

State v. Bush

Citation: State v. Bush, No. CR-11-0107-AP, 2018 WL 3910681 (Ariz. Aug. 16, 2018).

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Opinion's Author: Justice Pelander

Joined By: Vice Chief Justice Brutinel, Justices Timmer, Bolick, and Gould

Practitioners: For quick reference, please see the "Issue" and "Holding" sections.

Facts: On the evening of May 29, 2009, Junior Flores, his wife Gina Gonzales, and their daughter Brisenia, were at their home. After Junior and Gina went to bed, and Brisenia slept on the living room couch, Junior woke Gina to tell her law enforcement officers were at the door. Junior went to the door while Gina joined Brisenia, who was still asleep on the couch. Gina heard two voices, a male and a female, order Junior to open the door so they could enter to "take a look." Junior complied and the man and woman entered their home. The man wore camouflage and black face paint, and he carried a handgun and a longer gun covered with duct tape. Junior pressed the intruders for identification and asked the man why one gun was covered in duct tape. The man responded, "Don't take this personally but this bullet has your name on it," and shot Junior in the chest. The man then shot Gina in her shoulder and thigh. Gina fell to the floor, and the man returned his focus to Junior, killing him with additional shots.

Lying on the floor, Gina heard two more men enter the home. Brisenia awoke and asked the man why he shot her father. After a brief discussion with her in which he stated nobody would hurt her, the man fatally shot Brisenia twice in the face. After this the intruders appeared to have departed the house and Gina called 911 attempting to obtain aid for Brisenia. The female intruder then returned and ordered someone to "go back and finish her off." Gina rushed to the kitchen, grabbed a gun Junior kept there, and opened fire on the male intruder. During the exchange of gunfire, the man cried out in pain and left the home.

Procedural History: The case is currently before the Arizona Supreme Court. The State charged Bush with two counts of first degree murder, attempted first degree murder, two counts of aggravated assault, first degree burglary, armed robbery, and aggravated robbery. A jury found Bush guilty on all counts. For the murder convictions, the jury found three aggravating circumstance: Bush was convicted of a serious offense, committed multiple homicides on the same occasion, and murdered a person under the age of fifteen. Considering those factors and the mitigation evidence, the jury sentenced Bush to death for each murder. For the non-capital convictions, the trial court sentenced Bush to prison terms totaling seventy-eight years.

During the trial, Bush motioned for a change of venue or, alternatively, a continuance, which he argued was necessary because of outrageous and extensive pretrial publicity about the case.¹ In denying the motion, the trial court reasoned that Bush had not shown that he was

¹ State v. Bush, No. CR-11-0107-AP, 2018 WL 3910681, at *2 (Ariz. Aug. 16, 2018).

entitled to a presumption of prejudice and could not show actual prejudice because the jury had not been selected at the time of his motion.² The court indicated it would examine the issue if the voir dire process failed to yield an impartial jury.³ Bush moved for a mistrial after jury selection but did not renew his motions for change of venue or continuance.⁴

Jury selection in this case lasted five days and involved 225 potential jurors. Before trial, each juror received and completed an eighteen-page juror questionnaire containing questions probing the juror's ability to deliver a fair and impartial verdict.⁵ The questionnaire included a question which stated:

If you agree the death penalty may be appropriate in some cases, please rank the following reasons from 1 to 4, 1 being most important, that would cause you to favor the death penalty.

___ To deter others from committing murder.

___ For economic reasons. It is expensive to house prisoners for the remainder of their lives.

___ Because an eye for an eye, is fair.

___ To protect the public against defendants who might get out of jail in the future.

___ Other (please specify): _____.⁶

Bush moved for a mistrial on the grounds that the above question "engrained" in the jurors that it is appropriate at some level from them to consider improper and impermissible non-statutory aggravating factors it lists. The trial court denied the motion but instructed the potential jurors that they were not to consider the factors listed in the question.⁷

Additionally, Bush moved before trial for individual, sequestered, and in-chamber voir dire, asserting it was necessary to "put the prospective juror at ease and encourage honest responses."⁸ The trial court denied the motion, noting that Bush's request was impracticable because of the large number of potential jurors.⁹ The court did state it would privately question a prospective juror, "if that need became apparent" either from the juror's request or to avoid tainting the other prospective jurors.¹⁰

During the second day of trial, Bush moved to present to prospective jurors some graphic photographs of the murder victims and a tape of Gina's 911 call. The trial court precluded Bush from presenting that evidence during voir dire.¹¹

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at *4.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at * 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *7.

