

Not Reported in P.3d, 2008 WL 4217114 (Ariz.App. Div. 1)

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24.

Court of Appeals of Arizona,

Division 1, Department D.

STATE of Arizona, Appellee,

v.

Christopher CHESTNUT, Appellant.

No. 1 CA-CR 05-1104.

Sept. 11, 2008.

Appeal from the Superior Court in Maricopa County; Cause No. CR2004-017196-001 DT; The Honorable Steven P. Lynch, Judge Pro Tem. AFFIRMED.

Terry Goddard, Attorney General By Kent Cattani, Chief Counsel, Criminal Appeals Section and Cassie Bray Woo, Assistant Attorney General, Phoenix, Attorneys for Appellee.

James J. Haas, Maricopa County Public Defender By Christopher V. Johns, Deputy Public Defender, Phoenix, Attorneys for Appellant.

MEMORANDUM DECISION

THOMPSON, Judge.

*1 ¶ 1 Christopher Chestnut (defendant) appeals his conviction for second degree murder asserting the trial court unfairly limited his closing argument and erroneously allowed a videotape of defendant's interview with police to go to the jury during deliberations. We affirm.

BACKGROUND

¶ 2 The state charged defendant with one count of second degree murder, a class one felony. As aggravating factors, the state alleged the offense involved the use of a handgun and caused emotional or financial harm to the victim's immediate family. A videotape of defendant's interview with police from the same day as the shooting was played for the jury and, over defendant's objection, admitted into evidence.FN1 Defendant testified on his own behalf.

FN1. During the interview, defendant admitted to shooting the victim and claimed he did so in self-defense.

¶ 3 At the end of the seventh day of trial, the parties presented closing arguments. The following morning, the parties discussed with the trial court defendant's request to "finish" or "add to" his closing. The court denied defendant's request, finding "I think you and your client had the benefit of having the last word for overnight. I don't think it's appropriate that you re-reopen [sic] your closing statements."

¶ 4 The jury found defendant guilty as charged, found the offense involved the use of a handgun, and found defendant caused emotional or financial harm to the victim's

immediate family. The trial court conducted a sentencing hearing, found the aggravating and mitigating circumstances weighed equally and sentenced defendant to the presumptive term of sixteen years imprisonment. Defendant appealed.

DISCUSSION

I. Closing Argument

¶ 5 Defendant first contends the trial court committed error by “[c]utting off [defense] counsel's right to persuade the jury....” However, defendant's premise that he was unable to complete his closing argument is not supported by the record. Defense counsel concluded his argument, stating:

When you go in to deliberate, we'll be waiting. We expect that you'll do the right thing. Look at the evidence, there's a whole ton of it. We know that you'll apply the law as the Judge gives it to you and we also know that when it's done, you'll do the only thing that you can do on the evidence and the law as it exists in Arizona and that's a not guilty verdict. Thank you.

¶ 6 Defendant points to no authority requiring a trial court to “re-open” or continue closing argument after a party has concluded its argument. Although a trial court may not deny a defendant “absolutely the opportunity for any closing summation at all[.]” *Herring v. New York*, 422 U.S. 853, 863 (1975), such a limitation on defendant's opportunity to present his version of the case did not occur here. Twenty-four pages of transcript are devoted to defense counsel's closing argument that the evidence showed defendant acted in self-defense. For these reasons, the trial court did not abuse its discretion when it denied defendant's request to continue his closing argument. See *Herring*, 422 U.S. at 862 (trial judge has broad discretion in controlling duration and limiting scope of closing arguments).

II. Admission of Videotape

*2 ¶ 7 Defendant next argues his videotaped confession should not have been “allowed into the jury room for replay[.]” He specifically contends (1) the jury's

ability to repeatedly view particular portions of the videotape is unduly prejudicial under Arizona Rule of Evidence 403; (2) the videotape contains statements by the interrogating officer, which are inadmissible hearsay; and (3) defendant's right to be present at critical stages of the trial was violated by the jury's ability to repeatedly view the tape in the jury room. We reject these arguments.

¶ 8 First, defendant did not present these arguments to the trial court; rather, his objection at trial was based on the tape's admissibility as an exhibit based on a purported similarity between the videotape and a recorded recollection, which although generally admissible, cannot be received as an exhibit unless offered by an adverse party. See Ariz. R. Evid. 803(5). Because defendant did not make these objections at trial, we review for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶ 9 To obtain relief under fundamental error review, defendant has the burden to show that error occurred, the error was fundamental and that he was prejudiced thereby. *Id.* at 567-68, ¶¶ 20-22, 115 P.3d at 607-08. Fundamental error is error that “goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial.” *Id.* at 568, ¶ 24, 115 P.3d at 608. To show prejudice, defendant must show that absent error, a reasonable jury could have reached a different result. *Id.* at 569, ¶ 27, 115 P.3d at 609. “Before we may engage in a fundamental error analysis ... we must first find that the trial court committed some error.” *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342, (1991). Here, we find no error in allowing the jury to view the videotape during deliberations.

¶ 10 Subject to the trial court's discretion, jurors shall take with them to deliberations tangible evidence admitted at trial. Ariz. R.Crim. P. 22.2(d). Applying this rule, Arizona courts have repeatedly upheld the right of deliberating jurors to review videotapes, audiotapes, and transcripts of recordings admitted into evidence. See, e.g., *State v. Lichon*, 163 Ariz. 186, 193, 786 P.2d 1037, 1044 (App.1989).

¶ 11 Here, the videotape was properly admitted into evidence as an admission by a party-opponent, see Ariz. R. Evid. 801(d)(2); accordingly, the trial court did not abuse its discretion in allowing the videotape to go to the deliberating jurors. *State v. Snowden*, 138 Ariz. 402, 404-05, 675 P.2d 289, 291-92 (App.1983). Furthermore, our supreme court has specifically held “juries that are permitted to hear taped confessions are also permitted to hear the questions police ask.” *State v. Huerstal*, 206 Ariz. 93, 107, ¶ 65, 75 P.3d 698, 712 (2003). Finally, defendant cites *U.S. v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir.1996) for the proposition that the playing of

the videotape is a critical stage where his presence is required. This case is distinguishable, as defendant himself notes, because the jury in that case listened to tapes that were never presented in open court. For all these reasons, we discern no abuse of the trial court's discretion in permitting the jury to have the videotape during deliberations.

CONCLUSION

*3 ¶ 12 The conviction and sentence are affirmed.

CONCURRING: DIANE M. JOHNSEN, Presiding Judge and ANN A. SCOTT TIMMER, Judge.

Ariz.App. Div. 1,2008.

State v. Chestnut

Not Reported in P.3d, 2008 WL 4217114 (Ariz.App. Div. 1)

Briefs and Other Related Documents (Back to top)

- 2008 WL 618675 (Appellate Brief) Appellee's Answering Brief (Jan. 24, 2008)
- 2007 WL 2983530 (Appellate Brief) Appellant's Opening Brief (Sep. 13, 2007)

END OF DOCUMENT