

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

FILED

DEC 06 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY W. W. Wado
DEPUTY CLERK

DAMON CAMPBELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 39127

APPELLANT'S REPLY BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

STEWART BELL, ESQ.
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA, ESQ.
NEVADA ATTORNEY GENERAL
Nevada Bar No. 0192
100 N. CARSON STREET
CARSON CITY, NV 89701
(702) 687-3538

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

MAILED ON

12/3/02

RECEIVED

DEC 06 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

02-20918

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DAMON CAMPBELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 39127

APPELLANT'S REPLY BRIEF

DAVID M. SCHIECK, ESQ.
LAW OFFICE OF DAVID M. SCHIECK
302 EAST CARSON AVE., STE. 600
LAS VEGAS, NEVADA 89101

STEWART BELL, ESQ.
DISTRICT ATTORNEYS OFFICE
200 S. THIRD STREET
LAS VEGAS, NEVADA 89155

FRANKIE SUE DEL PAPA, ESQ.
NEVADA ATTORNEY GENERAL
Nevada Bar No. 0192
100 N. CARSON STREET
CARSON CITY, NV 89701
(702) 687-3538

ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
FACTUAL MATTERS	1
ARGUMENT	
I. IT WAS ERROR FOR THE COURT TO REFUSE TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF SELF DEFENSE	3
II. THE COURT ERRED IN DENYING CAMPBELL'S MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES	5
III. THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 ARE UNCONSTITUTIONAL AS THEY FAIL TO TRULY NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS	6
IV. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT CAMPBELL OF FIRST DEGREE MURDER	7
V. THE COURT ERRED IN ALLOWING THE ADMISSION OF OTHER BAD ACTS AGAINST CAMPBELL	9
CONCLUSION	11
CERTIFICATE OF COMPLIANCE	12
CERTIFICATE OF MAILING	13

TABLE OF AUTHORITIES

PAGE NO.

1		
2		
3	<u>Allen v. State,</u>	
4	97 Nev. 394, 632 P.2d 1153 (1981)	3
5	<u>Runion v. State,</u>	
6	116 Nev.Ad.Op. 111, 13 P. 3052 (2000)	3
7	<u>Williams v. State,</u>	
8	99 Nev. 530, 665 P.2d 260 (1983)	4
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

FACTUAL MATTERS

The testimony presented by the State at trial was extremely contradictory and inconsistent. The State in the Statement of Facts in the Answering Brief has only selectively included tidbits of testimony from each witness that supports its theory of the case. Examination of the entire testimony is necessary to understand the weakness of the State's case against CAMPBELL. The State also has confused the action of the individuals that were involved in the altercation.

The State refers to "Leonardo Martinez and his brother Rigoberto Martinez" drinking in the parking lot and being approached by Campbell. (Ans. Br. p. 2) In fact it is Rigoberto Villanueva and he was not present when the altercation started, it was Leonardo and Augustin Martinez. (2 APP 217) It was Augustin that whistled for reinforcements when the altercation started and Carlos, Javier, Humberto, Wilfredo and a group of seven other individuals that came running. (2 APP 219; 229) Thus there was no evidence of a graze wound.

The State also claims that Leonardo received a graze wound to his arm as he was going back to the apartment. (Ans. Br. p 3) In fact Campbell was acquitted of the charge relating to Leonardo's injury (1 APP 151) and Leonardo testified that he did not know how he received the injury to his arm. (2 APP 223)

The State also portrays that in response to Augustin's signal "several other unarmed individuals came out of the

1 apartment to see what was happening." (Ans. Br. p. 3) The
2 testimony, however, showed that most of the individuals were
3 already outside and were drinking beer from bottles that could
4 be utilized as weapons and that at least one wooden stick was
5 used to damage Campbell's vehicle during the course of the
6 altercation. Tovah Gold testified that she saw one of the
7 Mexican individuals throw an item consistent with a gun into a
8 metal dumpster while fleeing the arrival of the police. (3 APP
9 422). Rhiana Sandlin also saw something silver that could have
10 been a gun before she called 9-1-1. (3 APP 442)

11 The State selectively places great emphasis on portions of
12 Sheldon Holliman's testimony. (Ans. Br. p. 3) Holliman never
13 testified that he observed Campbell firing any shots from the
14 bathroom window or that the windows overlooked his car. The
15 State completely ignores Hollimon's testimony that it was he
16 and Campbell that were attacked by a crowd of drunken
17 individuals wielding sticks and bottles. (2 APP 209)

18 The State also incorrectly portrays that Carlos Villanueva
19 was shot in the back. (Ans. Br. p. 3) The testimony was that
20 the bullet entered his shoulder and not his back. (3 APP 287)

21 It is respectfully urged that this Court consider all of
22 the testimony in deciding the issue presented herein and not
23 those selected by the State in it's Answering Brief.
24
25
26
27
28

ARGUMENT

I.