Furthermore, Bush argued that the trial court committed structural error and violated his rights to due process because the court did not strike Jurors 2, 3, 8, and 9 who allegedly “made death-presumptive statements in their questionnaires for which they were never rehabilitated.”¹²

Bush also raised issues regarding his confession at trial, noting that, although he did not object to officer testimony and did not cross-examine the officer, he was not granted a voluntariness hearing which would have assisted in determine whether his confession was admissible.¹³ Bush argues that the court erred in failing to sua sponte conduct a hearing to determine whether his confession was voluntary.¹⁴

With regards to his sentencing, Bush stated without elaboration, right before jury selection began, that he did not agree that the jury should be advised as to the possibility of release and that he would follow up on this issue later, which he never did.¹⁵

After the aggravation phase and before Bush presented his mitigating evidence, Gina provided a victim-impact statement to the court. Bush did not object to the statement until several days after Gina had appeared before the jury, when he submitted limiting instructions and moved for a mistrial, which the court denied.¹⁶

Issue: Bush raised roughly ten issues over his lengthy appeal. Bush requested an abuse of discretion review for denials of his motions for change of venue and continuance, the content of a jury questionnaire, the lower court’s rulings on voir dire of prospective jurors, and allowing for the introduction of victim-impact evidence at trial. Bush also raised issues relating to fundamental errors in the field of exclusion of evidence from voir dire, failure to strike jurors sua sponte, the admissibility of his confession, failing to inform the jury that he would not be eligible for release if sentenced to life imprisonment, and the nature of his sentencing. He also raises the issue of whether the trial court should have conducted a voluntariness hearing sua sponte.

Holding: At no time did the trial court abuse their discretion, nor did they commit a fundamental error in their adjudications.

Disposition: The jury’s verdict is affirmed and the decisions of the trial court are also affirmed.

Rule: The party making claims to abuse of discretion and fundamental error must raise the appropriate objections and must do so in a timely manner.

¹² *Id.*

¹³ *Id.* at *9.

¹⁴ *Id.* at *10.

¹⁵ *Id.* at *12.

¹⁶ *Id.* at *15.

Reasoning:

- **Pretrial Motions for a Change of Venue and Continuance.** The court held questionable or allegedly inaccurate publicity alone is not enough to presume prejudice, particularly when, as here, the “information in the great bulk of news reports” was “largely factual.”¹⁷ The court noted that Bush has not shown that “the media successfully influenc[ed] law enforcement officers[,] . . . court personnel[,] [or] the court itself.”¹⁸ In the absence of presumed prejudice, “the focus is whether the potential jurors ‘could not judge impartially the guilt of the defendant,’” which Bush failed to show.¹⁹ All empaneled jurors disclosed their preliminary opinions regarding Bush’s guilt and provided adequate assurances they would set their opinions aside and consider only the evidence presented at trial.²⁰ The court thus rejected the claim of error.²¹
- **Non-statutory Aggravators in Juror Questionnaire.** Bush singled out question 27, which is listed above.²² The court noted that Bush did not object to question 27 or any other part of the questionnaire.²³ After the jurors had received the questionnaire, Bush moved for a mistrial.²⁴ The court ruled that question 27 does not instruct jurors that the reasons it lists are aggravating factors, but rather expressly states that its purpose is to determine what reasons would lead a particular juror to favor the death penalty.²⁵
- **Denial of individual voir dire.** The court held that there was no abuse of discretion in a denial of individual voir dire.²⁶ The trial court noted that Bush’s request was impracticable because of the large number of potential jurors, however the trial court stated it would privately question a prospective juror if that need becomes apparent from the juror’s request or to avoid tainting the other prospective jurors.²⁷ The court found that these factors, along with the trial court’s decision to allow the defendant to ask individualized questions, was enough to mitigate this issue.²⁸
- **Exclusion of evidence from voir dire.** The court held that because Bush did not raise the issue of the voir dire ruling at trial, it must perform a fundamental error review.²⁹ The court ruled that voir dire is “not meant to allow a defendant to ‘ask a juror to

¹⁷ *Id.* at *3 (quoting *State v. Bible*, 858 P.2d 1152, 1167 (1993)).

