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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/01/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0579
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MURRAY E. GIBBS,) Rule 111, Rules of the
) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-048421-003 DT

The Honorable Roland J. Steinle, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Murray Gibbs appeals his convictions and sentences for

murder in the first degree and conspiracy to commit murder in the first degree. For the following reasons, we affirm.

BACKGROUND

¶2 In July 2006, Gibbs and two co-defendants, Adam Elmore and Jason Vazquez, were indicted on four counts: count one, first degree murder, a class 1 dangerous felony; count two, kidnapping, a class 2 dangerous felony; count three, conspiracy to commit first degree murder, a class 1 felony; and count four, conspiracy to commit kidnapping, a class 2 dangerous felony. Count one of the indictment alleged that Gibbs, Elmore, and Vazquez, on or around January 4, 2006, intending or knowing their conduct would cause death, and with premeditation, caused the victim's death. Count two alleged that the three defendants knowingly restrained the victim with the intent to inflict death, physical injury, or a sexual offense. Count three alleged that the three defendants, with the intent to promote or aid in the commission of murder in the first degree, agreed with one another to engage in acts constituting murder in the first degree. Count four alleged that three defendants, with the intent to promote or aid in the commission of a kidnapping, agreed with one another to engage in acts constituting kidnapping.

¶3 In December 2006, Gibbs joined in Elmore's motion for a new finding of probable cause. The trial court granted the

motion and remanded the case back to the grand jury. On remand, the grand jury again indicted Gibbs and his co-defendants on the same four counts.

¶14 In February 2009, Gibbs and his co-defendants agreed to sever the counts against him from the counts pertaining to Elmore and Vasquez. The court granted the severance and set the matter for trial.

¶15 An eight-day jury trial commenced in April 2009. On the fifth day of the trial, the State presented the testimony of William Grinstead. Grinstead testified that he saw Gibbs, Elmore, and Vasquez early on January 5, 2006 at a Budget Suites motel. Grinstead said Gibbs was wearing a leather trench coat, gloves, and a leather skull cap. Grinstead also testified that Gibbs was carrying a shotgun, and Gibbs remarked that he had been "out in the neighborhood cleaning up the trash." Grinstead admitted at trial that he agreed to testify in Gibbs' case in exchange for a reduced sentence related to a 2006 aggravated assault charge.

¶16 On the sixth day of trial, the court granted Gibbs' motion for directed verdict as to counts two and four.

¶17 On the seventh day of trial, Gibbs requested that the following instruction be read to the jury:

You have heard evidence that a witness has entered into a cooperation agreement with the state which provided him with benefits

for his testimony at trial. You may consider this evidence only as it may affect the witness' believability.

The court would not permit the instruction, finding that the instruction was not an approved R.A.J.I. (Revised Arizona Jury Instruction). Additionally, the court concluded that Article 6, Section 27, of the Arizona Constitution, stated that judges "should not charge jurors with respect to matters of fact," and that the proposed instruction was a "comment on the evidence."

¶18 The jury ultimately found Gibbs guilty of count one, first degree murder, and count three, conspiracy to commit first degree murder. The court sentenced Gibbs to life in prison, with the possibility of parole after twenty-five years, on each count, with both sentences to be served concurrently.

¶19 Gibbs timely appeals and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2005), 13-4031 (2010), and 13-4033 (2010).

DISCUSSION

¶10 On appeal, Gibbs argues that the trial court erred in refusing to give his requested jury instruction regarding a witness who was the subject of a witness cooperation agreement. The State counters that the requested instruction constituted an impermissible comment on the evidence, the substance of the instruction was adequately covered by other instructions, and,

even if the court erred, it was not reversible because Gibbs suffered no prejudice.

¶11 We review a trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006).

¶12 The Arizona Constitution prohibits trial judges from commenting to the jury about the evidence. See Ariz. Const. art. 6, § 27 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); see also *State v. Rodriguez* 192 Ariz. 58, 63, ¶ 29, 961 P.2d 1006, 1011 (1998) ("The constitution prohibits the sort of judicial comment upon the evidence that would interfere with the jury's independent evaluation of that evidence."). We need not determine whether the requested instruction was an impermissible comment on the evidence, however, because we find that the substance of the instruction was adequately covered by other instructions and on this basis we affirm the court's denial of this requested instruction.

¶13 "A party is entitled to an instruction on any theory reasonably supported by the evidence." *Rodriguez*, 192 Ariz. at 61, ¶ 16, 961 P.2d at 1009. A trial court is not required, however, to give a requested jury instruction when "its substance is adequately covered by other instructions." *State v. Mott*, 187 Ariz. 536, 546, 931 P.2d 1046, 1056 (1997). The test

is whether the jury instructions, when taken in their entirety, adequately set forth the law applicable to the case. *Rodriguez*, 192 Ariz. at 61-62, ¶ 16, 961 P.2d at 1009-10.

¶14 The court sufficiently instructed the jurors regarding witness credibility. Specifically, the court instructed:

In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as the witness's ability to see, hear, or know the things the witness testified about; the quality of the witness's memory; the witness's manner while testifying; *whether the witness has any motive, bias, or prejudice*; whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence. You are to consider all of the evidence in the light of reason, common sense, and experience.

(Emphasis added.) This instruction adequately sets forth the law applicable to witness credibility, and we conclude that the requested instruction was not necessary in order for Gibbs to get a fair trial.

¶15 Additionally, Gibbs's counsel argued in closing that Grinstead's credibility was questionable because Grinstead only had to "satisfy the State" and he would receive a substantially reduced sentence. Gibb's counsel remarked that Grinstead may "be forgetful sometimes" or "go a little further than he needs to [] other times." The detailed general jury instruction

given to the jury regarding evaluation of testimony provided foundation and support for Gibbs's argument and position that Grinstead should not be believed. Therefore, the instructions adequately set forth the law applicable to the case.

CONCLUSION

¶16 For these reasons, we find the trial court did not abuse its discretion in refusing the requested instruction specifically addressing the cooperation agreement. Gibbs's convictions and sentences are affirmed.

 /s/
JOHN C. GEMMILL, Judge

CONCURRING:

 /s/
PATRICIA K. NORRIS, Presiding Judge

 /s/
PATRICIA A. OROZCO, Judge