IN THE SUPREME COURT OF THE STATE OF NEVADA

DARION MUHAMMAD-COLEMAN, aka Darion Muhammadcoleman Appellant,	)	CASE NO.: 72867
vs	)	
THE STATE OF NEVADA, Respondent.	)	

APPELLANT'S REPLY BRIEF
Appeal From Judgment of Conviction

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement stands as enunciated in the Opening Brief.

ROUTING STATEMENT

The Routing Statement stands as enunciated in the Opening Brief.

REPLY TO STATE'S ANSWER

I.

ARGUMENTS

A. THE DISTRICT COURT ERRED BY DENYING THE DEFENSE REQUEST FOR A CONTINUANCE, AS WELL AS AN ADDITIONAL PSYCHOLOGICAL EVALUATION.

The State alleges in its Answering Brief, that *"...Appellant had already been evaluated by five different psychologists -- each of them concluding that Appellant did not have PTSD,"* Respondent's Answering Brief (hereinafter RAB) at page 12. This is simply not true. The citation to the record in this regard is nothing more than a recitation of the trial prosecutor's opinion regarding his review of the relevant documents. This is hardly dispositive of the issue the State attempts to prove. Furthermore, The State then quotes the District Court Judge, who stated in denying the Motion: *"The motion to continue the trial is denied. It appears that there has been adequate evaluation of the defendant's mental health history; and* ***while I***

***understand that there may not have been a direct investigation of the PTSD element**, there have clearly been lengthy examinations of the defendant's mental health history, and the conclusion by most of the examiners that malingering at best,"* RAB at page 14, **(emphasis added.)**

This clearly refutes the State's own position, since it conclusively establishes that the District Courts review of the evaluations revealed they simply did not address the issue of PTSD. That is a far cry from establishing that any of the psychologists concluded that Appellant did not have PTSD, as the State alleges.

As evidenced by the State's own brief, it is simply not true that any psychologists, and certainly not five, made any conclusions about the possibility that the Defendant suffered from PTSD. As outlined in Appellant's Opening Brief (hereinafter AOB,) this diagnosis, had such been requested or made, would have greatly enhanced Appellant's argument regarding the potential for a manslaughter jury instruction, as well as negating the necessary requirements of First Degree murder, considering that Appellant was acquitted on the Robbery Count.

Additionally, the State is in error in suggesting that Appellant is attempting to pursue a diminished capacity defense. And while the State is correct that the Washington State case, State v. Bottrell, 103 Wash.App 706, 14 P.3d 164 (2000) is

merely persuasive, the point of the case is not an argument for a diminished capacity defense, but rather, that PTSD has been recognized as an issue with respect to the Mens Rea, or criminal intent of a crime, and thus has been used to attack an essential element of a specific offense, id. As the Appellant was found not guilty of a predicate felony for First Degree felony murder, the diagnosis would have greatly enhanced his ability to directly attack the necessary elements for a First Degree murder conviction.

The point of citing Weaver v. Warden, 107 Nev. 856, 822 P.2d 112 (1991) was simply to illustrate that this Court recognizes the importance of this diagnosis, as trial counsel in that case was found ineffective for failure to pursue it.

Lastly, the State attempts to suggest that even if Appellant suffered from such a diagnosis, he was given ample opportunity to explain it himself, RAB, at page 15. Applying this "standard," no criminal defendant requires any expert opinion, so long as he testifies to his own emotional distress. Such a conclusion boggles the mind.

B. THE DISTRICT COURT ERRED BY DENYING A DEFENSE REQUEST FOR A MANSLAUGHTER CHARGE TO BE INCLUDED AS A LESSOR INCLUDED OFFENSE ON THE VERDICT FORM.

The State's citations to Ford v. State, 99 Nev. 209, 211, 660 P.2d 992,993(1983), and Sanchez-Dominguez v. State, 130 Nev. ___, ___, 318 P.3d

1068, 1072 (2014) are confusing, RAB at page 16. The record exhibits no jury instruction that would have allowed the jury to convict Appellant of manslaughter, nor was there any jury instruction at all on this specific lesser included offense. The lack of any such instruction has nothing to do with an instruction actually given. It is interesting to note that the State supports its proposition that "A trial court is justified in refusing to give an instruction on the crime of manslaughter if there is no evidence to support such an instruction," by citing Graves v. State, 84 Nev. 262, 265, 439 P.2d 476, 477 a 1968 decision by this Court. No where does the State concede, or even explain the significance of the line of cases cited by the Appellant which clearly state that things have changed since the Graves decision. Specifically, this Court has repeatedly stated that "A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it. Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) Similarly, in Crawford v. State, 121 Nev. 744, 121 P.3d 582, 587 (2005), this Court said, "The United States Supreme Court held in Mullaney v. Wilbur that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when

the issue is properly presented in a homicide case," quoting Mullaney v. Wilbur, 421 U.S. 684, 704.

