

## ***State v. Valenzuela***

**Full Citation:** State v. Valenzuela, No. CR-14-0351-AP, 2018 WL 4568950 (Ariz. Sept. 25, 2018).

**Date Filed:** September 25, 2018

**Opinion's Author:** Vice Chief Justice Brutinel

**Joined By:** Chief Justice Bales, Justices Pelander, Timmer, Bolick, Gould, and Judge Jones. (Justice Lopez recused himself).

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

**Facts:** In August 2011, Edgar S. and his girlfriend Perla M. went to a local Baskin Robbins to get ice cream. There they saw Jose Alejandro Acuna Valenzuela ("Acuna"), who was previously Edgar's good friend. However, in 2008, Edgar had testified against Acuna during a criminal proceeding in which Acuna had been sentenced to prison. Thereafter, the two were no longer on good terms.

When Acuna saw the couple at Baskin Robbins, Acuna stated that he had already told Edgar that he did not want to see him again. Acuna then left the store. As the couple got into Perla's car, Perla saw Acuna running towards them, firing a gun at her vehicle. First, Acuna shot at Edgar, and Edgar sustained multiple bullet wounds. Then, Acuna ran around the car and continued to shoot at Perla. Acuna then left the scene in a friend's car.

Perla was hit in her upper back, but she survived after two surgeries. Edgar died from his injuries.

**Procedural History:** This case is currently before the Arizona Supreme Court. At the trial level, the jury found Acuna guilty on all charges. The charges included first-degree murder, attempted first-degree murder, discharge of a firearm at a structure, and misconduct involving weapons. Later, the jury found two aggravating circumstances: (1) that Acuna had previously been convicted of another serious offense (the attempted first-degree murder of Perla);<sup>1</sup> and (2) that Acuna murdered Edgar in retaliation for his testimony in a court proceeding.<sup>2</sup> After considering these factors, the jury determined that Acuna should receive the death penalty for the first-degree murder. For the other convictions, the trial court imposed concurrent prison sentences to be served consecutively to the death sentence.

This Arizona Supreme Court has jurisdiction over this automatic appeal under article 6, section 5(3) of the Arizona Constitution and sections 13-4031 and 13-4033(A)(1) of the Arizona Revised Statutes.

### **Issues:**

1. Under the Arizona Rules of Criminal Procedure in effect at the time of trial, the trial court is authorized, but not required, to order a severance of offenses on its own

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<sup>1</sup> See ARIZ. REV. STAT. ANN. § 13-751(F)(2) (2018).

<sup>2</sup> See *id.* § 13-751(F)(12).

initiative when necessary to promote a fair determination of the guilt or innocence of any defendant of any offense. Did the trial court commit a fundamental error by failing to sua sponte sever the misconduct-involving-weapons charge and permitted the State to admit evidence that Acuna was a convicted felon?

2. The trial court shall control the voir dire examination and, upon request of any party, shall permit that party a reasonable time to further oral examination of the prospective jurors. Did the trial court abuse its discretion and violate Acuna's right to a fair and impartial jury by limiting voir dire and failing to strike certain jurors for cause?
3. An aggravator must meet two criteria to be constitutional: (1) the circumstance must apply to only a subclass of defendants convicted of a murder, and (2) the circumstance must not be overly vague. Did the trial court provide the jury with unconstitutionally vague and overbroad instructions on the (F)(12) retaliation aggravator?
4. Judges are prohibited from commenting on evidence presented at trial. Did the trial court commit a fundamental error by reading a statement to the jury that explained that the witness Arianna H. incorrectly testified about her ability to answer questions beyond using "yes" or "no"?
5. A defendant may be entitled to a new trial only if a juror conceals facts pertaining to his or her qualifications or bias on proper inquiry during voir dire. Did the trial court abuse its discretion by denying Acuna's motion to vacate judgement or hold an evidentiary hearing on newly discovered evidence of Juror 16's post-trial blog posts?
6. A defendant must demonstrate that a prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Did the prosecutor's pervasive and persistent alleged misconduct deprive Acuna of due process and a fair trial?
7. The Arizona Supreme Court must review the jury's finding of aggravating circumstances and imposition of a death sentence for abuse of discretion. Did the jury abuse its discretion either by finding the (F)(2) and (F)(12) or by imposing the death sentence?

**Holdings:**

1. No. There was no fundamental error because the trial court had no duty to protect Acuna's constitutional rights and the prior conviction was relevant to prove motive.
2. No. The trial court did not abuse its discretion during voir dire because it generally allowed for a reasonable time to examine the prospective jurors and it properly rehabilitated the challenged jurors to assure that they were fair and impartial.
3. No. The statutory provision and the jury instruction sufficiently narrow the aggressor to apply to a subclass of defendants convicted of first-degree murder of persons who testified against them in a previous court proceeding.
4. No. The judge did not state an opinion or draw any inferences from the evidence, thus the trial court did not abuse its discretion in instructing the jury regarding Arianna's testimony.
5. No. the trial judge did not abuse his discretion in denying Acuna's motion to vacate judgment without holding an evidentiary hearing because Juror 16's blog does not reflect intentional concealment of her bias during voir dire.

