

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

S.C. Case No. 77018

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APPELLANT'S OPENING BRIEF

(Appeal from a Judgment of Conviction Following a Jury Trial and Verdict)

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1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are persons and entities as
3 described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These
4 representations are made so that the justices of this Court may evaluate any potential
5 conflicts warranting disqualification or recusal.

6 1. Attorney of Record for Appellant: Brian Rutledge

7 2. Publicly held Companies Associated: a. N/A

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10 Kenneth Long, Esq.

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13 DATED this 14th day of March, 2019.

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This appeal is presumptively assigned to the Supreme Court because it relates to convictions for a category A felony. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

II. Whether the District Court Judge abused his discretion in adjudicating Defendant a Habitual Criminal and imposing a sentence of Life Without the Possibility of Parole.

Defendant Thomas Cash was charged via an Amended Information on April 19, 2018 with Murder with use of a deadly weapon and Battery with intent to kill. Appellant's Appendix (hereafter AA) 1342. Trial for Mr. Cash commenced on June 18, 2018. AA 001. Trial concluded on June 28, 2018, when the jury found Mr. Cash guilty of Second Degree Murder With Use of a Deadly Weapon, and Not Guilty of

1 Battery With Intent to Kill. AA1339. On August 20, 2018, Mr. Cash was sentenced
2 by Judge Douglas Smith to Life Without the Possibility of Parole under the Large
3 Habitual Criminal enhancement for the Second Degree Murder conviction.
4
5 AA1349-1380.

6 **STATEMENT OF THE FACTS**

7
8 On December 11, 2017, Kyriell Davis went to pick up his daughter from his
9 girlfriend, Brittney Turner. At the time Brittney was pregnant with Davis' second
10 child, and was living at 3999 Pistachio Nut Drive with her Mother (Antoinette),
11 stepfather (Defendant Thomas Cash), and sister (Angel Turner). Appellant's
12 Appendix (hereafter AA) 873-875, 954. Davis was driving a borrowed car, and
13 asked a roommate, Ezekiel Devine, to come with him. AA879. Davis waited outside
14 the house for Brittney to bring out their daughter, but she left him waiting 15-20
15 minutes while he called and texted her numerous times. AA884.

16
17 Davis testified that she was yelling at him from the time she came out of the
18 house. AA 886. A neighbor, Isidra Carolina Araiza Flores, testified that the
19 argument was very loud, and she looked out a window and saw "a man and a
20 woman were fighting." AA844-845.

21
22 Brittney testified that as she and Davis were arguing, he threatened her, it
23 "escalated" and he grabbed her by the arms. AA956. Davis testified that while
24 Brittney was yelling at him he "got her off me" by "pushing her shoulders", which
25 he claimed "wasn't a hard push because she was pregnant", but rather a "get out of
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1 my face type push". AA886-889. Brittney testified she was scared, and noticed her
2 sister Angel looking out the window at the fight. AA959-960. Angel testified she
3 heard a commotion out front, and looking out the window she could see Davis
4 battering her sister, holding her arms and "banging her up against the car". AA1118-
5 1119. Angel said she went to her step-father Cash and told him "come real quick,
6 Kyriell is banging up Brittney against the car". AA1120. Tamisha Kinchron (Cash's
7 niece) testified she heard Angel scream to Cash, saying "that boy" was jumping on
8 her sister. AA1173. Cash told police that he was wrapping Christmas presents when
9 Angel ran in and said Davis was attacking Brittney in front of the house, so he
10 immediately ran outside. AA1239.

14 Kinchron testified she saw Cash and Angel run down the stairs and out the
15 front door. AA1175. Angel testified Cash ran outside, and Davis still had Brittney
16 by the arms, so Cash got Davis off Brittney by putting him in a headlock. Angel said
17 the two men then started "squaring up" to fight and circling each other. AA1121-
18 1123. Kinchron testified Cash ran up to Brittney and Davis and tried to break them
19 apart, and she saw Davis punch Cash. AA1178. Cash told police he immediately ran
20 outside and saw Brittney breaking away, and Davis trying to grab her again, so he
21 punched at and grabbed Davis. AA1239-1240. Davis testified that Thomas Cash ran
22 outside and swung at him (Davis), but Cash missed and Davis grabbed Cash's face
23 and they started to wrestle. AA891-895. Brittney testified that Cash came out of the
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1 house and sort of swung at Davis (but missed), and then they grabbed onto each
2 other. AA961.

