



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. GARY WAYNE GIPSON
CR-11-0282-PR**

PARTIES:

Petitioner: Defendant Gary Wayne Gipson

Respondent: The State of Arizona

FACTS:

One evening, the victim drove to Gipson's house. The two argued outside Gipson's front door, apparently over a business arrangement the victim believed Gipson had not honored. The altercation escalated, and the pair exchanged punches. Gipson then pulled out a handgun and shot the victim at least twice. The victim turned and was running toward his car when Gipson fired several more shots, hitting the victim in the back. The victim subsequently died from the gunshot wounds.

As relevant to the issues raised on review, Gipson was charged with premeditated first-degree murder. In his notice of defenses, he designated self-defense and other theories. After evidence was presented, the judge indicated he would instruct on lesser-included offenses of first-degree murder, including second-degree murder and manslaughter by sudden quarrel or heat of passion, although neither party had requested that any lesser-included offense instruction be given. Gipson's counsel objected.

After conferring with Gipson, who indicated his desire to have the jury instructed only on first-degree murder, the court overruled Gipson's objection. It explained it "ha[d] an independent responsibility to charge the jury with any offenses it fe[lt] were substantially developed by the evidence and the facts," and that, in addition to first-degree murder, it would instruct on second-degree murder and manslaughter by sudden quarrel or heat of passion.

The jury acquitted Gipson of first-degree murder, was unable to agree on the second-degree murder charge, and convicted him of manslaughter by sudden quarrel or heat of passion.

Gipson appealed, asserting in relevant part that the trial court erred in giving the manslaughter instruction because Rule 21.3 of the Arizona Rules of Criminal Procedure does not impose a duty on a judge to give a lesser-included offense instruction, especially where both parties object to the instruction. The court of appeals agreed that Arizona law no longer imposes an affirmative duty on a judge to give a lesser-included offense instruction supported by the evidence. Nevertheless, the court was unaware of any authority supporting Gipson's theory that the trial court erred by choosing to give a proper lesser-included instruction, even over both sides' objections. It noted Gipson did not dispute either that the evidence supported the manslaughter instruction or that the instruction improperly stated the law. Therefore, the court

affirmed Gipson's conviction and sentence.

ISSUES:

- A. In a murder trial where both the prosecution and defense objected to giving the lesser-included instruction as to manslaughter, was it error for the court to give the instruction?
- B. Did the trial court wrongfully give the manslaughter instruction because it believed it had the duty to [do so] based upon *State v. Madden*, 104 Ariz. 111, 449 P.2d 39 (1969), which was overturned by Criminal Rule 21.3?

DEFINITION:

Lesser-included offense: a crime composed solely of some, but not all, of the elements of a more serious crime, so that it is impossible to commit the more serious offense without also committing the lesser offense.

RELEVANT RULE PROVISION:

Rule 21.3(c), Arizona Rules of Criminal Procedure, requires that, in order to preserve the issue for appeal, a party must object to the trial court's giving or failure to give a jury instruction before the jury retires to consider its verdict. The comment to this provision states, in relevant part:

There is no intention to change the court's inherent duty to instruct the jury on fundamental principles of law, or bar the raising of fundamental errors on appeal. . . . However, this provision reverses the rule in *State v. Madden*, 104 Ariz. 111, 449 P.2d 39 (1969), that the court is duty bound in all homicide cases to instruct the jury on all necessarily-included offenses that the evidence will support, regardless of whether or not such instruction is requested.

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