6. No. The cumulative effect of any instances of prosecutorial misconduct during trial did not render it unfair.
7. No. The jury did not abuse its discretion by finding the F(2) and F(12) aggravating factors or the death sentence.

**Disposition:** The Arizona Supreme Court affirmed Acuna's convictions and sentences.

**Reasoning:**

**Misconduct-Involving-Weapons Charge**

- The court held that the trial court did not err by failing to sue sponte sever the misconduct-involving-weapons charge, thus permitting the jury to hear that Acuna was a convicted felon.<sup>3</sup> First, the court dismissed Acuna's argument that the trial court had a duty to protect his constitutional rights by differentiating this case from *State v. Torres*.<sup>4</sup> *Torres* addressed a defendant's right to competent counsel, which is a right especially vulnerable to violation.<sup>5</sup> Second, the court did an analysis under the Arizona Rule of Evidence 404(b), which provides that evidence of other acts is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>6</sup> The court held that the prior conviction was relevant to prove motive under 404(b) as it was directly related to his statement.<sup>7</sup>

**Voir Dire Issues**

- **Limiting Voir Dire:** If a party requests extra time during the voir dire examination, "the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors."<sup>8</sup> Here, Acuna failed to meet his burden to demonstrate not only that the voir dire examination was inadequate, but also that the jury selected was not fair, unbiased, and impartial.<sup>9</sup> Although the trial court allowed defense counsel additional time on several occasions, the trial court twice enforced a time limit upon defense counsel.<sup>10</sup> Because (1) Acuna failed to demonstrate specifically how the jury was biased, unfair, or partial in light of the general time limit imposed; and (2) the trial court was generally flexible in not adhering to the time limit, no error occurred.<sup>11</sup>
- **Juror Rehabilitation and Strikes for Cause:** By asserting that the trial court erred in denying a motion to strike a juror for cause, Acuna "has the burden of establishing that the juror is incapable of rendering a fair and impartial verdict."<sup>12</sup> Although Jurors

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<sup>3</sup> State v. Valenzuela, No. CR-14-0351-AP, 2018 WL 4568950, at \*2 (Ariz. Sept. 25, 2018).

<sup>4</sup> *Id.* (citing State v. Torres, 75 P.3d 142, 147 (Ariz. Ct. App. 2003), *vacated in part*, 93 P.3d 1056 (Ariz. 2004)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (quoting ARIZ. R. EVID. 404(b)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*3 (quoting ARIZ. R. CRIM. P. 18.5(d)).

<sup>9</sup> *Id.* (citing State v. Moody, 94 P.3d 1119, 1146 (Ariz. 2004)).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at \*4 (quoting State v. Lavers, 814 P.2d 333, 347 (Ariz. 1991)).

23, 100, 122, and 140 expressed a predisposition for the death penalty,<sup>13</sup> the trial court sufficiently rehabilitated those challenged jurors through follow-up questions, showing that they could sit as fair and impartial jurors.<sup>14</sup> Regarding Juror 202 who admitted to a close friendship with a prosecutor in the Maricopa County Attorney's Office, the court held that Juror 202's answers did not reflect an inability to decide the case fairly and impartially.<sup>15</sup>

### **A.R.S. § 13-751(F)(12) Jury Instructions**

- The court addressed each of Acuna's three arguments concerning the unconstitutionality of section 13-751(F)(12) of the Arizona Revised Statutes.<sup>16</sup> The contested jury instructions read, "The Defendant committed the offense in retaliation for a person's testimony in a court proceeding."<sup>17</sup> First, the court held this jury instruction met the criteria required for an aggravator to be constitutional as it applied to only a subclass of defendants convicted of a murder and was not overly vague.<sup>18</sup> Second, the court found the jury had sufficient guidance on interpreting the (F)(12) factor because the word "retaliate" possesses a core meaning.<sup>19</sup> Third, the (F)(12) aggressor has the statutorily required causal relationship between the aggravator and the subsequent murder. Relying on *State v. Miller* as the precedent case, the court held the statements Acuna made immediately before the murder proved a retaliatory motive, establishing a clear causal connection.<sup>20</sup>

### **Trial Court Statement on Witness Testimony**

- The Arizona Constitution prohibits judges from commenting on evidence presented at trial.<sup>21</sup> If a judge expresses an opinion as to what the evidence proves in a way that interferes with the jury's independent evaluation of the evidence, it constitutes a violation of this prohibition.<sup>22</sup> The court found that the trial court did not state an opinion or draw any inferences when it instructed the jury that "[Arianna] was not required to simply answer her questions yes or no, and she was given the opportunity to answer the questions."<sup>23</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*4-5.

