

Summary of SC90853, *State of Missouri v. Anthony Brown*

Appeal from the St. Louis circuit court, Judge Thomas J. Frawley

Argued and submitted January 5, 2011; opinion issued May 17, 2011

Attorneys: Brown was represented by Gwenda R. Robinson of the public defender's office in St. Louis, (314) 340-7662, and the state was represented by Terrence M. Messonnier of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of second-degree murder but who asserted he acted in self-defense appeals the trial court's decision permitting the state to use as a demonstrative exhibit during closing arguments a revolver not introduced into evidence. In a 5-2 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. There was no evidence of the size or shape of the gun the victim allegedly had in his possession, and so there was no way to determine whether the revolver used in closing arguments physically was similar, creating the opportunity for the jury to be misled.

Judge Zel M. Fischer dissents. He would hold the trial court did not abuse its discretion in allowing the demonstration, which was directed at the credibility of the defense theory of self-defense, and, based on the overwhelming evidence, would affirm the conviction. The trial court was in a far superior position than this Court to know and understand what effect the demonstration, which included gestures and the use of the revolver prop, would have on the jury and to exercise its broad discretion to determine whether the demonstration was fair under the facts of this case.

Facts: Anthony Brown and another man got into an argument at a birthday party. As other guests began arguing, Brown retrieved a gun and then approached the man with whom he had been arguing. They resumed their argument, and Brown fired several shots and fatally wounded the man. The state charged Brown with first-degree murder and armed criminal action. At trial, Brown testified he shot the man in self-defense because he believed the man was reaching for a gun. Brown believed the man was carrying a gun in the left pocket of his sweatpants. During closing arguments, and over the defense's objections, the state used the victim's sweatpants and a .38 revolver as demonstrative exhibits to show the man could not have carried and drawn the gun as Brown asserted in his self-defense argument. During deliberations, the jury asked to see the revolver the state had used during closing arguments. The court did not permit it to view the revolver as it had not been received into evidence. The jury found Brown guilty of second-degree murder and armed criminal action. He appeals.

REVERSED AND REMANDED.

Court en banc holds: The trial court abused its discretion in permitting the state to use the revolver as a demonstrative exhibit during closing argument. During closing arguments, the state is permitted to argue the evidence and all reasonable inferences from that evidence, but it cannot use an otherwise inadmissible object. When assessing the relevance of a demonstrative exhibit, a

court must ensure that it is a fair representation of what is being demonstrated and that it is not inflammatory, deceptive or misleading. Here, the state used the revolver to rebut Brown's self-defense theory by showing it was impossible for the victim to have carried and drawn his gun in the manner described by the defense witnesses. As such, the revolver's relevance depended on its physical similarity with the victim's gun. The only evidence the state presented about the victim's gun, however, was that it was "shiny looking" and had a light or pearl handle. That vague, cosmetic description was insufficient to establish the size or shape of the gun. Without such evidence, there is no way to demonstrate that the victim's gun was similar in shape and size to that of the revolver shown to the jury, creating a distinct possibility of misleading the jury. Use of the otherwise inadmissible revolver in closing arguments was not harmless. Given that, during deliberations, the jury asked to see the sweatpants and gun used during closing arguments, it is apparent the jury attached significance to the state's demonstration. As such, there is a substantial likelihood that Brown was prejudiced by the improper demonstration.

Dissenting opinion by Judge Fischer: The author would hold the trial court did not abuse its discretion in allowing the state's demonstration and, based on the strength of the evidence in the record, would affirm Brown's conviction. In allowing the demonstration, the trial court found it was appropriate for the state to be able to demonstrate to the jury the believability or non-believability of both sides' stories of how the shooting transpired. The court made clear to the jury that the revolver used in the demonstration was not evidence and that the jury was to base its verdict solely on the evidence, and the jury is presumed to have followed the court's instructions. Because the revolver was not admitted into evidence, the principal opinion incorrectly bases its analysis on the standard of admissibility for demonstrative evidence. The demonstration here was a reasonable inference supported by the evidence, and the trial court did not abuse its discretion in allowing the state to use the revolver as a prop during closing arguments. Further, Brown failed to demonstrate that the demonstration had such a decisive effect that the jury would believe he acted in self-defense.