

Summary of SC89168, *State of Missouri v. Kevin Johnson*

Appeal from the St. Louis County circuit court, Judge Melvyn W. Wiesman

Attorneys: Johnson was represented by Deborah B. Wafer of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by Daniel N. McPherson 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 the June 2005 shooting death of a Kirkwood police officer appeals his conviction and death sentence. In a decision written by Judge William Ray Price Jr., the Supreme Court of Missouri affirms the conviction and sentence.

All seven judges agree the trial court did not abuse its discretion in: overruling the motion for a new trial, because a juror who failed to disclose she knew a detective who testified was unintentional at worst; removing from the jury pool, for cause, a woman whose views about the death penalty would prevent her from considering it as a possible punishment in this case; or admitting into evidence a victim impact statement from the victim's minor son. All seven judges also agree the trial court did not err in: overruling the motion for a judgment of acquittal, because there was sufficient evidence for a reasonable juror to find the man guilty beyond a reasonable doubt; submitting to the jury certain instructions that mirrored the Missouri Approved Instructions, including those offering a choice between first- and second-degree murder and those regarding aggravating and mitigating circumstances; precluding the state from seeking the death penalty, because, as this Court repeatedly has held, the state is not required to plead the statutory aggravators in the indictment and instead is permitted to give notice of the aggravators pursuant to statute; or sentencing the man to death in accord with the jury's recommendation. In addition, all seven judges agree the trial court did not commit plain error in: allowing the prosecutor to reference both "deliberation" and "conscious decision" during closing arguments; submitting to the jury the verdict-directing instruction for first-degree murder, which properly does require juror unanimity as to each element of first-degree murder but properly does not require the jury to acquit on first-degree murder before it can consider second-degree murder; or admitting into evidence the man's statements to police, which were not obtained in violation of his constitutional rights against self-incrimination.

Six judges agree that the trial court did not err in finding the state's reasons for removing a particular woman from the jury pool were not based on her race but rather were because she was unwilling to answer questions about whether she could impose the death penalty and because she had served as a foster parent for a particular agency that had provided services to the defendant when he was a youth. In responding only that another foster

parent, for a different agency, was allowed to remain in the jury pool, the man failed in his burden to prove the state's reasons were pretextual.

In an opinion concurring in part and dissenting in part, Judge Richard B. Teitelman would reverse the judgment and would remand (send back) the case for a new trial. Given the totality of the circumstances, the state's reasons in removing the foster parent from the jury pool were not race-neutral because it did not remove at least four similarly situated white jurors and did not explore whether other jurors also might have similar contacts with agencies that provided services to the defendant during his childhood. The author concurs in all other parts of the principal opinion.

Facts: On the evening of June 5, 2005, Kirkwood police began investigating a vehicle believed to belong to Kevin Johnson, for whom there was an outstanding warrant for a probation violation resulting from misdemeanor assault. Their investigation was interrupted 10 minutes later when Johnson's younger brother had a seizure in the house next door to where Johnson's vehicle was parked. The family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. William McEntee, arrived. The brother was transported to the hospital, where he died of a preexisting heart condition. After police left, Johnson retrieved a 9 mm handgun from his vehicle, explaining to friends that he believed the police were too busy looking for him to help his brother. About two hours after the brother's seizure, Johnson saw McEntee talking to three juveniles in response to a report of fireworks. Johnson approached McEntee's patrol car, accused him of killing his brother and fired the gun five times at McEntee, hitting McEntee in the head and upper torso and hitting one of the juveniles in the leg. Johnson then reached into the patrol car and took McEntee's .40-caliber handgun. He walked down the street with both guns, told his mother that because McEntee let his brother die, "he needs to see what it feel[s] like to die," and continued walking away. Meanwhile, McEntee's patrol car rolled down the street and hit a parked car and a tree before coming to rest. McEntee, alive but bleeding and unable to speak, got out of the patrol car and sat on his knees. Johnson reappeared and shot McEntee twice more in the head. McEntee collapsed to the ground, and Johnson went through his pockets. All seven of McEntee's wounds were from the 9 mm gun. One was lethal and caused his death.