3 Davis testified that Ezekiel then ran over and interjected himself into the
4 fight, and pushed them apart. AA 895-896. Brittney testified Ezekiel got out of the
5 car and started to fight Cash. AA965. She told the police that Ezekiel broke Davis
6 and Cash apart by punching Cash in the face (not by shoving them apart as Davis
7 had testified). AA1009. Cash told police he was wrestling with Davis when he heard
8 Davis say "get 'em, get 'em", and a man he has never seen before (Ezekiel) got out
9 of a car and punched Cash in the face. AA1240-1241. Brittney testified that Davis
10 yelled that he was going to get a gun or shoot somebody, that he said he will shoot.
11 AA986-987. Angel heard Davis tell Ezekiel "go get my thing out of the car" which
12 she believed was in reference to a gun. AA1125-1126. Kinchron testified she saw
13 Davis and Cash swinging at each other, with some punches landing, when she heard
14 Davis say to someone "bring my shit". AA1180. Brittney said that Ezekiel punched
15 Cash in the face with a closed fist, damaging Cash's nose and knocking Cash to the
16 ground. AA989, 1006-1007. Angel also testified Ezekiel got out of the car and
17 joined the fight, and Angel testified she saw both Davis and Ezekiel land punches on
18 Cash. AA1125. Kinchron testified she saw Ezekiel get out of the car and join Davis
19 in attacking Cash, two on one. AA1181-1182. Cash told police that when Ezekiel
20 punched him in the face, the punch was so strong it took him by surprise, and he
21 believed it was more than just a fist - like Ezekiel had a metal bar in his hand.
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1 AA1242, 1250. Cash was being held by Davis when Ezekiel punched him, and the
2 blow was so powerful that it disoriented him. AA1248, 1250. Cash said Ezekiel was
3 coming at him again and he was afraid of being hit like that again, so he pulled out
4 the small pocket knife he used for work and stabbed Ezekiel once as Ezekiel came at
5 him. AA1242,1243,1252. Davis said he stumbled back and warned Ezekiel to
6 "watch out" because he saw a glint in Cash's hand. AA896. Davis saw Ezekiel fall,
7 but did not yet know Ezekiel was injured. AA896.

10 Davis testified he is a football player in what he described as "perfect shape".
11 AA939. Brittney said Cash was in his 50s, while both Davis and Ezekiel were
12 football players in their early 20s. AA984.

14 Cash told police he then heard Davis say he's going to get a gun and shoot
15 him, so Cash ran into the house. AA1242. Davis said Cash ran to his house, and
16 Davis said he ran after him and "tried to kick the door down" and only failed to kick
17 the door in because Cash had his weight pressed against the other side of the door.
18 AA896. Davis said he wanted to kick in the door so he could "fight" Cash some
19 more, to "finish" the fight. AA910. At that point Davis heard Ezekiel calling his
20 name and went back and found out Ezekiel was hurt. AA897.

24 The medical examiner testified that the cause of death was a single stab wound to
25 the chest, a wound that traveled in an upward motion. AA707,711.

27 Detective Gillis testified when he came into contact with Cash, Cash had a
28 nose injury and blood on his shirt and pants consistent with the injury to his face,

1 however when they checked Cash's hands to see if he had any injuries consistent
2 with punching someone there were no injuries to Cash's hands. AA1042, 1047. Cash
3 also had injuries to one arm. AA1048.

4 SUMMARY OF THE ARGUMENTS

5
6 There was substantial evidence that Mr. Cash was acting in self-defense when
7 he stabbed Ezekiel a single time, and the prosecutors produced insufficient evidence
8 to meet their burden of proving Mr. Cash did not act in self-defense.

9
10 Judge Smith abused his discretion by sentencing Mr. Cash to Life Without the
11 Possibility of Parole under the habitual criminal enhancement when all of Cash's
12 priors were stale and unrelated to the alleged crime at issue.

13 ARGUMENT ON THE ISSUES

14 I. There was insufficient evidence produced by the State to meet their burden 15 16 of proving the Defendant did not act in self-defense.

17
18 This case began as a domestic violence situation, with an argument between
19 Brittney Turner and her former boyfriend Kyriell Davis that was so loud that it was
20 noticed by the neighbors. AA844-845,886. Although the level of physical violence
21 Davis inflicted upon Brittney was in dispute (Davis claiming he only grabbed and
22 pushed her and that it "wasn't a hard push because she was pregnant", but rather a
23 "get out of my face type push", while Brittney, Angel Davis, and Tamisha Kinchron
24 all testified as to greater violence)(AA 956, 886-889, 1118-1119), what was not in
25 dispute is that Brittney's sister Angel saw the altercation and believed Brittney
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1 needed help - and ran and told their stepfather (Thomas Cash, the Defendant) that
2 Davis was battering Brittney and she needed help. AA118-1120, 1173, 1239. All the
3 testimony also agreed that after Angel told Cash, Cash immediately ran outside and
4 confronted Davis. Id.

