must be irreconcilable. Evidence that tends to exculpate one defendant must tend to inculpate the other, so that the jury must be required to find the defendant guilty in order to acquit the codefendant.

Here, we agree with the trial court that Stancil's and Zuniga's defenses were not irreconcilable. Though Stancil's counsel highlighted the fact that the identification evidence was stronger against Zuniga than it was against Stancil, both defendants' defenses worked in parallel. They both argued that they were not identified beyond a reasonable doubt, and that they were not present in the car when the shots were fired.

In attempting to show that their defenses were antagonistic, Zuniga focuses on a letter introduced at trial by Stancil's counsel. The letter, addressed to K.W., was written by Zuniga while he was in prison, and read in part:

> Remember the day it all went down we stopped at the store to pick up something, then got into it with the [boys] at the store. Then they dropped us off because your son was in the car and we don't know where they went from there. I had told you to say that me and him was together because I didn't know what the police were there for at the house.

Though the letter may lead to an inference that Zuniga and K.W. were conspiring to change their stories after the alleged crime, the letter does not exculpate Zuniga at Stancil's expense, nor does it exculpate Stancil at Zuniga's expense. The letter shows that the defendants were hostile to each other, but it does not render their defenses antagonistic. Each defendant's theory of defense remained that he was not in the car when the shots were fired.

Based upon the defenses, the jury did not need to find Stancil guilty in order to acquit Zuniga, or vice versa. Rather, the jury could have believed one of the boys, who testified that Zuniga was driving and that an unnamed bald man was the shooter. Or it

could have found that K.W. was driving and Zuniga was shooting, or that neither Zuniga nor Stancil was in the car that fired on the boys. Zuniga's culpability is independent of Stancil's.

In contrast, in *Eder* it was clear that the hashish found in the bedroom belonged to one of the two occupants of the room; the defenses were truly irreconcilable. Here, between Stancil and Zuniga, one, neither, or both of them could have been in the car that fired on the boys.

Because the guilt of one codefendant was not based on the innocence of the other, Stancil's and Zuniga's defenses were not so antagonistic as to warrant severance. Therefore, the trial court did not err in denying Zuniga's motion to sever.

III. Juror Excusal

The trial court excused a juror mid-trial, replacing him with an alternate. Zuniga argues that the court did so in error because the juror was able to serve and deliberate. We are not persuaded.

Section 16-10-106, C.R.S. 2009, provides: "Where a jury of twelve has been sworn to try the case, and any juror by reason of illness or other cause becomes unable to continue until a verdict is

reached, the court may excuse such juror." Section 16-10-105, C.R.S. 2009, describes the use of alternate jurors: "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties."

"The trial court is in the best position to evaluate whether a juror is 'unable' to serve, and its decision to excuse a juror will not be disturbed absent a gross abuse of discretion." *People v. Abbott*, 690 P.2d 1263, 1268 (Colo. 1984). In evaluating the ability of a juror to serve, trial courts are in a unique position to assess a juror's credibility or state of mind. *See Carrillo v. People*, 974 P.2d 478, 486 (Colo. 1999).

Though a defendant is entitled to a trial by a fair and impartial jury, he is not entitled to a trial before any particular juror. *People v. Johnson*, 757 P.2d 1098, 1100 (Colo. App. 1988). In arguing that a trial court erred in dismissing a particular juror, a defendant must show that he was prejudiced in some way by the dismissal and replacement of the juror. *Id.*; *People v. Evans*, 674 P.2d 975,

978 (Colo. App. 1983). Prejudice will not be presumed. *Johnson*, 757 P.2d at 1100; *Evans*, 674 P.2d at 978.

Here, a juror was excused mid-trial after he submitted a note to the court explaining that he lived near the families of both the defendants and the victims, stating, "I fear for my life because the people involved live in the same area & one day they will see me again & won't be very happy!!!" The court interviewed the juror, and while the juror stated that he thought he could be impartial, the court found he was emotional throughout the interview and clearly uncomfortable. Based on these findings, the court excused the juror and replaced him with an alternate.

Zuniga did not argue, either at trial or on appeal, that he was prejudiced in any way by the excusal and replacement of the juror, or that the jury was not fair and impartial. Because prejudice will not be presumed, *Johnson*, 757 P.2d at 1100; *Evans*, 674 P.2d at 978, we conclude that the trial court did not err in excusing the juror and seating the replacement.

IV. Complicity Instruction

Zuniga argues that the trial court erred by giving the model complicity jury instruction, CJI-Crim. 6:04 (1983). He contends that the instruction deprived him of due process because it failed to adequately set forth a dual state of mind requirement. The complicity instruction given to the jury read:

> A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, each of the following must be established beyond a reasonable doubt:
>
> 1. A crime must have been committed;
> 2. Another person must have committed the crime;
> 3. The defendant must have had knowledge that the other person intended to commit the crime;
> 4. The defendant must have had the intent to promote or facilitate the commission of the crime; and
> 5. The defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

Zuniga argues that the tendered instruction did not inform the jury that, in order to convict him of complicity, the jury needed to find that he shared the principal's culpable state of mind. We disagree, and conclude that the instruction appropriately required

that the jury find beyond a reasonable doubt that the dual state of mind requirement was satisfied.