Given that the District Court refused to allow the instruction, the State had no such requirement, which was to the great detriment of the Appellant's defense.

Additionally, the District Court specifically erred with its reasoning, quoted by both Appellant and the State in their Answering Brief, wherein the Court opined, *"You can't mix voluntary and self-defense and kind of create a voluntary based instruction because of a self defense argument,"* RAB at 19.

This is clear error for two reasons. One, a criminal defendant is entitled to proceed on disparate defense theories, Walker v. State, 110 Nev. 571, 576-577, 876 P.2d 646, 649 (1994), and two, as stated in Crawford v. State, 121 Nev. 744, 121 P.3d 582, 587, "A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it. Williams, at 531.

The failure of the district court to provide this instruction is reversible error. Especially when you consider the argument of the State in footnote one of their Answering Brief, suggesting that even if Appellant was entitled to such an instruction, the error was harmless, RAB at page 20. This is staggering, since the

failure of the district court to give this instruction completely eliminated the requirement from the state that they disprove heat of passion beyond a reasonable doubt, as clearly required in Crawford, id.

Lastly, "...denying a defendant's right to an instruction on a lesser-included offense, simply because he has not presented the evidence supporting it or has argued a disparate theory, is also contrary to a defendant's right to have the jury decide questions of fact," Rosas v. State, 122 Nev. 1258, 147 P.3d 1101, 1108 (2006)

C. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUSTAIN A CONVICTION OF FIRST DEGREE MURDER.

The State in its Answering Brief correctly states the legal standard this Court must take into consideration when the question of insufficiency of the evidence comes into question. RAB, at pages 20 through 22. However, the State's application of the facts of this case completely ignores that not one of the State's witnesses actually saw what happened on the date and time in question, and therefor there was no testimony other than Appellant, from anyone who actually observed the incident.

The State partly relies on Appellant's own testimony in an attempt to find

some way to envision a circumstance where any reasonable jury could make a finding of deliberation, premeditation and willfulness, when, in fact, there was no evidence of any of the three adduced at trial, and certainly not all three.

No reasonable jury could possibly have found the Appellant guilty of First Degree murder, once he was acquitted of the felony robbery charges, with no one to testify as to what actually happened. The state attempts to make definitive proof from witness testimony as to what the surveillance video shows, and then offers these assumptions as evidence that the Appellant acted one way or the other, RAB at page 23, 24. In point of fact, there is no way any rational person could view this video and come to any other conclusion than Appellant and the Decedent got into a gun battle.

The State asks this Court to make assumptions to which no reasonable person could come. That Appellant "took steps" to ensure his conversations were not overheard, RAB at page 23; that Appellant "waited for witnesses to leave" before he shot the decedent, RAB, id.; that testimony from the Detective – who did not testify as a crime scene analyst – about the cartridge casings, is somehow conclusive proof of who did what when, RAB, id.; the incredible allegation that "Borero did not shoot at Appellant until after Appellant shot him twice, RAB, at page 24, when, as pointed out in Appellants Opening Brief, not even the two

Detectives assigned to the case, could tell who shot first, and this after each repeatedly viewed the video, AOB, at page 23.

The State neglects to refute any of the following:

1) Richard McCampbell heard some one say, "show me the money," and it was not the Appellant's voice, AOB, at page 21;

2) Rachel Bishop testified that the decedent was speaking with Dustin Bleak, who appeared to be angry, and that they were having a "heated discussion," AOB at page 22;

3) The Decedent was heavily under the influence of methamphetamine at the time of the incident, AOB, at page 23.

The Due Process Clause of the United States requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charges has been proven beyond a reasonable doubt. Origel-Candido v. State, 114 Nev. 378 382, 956 P.2d 1378, 1381 (1998)

Simply put, no reasonable juror could possibly conclude that the Appellant acted with willfulness, malice and premeditation, each finding necessary for a First Degree murder conviction, based upon the testimony and evidence presented at trial.

II.
CONCLUSION

Appellant would refer the Court to his conclusion as set forth in his opening brief.

Respectfully,

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COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4) the typeface requirements of NRAP32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepard in a proportionally spaced typeface using 14 point font of the Times New Roman style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(7)(b). Pursuant to NRAP 32(7)(b) this appellate brief complies because excluding the parts of the brief exempted by NRAP32(7)(b) it does not contain more than 7,000 words to wit, 1729 words and 11 pages.

3. Finally, I hereby certify that I have read this reply brief and the best of my knowledge, information and belief it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicableNevada Rules of Appellate Procedure, in particular NRAP28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate reference s to the record on appeal. I understand tha I me be subject to sanctions iin the event that the accompanying brief is not in conformity wit the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of November, 2017.

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CERTIFICATE OF SERVICE

I here by certify that this Reply Brief was filed electronically with the Nevada Supreme Court on the 15 day of November, 2017. Service of the foregoing document shall be made in accordance with the Master Service List to the following:

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