6 Although the exact description of the initial altercation between Cash and
7 Davis is in some dispute, the differing versions agree that there was minimal
8 successful punching and it was mostly wrestling. At that point Ezekiel interjected
9 himself into the fight - either on his own or at Davis' request. All the testimony
10 showed Ezekiel exited the car and joined the fray, starting by "breaking apart" Davis
11 and Cash. Davis said that Ezekiel just shoved them apart, but the State's other
12 witness (Brittney) said that Ezekiel broke them apart by punching Cash in the face -
13 and Angel and Kinchron also testified that Ezekiel punched Cash in the face, and
14 Cash told police that the first time he had ever seen Ezekiel was when Ezekiel
15 punched him in the face. Thus there was virtually unanimous testimony that
16 Ezekiel's first interaction with Cash was to punch Cash in the face while Cash was
17 being held by Davis. AA895-896, 965, 1009, 989, 1006-1007, 1125, 1181-1182.
18 The only slight dissent was Davis claiming it was a "shove" rather than a punch, and
19 Davis also claimed he never saw Cash punched in the face - even though everyone
20 else did, and the Police said Cash had the facial injuries and bloody clothes to match
21 the punch to the face. AA1042, 1047.

1 Once Ezekiel hit Cash while Cash was wrestling Davis, it was a two-on-one
2 fight, and it was a fight between a man over 50 years old who was now facing a
3 *second* attacker who was also a football player in his early 20's and in prime
4 physical shape. AA984, 939. Furthermore, there was nothing to dispute Cash's
5 characterization of Ezekiel's punch to the face as a massive blow that stunned Cash
6 and made him believe that Ezekiel must have a weapon in his hand to cause such an
7 impact, and the police testimony of Cash's injury (blood from the facial injury
8 soaked his shirt and pants and left a bloody trail up to and through the house and
9 even into the backyard) makes Cash's supposition at the time reasonable (even
10 though no such weapon was found). AA1042, 730-737. Further supporting his belief
11 Ezekiel might be using a weapon were two different witnesses testifying they heard
12 Davis request Ezekiel bring some kind of weapon from the car (Angel heard "go get
13 my thing out of the car" while Kinchron heard "Bring my shit"). AA1125-1126,
14 1180. It was only at this point - after the second assailant hit him in the face so hard
15 he believed it must be with a weapon, and that assailant coming at him for additional
16 blows - that Cash pulled his work knife out of his pocket and stabbed Ezekiel a
17 single time to prevent further attack. Nevada's "decisional law with regard to self-
18 defense has construed Nevada's statutory scheme to be consistent with the common
19 law, recognizing that self-defense is a justification for homicide not only in
20 instances of actual danger but also in instances of apparent danger", and "the State
21 must prove beyond a reasonable doubt that the defendant did not act in self-
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1 defense". *Runion v State*, 116 Nev 1041, 13 P.3d 52 at 56 (2000), *Barone v. State*,
2 858 P.2d 27, 28, 109 Nev 778, 781 (1993). Under the testimony elicited at trial, no
3 reasonable jury could find that that State proved Cash did not act in self-defense.
4

5 Nevada case law and statutes have also long held that there is no duty to
6 retreat before exercising your right to self-defense. *State v. Grimmett*, 33 Nev. 531,
7 534, 112 P. 273, 273 (1910)(recognizing " the right to stand his ground and slay his
8 adversary"), NRS 200.120(2)("A person is not required to retreat before using
9 deadly force"). This court has also held that one good reason that Nevada does not
10 require a person to retreat is that "it is often quite difficult ... to determine whether a
11 person should reasonably believe that he may retreat from a violent attack in
12 complete safety." *Culverson v. State*, 106 Nev. 484, 489, 797 P.2d 238, 240 (1990).
13 This rationale strongly supports Cash's self-defense claim - he did not resort to
14 deadly force until attacked by the *second* man (who, like the first, was a much
15 younger football player in prime physical condition) and not until that man had hit
16 him in the face so hard (and caused so much bodily harm) that Cash believed that he
17 must be holding a metal bar or other weapon to enhance his punch. After the single
18 use of his work knife to fend off the second attacker, Cash did in fact try to retreat
19 by running into his house - and the other person beating him (Davis) chased Cash to
20 the house and in Davis' own words "tried to kick the door down" so he could beat
21 Cash and "finish" him. AA896, 910. It is important to note that Davis trying to break
22 into Cash's home to batter him further was not in response to the stabbing (Davis
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1 said at that point he did not know Ezekiel was hurt), but rather his desire to "finish"
2 the fight. AA893, 910. Under these facts it is clear that Cash could not have safely
3 retreated from both Ezekiel (who was striking him) and Davis without the use of his
4 knife, as he barely was able to escape even with the use of his knife. It is important
5 to note that this retreat was not required by Nevada law, but had to be taken by Cash
6 to save himself even after the use of deadly force. Under these facts it is clear that
7 the State failed to meet their burden of proving beyond a reasonable doubt that Cash
8 did not act in self-defense. In fact, the State not once but *twice* incorrectly and
9 improperly told the jury that Cash *had* the duty to retreat, telling the jury that "He
10 could have retreated" (AA1296) and "He could have ran inside. He could have
11 yelled for help." (AA1281). Not only were these arguments incorrect and
12 prosecutorial misconduct, they show that the prosecutor was well aware that they
13 had failed to prove beyond a reasonable doubt that Cash did not act in self-defense,
14 and only by improperly convincing the jury that Cash should have retreated did they
15 have a chance of convicting him.