Johnson left the scene, drove to his father's house and spent three days at a family member's apartment before surrendering to a family member who also was a police officer. He was indicted on one count each of first-degree murder, first-degree robbery and first-degree assault and three counts of armed criminal action. His first trial, on the murder charge only, ended in a hung jury during the guilt phase. In his second trial, the jury deliberated for four hours before finding him guilty of first-degree murder. In the penalty phase, the jury deliberated for four hours before finding the presence of three statutory aggravating factors – that Johnson's act of murdering McEntee created a great risk of death to more than one person by means of a hazardous weapon; that the murder

involved depravity of mind and was outrageously and wantonly vile, horrible and inhuman; and that the murder was committed against a peace officer while in the performance of his official duty – and recommended Johnson be sentenced to death. The trial court entered judgment accordingly, and Johnson appeals.

AFFIRMED.

Court en banc holds: (1) The trial court did not abuse its discretion in overruling Johnson’s motion for a new trial on the basis that a particular juror failed to disclose, during jury selection, that she knew a detective who testified for the state. During jury selection, the prosecutor read the list of police witnesses, including the detective, and asked whether any of the potential jurors were familiar with any of the witnesses or knew any law enforcement officers at all. The juror disclosed that her stepbrother is a police officer but did not disclose that she knew the detective. At the post-trial hearing, she testified that, when the prosecutor was reading the list, it did not register that she knew the detective. She said she had not seen him in more than two years and didn’t realize she knew him until he actually testified, at which point she said she did not know that she could have said anything. The evidence supports the trial court’s findings that the juror’s conduct was not non-disclosure or, at worst, was only unintentional non-disclosure that did not influence the verdict prejudicially and, therefore, did not warrant a new trial.

(2) The trial court did not err in overruling Johnson’s challenge, under *Batson v. Kentucky*, 476 U.S. 79 (1986), that the state’s peremptory strike of a particular potential juror (removing a person from the jury pool without having to show cause) was based on her race. In response to Johnson’s *Batson* challenge, the state offered race-neutral reasons for the strike: that the potential juror was unwilling to answer questions about whether she could impose the death penalty and that she had served as a foster parent with the Annie Malone Children’s Home, which had provided services to Johnson when he was a youth. Johnson’s only response was that another juror was a foster parent, albeit for a different agency. In offering this response, Johnson failed in his burden to prove the state’s proffered reasons were pretextual. Because the trial court found one race-neutral reason to strike the potential juror, it is unnecessary to determine whether her unwillingness to answer questions about the death penalty was pretextual. In addition, the fact that the prosecutor’s office previously violated *Batson* in a different case does not constitute evidence of a *Batson* violation in this case.

(3) The trial court did not err in overruling Johnson’s motion for a judgment of acquittal because there was sufficient evidence for a reasonable juror to find Johnson guilty beyond a reasonable doubt. Viewed in the light most favorable to the verdict, the record shows that Johnson expressed belief the police did not help his brother, took his gun from his vehicle after his brother was taken to the hospital, accused McEntee of killing his brother before shooting him, told his mother he believed McEntee needed to see what it felt like to die and later shot McEntee twice more in the head.

(4) The trial court did not err in submitting to the jury a first-degree murder instruction based on Missouri Approved Instruction No. 314.02, which included the statutory definition of “deliberation” as “cool reflection for any length of time no matter how brief.” This definition is not unconstitutionally vague, and the instruction adequately set out the additional element of deliberation so the jury could distinguish first-degree murder from second-degree murder.

(5) The trial court did not commit plain error in allowing certain arguments by the prosecutor or in submitting to the jury the first-degree murder verdict-directing instruction. Because Johnson failed to object on these grounds at trial or raise them in his motion for a new trial, this Court reviews for plain error, which requires a finding that the error resulted in manifest injustice or a miscarriage of justice. Neither is present here.

(a) The state’s use of the phrase “conscious decision” in closing argument, especially after reciting the actual language of the instruction, was not plain error. The state defined “deliberation” and then used the terms “deliberation,” “cool reflection” and “conscious decision” to illustrate Johnson’s actions. The term “conscious decision” is neither an element nor a description of either first- or second-degree murder. In context of the entire closing argument, the state argued both conscious decision and deliberation. The jury is presumed to have followed the instruction, which properly defined “deliberation.”