<sup>15</sup> *Id.* at \*6.

<sup>16</sup> "The defendant committed the offense to prevent a person's cooperation with an official law enforcement investigation, to prevent a person's testimony in a court proceeding, in retaliation for a person's cooperation with an official law enforcement investigation or in retaliation for a person's testimony in a court proceeding." ARIZ. REV. STAT. ANN. § 13-751(F)(12).

<sup>17</sup> *Valenzuela*, 2018 WL 4568950, at \*6.

<sup>18</sup> *Id.* at \*7 (citing *State v. Hausner*, 230 P.3d 604, 626 (Ariz. 2012)).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*7-8 (*State v. Miller*, 316 P.3d 1219, 1233 (Ariz. 2013)).

<sup>21</sup> ARIZ. CONST. art. VI, § 27.

<sup>22</sup> *Valenzuela*, 2018 WL 4568950, at \*9 (citing *State v. Rodriguez*, 961 P.2d 1006, 1011 (Ariz. 1998)).

<sup>23</sup> *Id.*

### **Motion to Vacate Judgement or Hold Evidentiary Hearing**

- Statements by jurors about their own or another's subjective feelings, developed during trial, are not competent evidence to impeach a verdict.<sup>24</sup> A defendant may be entitled to a new trial only if a juror conceals facts pertaining to his or her qualifications or bias on proper inquiry *during voir dire*.<sup>25</sup> Acuna argued that Juror 16's blog expressing distaste for the defense counsel's mannerisms demonstrated that the juror had an anti-defense bias. The court determined that because the blog revealed potential biases as they existed *during trial*, and because the blog was not material to the issue(s) involved, the trial judge did not abuse his discretion in denying Acuna's motion to vacate judgment without holding an evidentiary hearing.<sup>26</sup>

### **Prosecutorial Misconduct Issues**

- The court reviews claims of prosecutorial misconduct first by assessing each claim of misconduct, then determining which claims constitute an error, and finally deciding if the cumulative misconduct resulted in an unfair trial.<sup>27</sup> The defendant must demonstrate that the prosecutor's conduct so infected the trial with unfairness that the resulting conviction constituted a denial of due process.<sup>28</sup> Here, the court did an independent analysis on each of Acuna's eight allegations of prosecutorial misconduct. The court held the prosecutor's misstatement during opening statements,<sup>29</sup> certain objections during witness testimony,<sup>30</sup> and request for stipulations were harmless and not so egregious as to affect the outcome of the trial.<sup>31</sup> Regarding Acuna's allegation of multiple instances of prosecutorial vouching, the court held that three of the allegations were not vouching, and one allegation was impermissible vouching, but it did not prejudice Acuna.<sup>32</sup> Acuna also argued that the prosecutor misstated the law by improperly shifting the State's burden of proof during her argument.<sup>33</sup> To this point, the court held that even if error occurred, there were multiple references to the State's burden throughout the trial, ensuring that this error did not cause sufficient prejudice to require reversal.<sup>34</sup> Next, the court held the prosecutor did not impugn the integrity and honesty of opposing counsel because prosecution did not fabricate testimony, fool the jury, improperly criticize the defense counsel, or interfere with the constitutional right to present a defense.<sup>35</sup> Additionally, the court held the prosecutor's statements did not improperly comment on Acuna's right to remain silent, and instead were fair rebuttal to the remarks of the defense counsel.<sup>36</sup> Acuna's last allegation of prosecutorial misconduct is that the prosecutor

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<sup>24</sup> *Id.* at \*11 (citing *State v. Cruz*, 181 P.3d 196, 212 (Ariz. 2008)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*12 (citing *State v. Hulsey*, 408 P.3d 408, 429 (Ariz. 2018)).

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at \*13.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at \*13–15.

<sup>33</sup> *Id.* at \*15.

<sup>34</sup> *See id.* at \*15–16.

<sup>35</sup> *See id.* at \*16–17.

<sup>36</sup> *See id.* at \*18.

presented arguments to appeal to the jurors' fears and sympathies.<sup>37</sup> The court held all four of the prosecutor's arguments that allegedly appealed to the jurors' emotions did not have the prejudice necessary to establish a fundamental error on behalf of the prosecutor.<sup>38</sup>

- Acuna's final argument regarding prosecutorial misconduct considers the cumulative effect of the misconduct. A court will reverse on cumulative error only when misconduct is so pronounced and persistent to indicate that the "prosecutor intentionally engaged in improper conduct and did so with indifference, if not a specific intent, to prejudice the defendant."<sup>39</sup> Acuna failed to make this demonstration, therefore the court found no prosecutorial misconduct occurred.<sup>40</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at \*18–20.

<sup>39</sup> *Id.* at \*20 (citing *State v. Payne*, 314 P.3d 1239, 1254 (Ariz. 2013)).

<sup>40</sup> *Id.*