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1 112 Nev 266, 914 P.2d 605 (1996) (citing "a career of criminal activity, including
2 sixty-five arrests, nine felony convictions, and eighteen misdemeanor convictions").

3 This simply does not apply to Thomas Cash. The priors used by the State at
4 sentencing were for a 29 year old possession of cocaine conviction, a 27 year old
5 robbery second degree conviction, and a 21 year old robbery second degree
6 conviction. There is no evidence Cash had any problems in prison and on the
7 contrary, he earned a certificate in HVAC repair. When Thomas was released from
8 prison, he honorably completed parole as well as additional I-1VAC training at
9 Antelope Valley Community College. Upon moving to Las Vegas so his wife could
10 study criminal justice, Thomas found employment at Sears. Thomas was such a
11 good employee that Sears stated it would re-hire him if he was released on bail even
12 when the case was pending in District Court. Furthermore, there is nothing about
13 this case that relates in any way to the crimes Cash committed in his youth 21 to 29
14 year previously - it is undisputed that the incident involved Cash rushing to the
15 defense of his pregnant stepdaughter after being told by her sister that she was being
16 battered by her boyfriend. Even if the State was correct and his use of deadly force
17 in the ensuing fight was excessive, that does not change the fact that the incident at
18 its core was the attempt of a father to protect his daughter, and could not be
19 considered in any way related to the drug and robbery cases of his younger years.
20 For Judge Smith to determine these wholly unrelated cases from 20 years prior
21 somehow justified sentencing as a habitual criminal and giving a sentence of life
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1 *without* the possibility of parole is clearly an abuse of discretion and this case should
2 be remanded to a different District Court judge for a fair re-sentencing.

3
4 **CONCLUSION**

5 Although there were differences in how the various eyewitnesses testified about the
6 incident in issue, it is clear that the State did not meet their burden of proving that
7 Thomas Cash did not act in self-defense when he stabbed his second attacker a
8 single time to permit his escape from a serious beating. The verdict should be
9 overturned. Furthermore, sentencing Cash to spend his entire life in prison under
10 the Large Habitual enhancement was clearly an abuse of discretion when the prior
11 convictions were all over 20 years old and none were related to the instant offense,
12 and if the verdict is not overturned by this court it should overturn the sentence and
13 send the case back to a new District Court Judge for re-sentencing.
14
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16

17 DATED this 14th day of March, 2019.

18
19 Respectfully Submitted by:

20 /s/ /Brian Rutledge/

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CERTIFICATE OF COMPLIANCE

1
2
3 1. I hereby certify that this brief complies with the formatting requirements of
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style
5 requirements of NRAP 32(a)(6) because this brief has been prepared in a
6 proportionally spaced typeface using Microsoft Word in 14 point Times New
7 Roman type style.
8
9

10 2. I further certify that this brief complies with the page- or type-volume
11 limitations of NRAP 32(a)(7)(A) as it contains 3596 words in 13 pages as computed
12 under NRAP 32(a)(7)(C).
13

14 3. Finally, I hereby certify that I have read this appellate brief, and to the best
15 of my knowledge, information, and belief, it is not frivolous or interposed for any
16 improper purpose. I further certify that this brief complies with all applicable
17 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
18 every assertion in the brief regarding matters in the record to be supported by a
19 reference to the page and volume number, if any, of the transcript or appendix where
20 the matter relied on is to be found. I understand that I may be subject to sanctions in
21 the event that the accompanying brief is not in conformity with the requirements of
22 the Nevada Rules of Appellate Procedure.
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1 DATED this 14th day of March, 2019.

2
3
4 /s/ /Brian Rutledge/

5 Brian Rutledge, Esq.

6 Nevada State Bar No. 4739
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8

9 **CERTIFICATE OF SERVICE**

10 I, the undersigned, hereby certify that on this 14th day of March, 2019, the foregoing
11 **APPELLANT’S OPENING BRIEF** and **APPENDIX** was served upon the appropriate
12 parties hereto via the Supreme Court’s notification system in accordance to the Master
13 Service List as follows:
14

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16 STEVEN S. OWENS, ESQ. Chief Deputy District Attorney

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20 DATED this 14th day of March, 2019.
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23 /s/ /Brian Rutledge/

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