(b) It was not plain error for the state to argue that the jury had to acquit Johnson of first-degree murder before it could consider second-degree murder. The jury instruction for second-degree murder – Missouri Approved Instruction No. 314.04 – is not an “acquittal first” instruction because it does not require the jury to find the defendant not guilty on the greater offense of first-degree murder before it can consider whether the defendant is guilty of the lesser offense of second-degree murder. Under such an instruction, a deadlocked jury could not consider a lesser-included offense. Here, this Court assumes the jury followed the instruction, and the strength of the evidence of deliberation precludes a finding of prejudice.

(c) The first-degree murder instruction to the jury is not plainly erroneous. It required juror unanimity as to each element of first-degree murder.

(6) The trial court did not err in refusing to grant Johnson’s request to give the jury instructions for the lesser-included offenses of second-degree murder without sudden passion and of voluntary manslaughter. Here, the jury was instructed as to one lesser-included offense – second-degree murder – and yet found Johnson guilty of the greater offense of first-degree murder. That the jury did not have additional lesser-included offenses to consider was not error.

(7) The trial court did not err in assessing a sentence of death against Johnson in accord with the jury's recommendation. Johnson does not allege, and a review of the record does not indicate, that Johnson's death sentence was influenced by passion, prejudice or other arbitrary factors. The evidence supports, beyond a reasonable doubt, the jury's findings of the three aggravating factors. A juvenile bystander was struck by a stray bullet during Johnson's first shooting of McEntee; Johnson committed two distinctly separate shootings in a short period of time, the second of which occurred when McEntee was injured seriously and helpless; and the first shooting occurred while McEntee was responding to a police call and was in his patrol car. Further, the death sentence here is neither excessive nor disproportionate. This Court has upheld other death sentences when a police officer was killed and when an injured and helpless victim is subject to a fatal injury. In reviewing the record, there are no trial errors and, therefore, no errors that would make the sentence unreliable. Although Johnson presented mitigating evidence of childhood abuse and neglect and of good character, the record is sufficient to support a reasonable juror's finding that this mitigating evidence did not outweigh the aggravating factors. The fact that a jury in Johnson's first trial could not reach a verdict is not dispositive on whether the jury in his second trial, after finding him guilty, could impose the death sentence. Finally, this Court previously has rejected arguments that the sentence should be set aside because prosecutors have discretion in seeking the death penalty.

(8) The trial court did not abuse its discretion in striking (removing) from the jury pool a particular potential juror for cause. During jury selection, the potential juror's answers to questions indicated she could not consider the death penalty in Johnson's case. She indicated she only could consider the death penalty – and even then, she indicated she was not sure whether she actually could assess the penalty – in cases involving genocide or a psychopath, neither of which was alleged here. As such, her views would prevent or substantially impair her from performing her duties to consider the range of punishments presented, had she served on the jury.

(9) The trial court did not commit plain error in admitting into evidence Johnson's interview with the police. The police did not violate Johnson's constitutional rights against self-incrimination under *Miranda v. Arizona*, 384 U.S. 436 (1966). Although Johnson's response to the *Miranda* warnings was inaudible in an audiotaped interview, and he did not sign a written waiver, in context it is clear there was no *Miranda* violation, and, from the record, it is evident Johnson indicated his willingness to talk with police. After he was advised of his rights, the interview lasted for more than five hours, and although he indicated he did not want to answer particular questions, he continued in the conversation, and at no point did he ask for an attorney or convey a clear desire to remain silent. The trial record shows Johnson did not file a motion to suppress his statements, and when the recording of his statement was offered into evidence, not only did he not object, he affirmatively stated "no objection" to the admission of the interview, thereby waiving plain error review of his constitutional rights. Further, Johnson failed to show a manifest injustice resulted from the interview itself or its admission into evidence.