¹⁸ *Id.* (quoting *Bible*, 858 P.2d at 1168).

¹⁹ *Id.* (citation omitted) (quoting *Bible*, 858 P.2d at 1169).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *4.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at *5.

²⁶ *Id.* at *6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *7.

speculate or precommit on how that juror might vote based on any particular facts,”³⁰ nor must a trial court allow a defendant to ask questions “designed to condition the jurors to damaging evidence expected to be presented at trial.”³¹ During voir dire questioning, Bush referred to this case as involving first degree, premeditated, cold-blooded, inexcusable murder and vividly described the photos that the jurors would be seeing.³² The court held that Bush’s statements sufficiently informed the jurors about the graphic nature of the evidence in the case.³³

- **Failure to strike jurors sua sponte.** The court held that because the trial court dismissed forty-five potential jurors for cause, including several whom Bush moved to strike because he believed they would automatically impose a death sentence, and because Bush did not move to strike the empaneled jurors, the trial court’s denial of Bush’s motion for a mistrial was appropriate.³⁴ The trial court did not deny Bush his right to voir dire, let alone his right to strike jurors based on their allegedly death-presumptive statements.³⁵ Additionally, the court ruled that Bush’s objection to voir dire was a “general objection to death qualification,” which is insufficient to preserve issues relating to the qualification of a particular juror.³⁶
- **Admissibility of evidence of Bush’s confession.** The court held Bush had the obligation to raise issues relating to the voluntariness of his confession.³⁷ Additionally, although Bush argues that the prosecutor engaged in misconduct by eliciting evidence of Bush’s confession through a Detective’s testimony, Bush did not object to that testimony or to any alleged prosecutorial misconduct at trial, thus forfeiting his claims.³⁸
- **Bush’s right to a voluntariness hearing.** The court noted that The United States Constitution “does not require a voluntariness hearing absent some contemporaneous challenge to the use of the confession.”³⁹ Because Bush did not move to suppress evidence of his statements to law enforcement, request a voluntariness hearing, or object to the Detective’s testimony, the trial court was not required to hold a voluntariness hearing.⁴⁰
- **Simmons error.** Under *Simmons*, “where the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires

³⁰ *Id.* (citation omitted) (quoting *State v. Smith*, 159 P.3d 531, 541 (Ariz. 2007)).

³¹ *Id.* (quoting *State v. Melendez*, 588 P.2d 294, 296 (Ariz. 1978)).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at *7-8.

³⁵ *Id.* at *8.

³⁶ *Id.* (quoting *State v. Moody*, 94 P.3d 1119, 1144-45).

³⁷ *Id.* at 9.

³⁸ *Id.* at *10.

³⁹ *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977)).

⁴⁰ *Id.*

that the sentencing jury be informed that the defendant is parole ineligible.”⁴¹ Here, Bush has not shown that he was deprived of the right to inform the jury of his parole ineligibility.⁴² The trial court neither refused to instruct, nor prevented Bush from informing, the jury regarding his parole ineligibility.⁴³

- **Victim-Impact evidence.** The court here held that because Gina did not advocate for the death penalty and her statements were not particularly problematic, such as calling the party a “cop killer” or describing victims’ bodies as “mutilated” and tortured, the statements were not unduly prejudicial.⁴⁴
- **Double Punishment.** The court held that the trial court did not commit a fundamental error, because Bush’s convictions for his non-capital offenses satisfy a test articulated in *State v. Gordon*⁴⁵ which examines whether there are identical elements of a crime that are not a necessary component of the capital offense, “whether . . . it was factually impossible to commit the ultimate crime without also committing the secondary crime[s],” and finally “whether the defendant’s conduct in committing the [secondary] crime[s] caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime.”⁴⁶ The court found that Bush’s sentences for his non-capital convictions satisfied the three-part tests of *Gordon*.⁴⁷

⁴¹ *Id.* at *13 (quoting *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994)).

⁴² *Id.*

⁴³ *Id.* at *14.

⁴⁴ *Id.* at *16.

⁴⁵ 778 P.2d 1204, 1211 (1989).

⁴⁶ *Bush*, 2018 WL 3910681, at *17 (quoting *Gordon*, 778 P.2d at 1211).

⁴⁷ *Id.*