The trial court must properly instruct the jury on all matters of law. *People v. Phillips*, 91 P.3d 476, 480 (Colo. App. 2004). We review jury instructions de novo to determine whether the instructions as a whole accurately inform the jury of the governing law. *People v. Oram*, 217 P.3d 883, 893 (Colo. App. 2009) (*cert. granted* Oct. 13, 2009). We review the trial court's decision to give a particular instruction for abuse of discretion. *Id.* We must read and consider all jury instructions together, and if, collectively, they adequately inform the jury of the law, there is no reversible error. *People v. Galimanis*, 944 P.2d 626, 630 (Colo. App. 1997). Jury instructions framed in the language of the relevant statutes are generally sufficient and proper. *Phillips*, 91 P.3d at 483.

Complicity is a legal theory "by which an accomplice may be held criminally liable for a crime committed by another person if the accomplice aids, abets, or advises the principal, intending thereby to facilitate the commission of a crime. *Bogdanov v. People*, 941 P.2d 247, 250 (Colo.), *amended*, 955 P.2d 997 (Colo. 1997), *and*

disapproved of on other grounds by Griego v. People, 19 P.3d 1 (Colo. 2001). Our complicity statute sets forth a dual mental state for the complicitor: "First, the complicitor must have the culpable mental state required for the underlying crime committed by the principal. Second, the complicitor must intend that his own conduct promote or facilitate the commission of the crime committed by the principal." *Id.* at 252; *see* § 18-1-603, C.R.S. 2009.

Bogdanov addressed the issue of whether the pattern jury instruction, CJI-Crim. 6:04, properly instructed the jury of the dual state of mind requirement and thereby protected the defendant's right to due process of law. Decided under the now disapproved of structural error analysis, *Bogdanov* concluded that the language of the pattern complicity instruction sufficiently instructs the jury regarding the dual mental state requirement. 941 P.2d at 253-54. The court noted the pattern instruction's use of the word "crime" and reasoned that "the defendant could not have *intended* his participation to further the crime unless he also intended the crime to occur. For him to intend that the crime occur, he would necessarily share the principal's mental state." *Id.* at 254.

A host of other Colorado cases reaffirm the holding in *Bogdanov* and approve of the pattern complicity instruction. *See, e.g., People v. Collins*, 187 P.3d 1178, 1184-85 (Colo. App. 2008), *People v. Fisher*, 9 P.3d 1189, 1192 (Colo. App. 2000). *People v. Bass*, 155 P.3d 547 (Colo. App. 2006), addresses Zuniga's argument directly, and rejects it. *Id.* at 552. We agree with *Bass*, and hold that the pattern complicity instruction correctly instructs the jury. We therefore discern no error.

Defendant's reliance on *People v. Williams*, 23 P.3d 1229 (Colo. App. 2000), is misplaced. In *Williams*, the trial court gave the pattern complicity instruction to the jury, and later clarified complicity's mens rea requirement in response to a juror question. Zuniga argues that the conviction in *Williams* was only upheld on appeal because the court's response clarified what would have otherwise been an insufficient jury instruction. We do not read *Williams* to require the clarification because the division concluded "that there was no reversible error in the instruction." *Id.* at 1232. The division held that the trial court did not err in refusing the defendant's tendered instruction, and did not question the holding

in *Bogdanov*. Subsequent Court of Appeals decisions have upheld the validity of the pattern instruction absent any clarification. *See, e.g., Bass*, 155 P.3d 547. We likewise conclude that the pattern instruction does not require any clarification, and that the trial court here did not err in giving the pattern instruction.

V. Sufficiency of the Evidence

Zuniga next argues that the evidence was insufficient as a matter of law to support his convictions for first degree murder after deliberation, conspiracy to commit first degree murder after deliberation, and attempted first degree murder after deliberation, because the evidence did not show that he acted "after deliberation." We disagree.

We "review challenges to the sufficiency of the evidence to determine whether the evidence, when viewed as a whole and in the light most favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crime charged beyond a reasonable doubt." *People v. Sharp*, 104 P.3d 252, 256 (Colo. App. 2004). The prosecution must be given the benefit of "every reasonable infe[r]ence which might fairly

be drawn from the evidence." *People v. Downer*, 192 Colo. 264, 268, 557 P.2d 835, 838 (1976). If there is evidence upon which one may reasonably infer an element of a crime, the evidence is sufficient to sustain that element, and where reasonable minds could differ, the evidence is sufficient to sustain a conviction. *People v. Grant*, 174 P.3d 798, 812 (Colo. App. 2007).

A person is guilty of first degree murder after deliberation if, after deliberation and with the intent to cause the death of another person, he causes the death of that person. § 18-3-102(1)(a), C.R.S. 2009. "Deliberation" requires not only "intent," but also that "the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner." § 18-3-101(3), C.R.S. 2009. Although deliberation requires that a design to kill precede the killing, the length of time required for deliberation need not be long. *People v. Bartowsheski*, 661 P.2d 235, 242 (Colo. 1983).

The evidence in the record before us, when viewed in the light most favorable to the prosecution, establishes that after flashing

rival gang signs back and forth with a group of high school age boys, Zuniga and Stancil followed their vehicle down a residential street, pulled up alongside, fired six to eight shots at the driver and passengers, and killed the driver. The jury could have reasonably inferred that this series of actions was the result of a series of deliberative choices, satisfying the requirements of first degree murder after deliberation. The verdict was therefore supported by sufficient evidence.

The judgment is affirmed.

JUDGE LOEB and JUDGE MILLER concur.