(10) The trial court did not abuse its discretion in overruling Johnson's objection to admission of the victim impact statement of McEntee's son, a letter written when the boy was 9. The boy, who was 12 at the time of trial, did not testify in the guilt or penalty phases, and the court permitted his mother to read it into evidence. Johnson did not ask the mother any questions about the letter. A victim impact statement is admissible to show the victim was a unique individual. Here, although the boy's letter constituted hearsay, as it was written outside of court and he did not testify in court about it, the letter was offered only to show the effect of his father's murder on the boy and his feelings. It was not offered to prove the truth of any factual matters he asserted in the letter, nor was it offered to prove an element of the charged offense or of a statutory aggravating circumstance. As such, it properly was used as a victim impact statement, which is not subject to the Confrontation Clause (which allows a defendant to cross-examine witnesses against him).

(11) The trial court did not err in submitting to the jury the aggravating-circumstances instruction proffered by the state – which mirrored Missouri Approved Instruction No. 314.40 – rather than the modified aggravating-circumstances instruction Johnson proffered. Johnson objected to the state's proposed instruction because it did not address the burden of proof for non-statutory aggravating circumstances. Under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), however, the jury is required to find only evidence that is functionally equivalent to an element – including statutory aggravating circumstances – beyond a reasonable doubt. This reasonable doubt standard does not apply, however, to mitigating evidence or non-statutory aggravating factors, including victim impact statements. As such, the trial court was not obligated to instruct the jury to find non-statutory aggravators, including the victim impact statement, beyond a reasonable doubt.

(12) The trial court did not err in submitting to the jury the statutory aggravating circumstances instruction – Missouri Approved Instruction No. 314.40 – and Johnson was not prejudiced by its submission. This Court previously has held that this instruction, which includes the “depravity of mind” factor, is not unconstitutionally vague because sufficient guidance is provided. The “depravity of mind” factor requires evidence to support at least one of the factors under *State v. Preston*, 673 S.W.2d 1, 11 (Mo. banc 1984). The notes to the Missouri approved instruction list 10 phrases that may be used, depending on the facts of the particular case, to comply with the *Preston* factors. Here, the instruction used the second listed phrase. Because its specific language defined “depravity of mind,” the instruction was not vague.

(13) The trial court did not err in submitting to the jury the state's proffered mitigating-circumstances instruction – which mirrored Missouri Approved Instruction No. 314.44 – rather than the modified mitigating-circumstances instruction Johnson proffered. The instruction does not shift the burden of proof improperly from the state to the defendant.

Such an argument has been rejected both by the United States Supreme Court, *Kansas v. Marsh*, 548 U.S. 163, 170-71 (2006) (quoting *Walton v. Arizona*, 497 U.S. 639, 650 (1990)), and by this Court, *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004).

(14) The trial court did not err in overruling Johnson's motion to quash the information or to preclude the death penalty on the basis that the state did not plead the statutory aggravators in the indictment. This Court repeatedly has rejected such an argument. Missouri's statutory scheme requires a single offense of murder with a maximum sentence of death, and the presence of aggravating facts or circumstances in no way increases this maximum penalty. The state was not required to include the statutory aggravators in the indictment and filed the notice to the defendant of the statutory aggravators on which it intended to rely, as required by section 565.005.1, RSMo 2000.

Opinion concurring in part and dissenting in part by Judge Teitelman: The author would hold that, given the totality of the circumstances, the state violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in removing the foster parent from the jury pool and, therefore, that the judgment must be reversed and the case remanded (sent back) for a new trial. Although the state struck this particular juror, who was black, because she had been a foster parent for the Annie Malone Children's Home, the state did not strike at least four similarly situated white jurors who had substantial contacts with the division of family services, which had legal custody of Johnson for most of his childhood. In addition, the state did not ask any of the other potential jurors whether they were familiar with the Annie Malone organization or any of the other private organizations that had provided services to Johnson during his childhood. Further, although the state argued the foster parent exhibited an "unwillingness" to answer certain questions related to the death penalty, it did not raise this issue while it was asking questions but only raised it after Johnson challenged her removal from the jury under *Batson*. The author concurs in all other parts of the principal opinion.