IT WAS ERROR FOR THE COURT TO
REFUSE TO INSTRUCT THE JURY ON
DEFENDANT'S THEORY OF SELF DEFENSE

The State takes the position that Campbell has waived the right to object to Instruction No. 29 because the Court refused to insert the requested defense language but rather added a plural to one word in the "stock" instruction. It is clear from the transcript that the statement at issue was not an agreement to the insertion as a substitute for the instruction offered by the defense. The defense did not withdraw the offered instruction but rather agreed that the change improved the situation but did not correct the entire problem with the instruction.

This case represents the refusal of the trial courts to follow the mandate of Runion v. State, 116 Nev.Ad.Op. 111, 13 P. 3052 (2000) to tailor instructions on self-defense to the unique facts of each case. If an individual is confronted with a group of drunken, hostile individuals, some with sticks, some with bottles, and perhaps some with guns, does the right of self-defense only extend to those exercising deadly force? Is not the entire crowd exercising deadly force?

The instruction given by the Court, while slightly improved by the single change, did not address the theory of defense presented by Campbell. The denial of the requested instruction violated the holding of this Court in Allen v.

1 State, 97 Nev. 394, 632 P.2d 1153 (1981); Williams v. State, 99
2 Nev. 530, 665 P.2d 260 (1983). The Court erred in failing to
3 add the language that "a person who is attacked by more than
4 one person has the right to act in self defense against all of
5 his attackers." (3 APP 449)

6 Campbell was prejudiced by the failure of the District
7 Court to fully instruct on his theory of defense and the
8 conviction must therefore be reversed.
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

THE COURT ERRED IN DENYING CAMPBELL'S
MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES

This issue is presented as one that ultimately must be decided by some Court. The State has been allowed to seek the death penalty in any murder case because the list of aggravating circumstances encompasses almost any conduct or lack of conduct. The arbitrariness of the aggravators is illustrated by the fact that the State alleged that the killing was based on race or in the alternative was random and without apparent motive, both of which were rejected by the jury.

The Nevada capital scheme allows prosecutors to seek the death penalty in order to gain a tactical advantage by having a death qualified jury. This procedure violated Campbell's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and can no longer be condoned. Campbell's conviction must be reversed.

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

III.

THE AGGRAVATING CIRCUMSTANCES ENUNCIATED
IN NRS 200.033 ARE UNCONSTITUTIONAL
AS THEY FAIL TO TRULY NARROW THE
CATEGORIES OF DEATH ELIGIBLE DEFENDANTS

This issue has been fully briefed by the parties and
Campbell realleges those arguments raised in his Opening Brief
previously filed herein.

IV.

THERE WAS NOT SUFFICIENT EVIDENCE
TO CONVICT CAMPBELL OF FIRST DEGREE MURDER

The State takes the position that Campbell is asking this Court to "second guess the jury merely because Defendant is dissatisfied with the outcome of their deliberation". (Ans. Br. p. 12) This is not an accurate description of Campbell's request. Campbell is asking this Court to look at all of the evidence in a neutral unbiased manner and reach the appropriate decision. For the most part the State ignores the majority of the evidence and instead focuses on unsubstantiated biased testimony from a few select witnesses.

The testimony that the State avoids discussing and asks this Court to ignore includes the following:

- Campbell had asked the two Hispanic males to stop urinating on the wall of his apartment and that when he approached them they started swinging and whistled for others to join the altercation (2 APP 197);
- Holliman tried to run away and was tackled and the attackers were throwing bottles at them (2 APP 208);
- Campbell stated that he believed the attackers had a gun (2 APP 200);
- Holliman never testified that Campbell fired out of the bathroom window;
- Campbell had his children sleep in the living room because he was afraid to let them sleep in the bedroom because

1 of the drunken behavior of the Mexicans (2 APP 204);

2 - Holliman knew the Mexicans had guns because they had
3 fired them on July 4th (2 APP 203-204);

4 - At least 11 individuals confronted Campbell in the
5 parking lot (2 APP 219; 229);

6 - Leonardo changed his version of the events on three
7 separate occasions (2 APP 224; 225; 228); and

8 - Two independent witnesses saw what they believed to be
9 guns in the hands of the attackers. (3 APP 422; 442)

10 Based on this evidence the State did not prove that
11 Campbell acted with premeditation and deliberation. When this
12 testimony is combined with the erroneous jury instructions on
13 self-defense, no conclusion can be reached other than this case
14 was not first degree murder. This Court should therefore set
15 aside said conviction.
16
17
18
19
20
21
22
23
24
25
26
27
28

V.

THE COURT ERRED IN ALLOWING THE
ADMISSION OF OTHER BAD ACTS AGAINST CAMPBELL

The State begins its argument on this issue with the statement "Defendant claims that the State improperly inquired into Defendant's plea in the case." (Ans. Br. p. 12) This is inaccurate, the issue raised has nothing to do with a plea in any case. The issue surrounds whether the Court erred in allowing the State to elicit testimony about a prior incident involving Campbell.

The State, once again, selectively refers to a small bit of testimony and mischaracterizes the testimony. The State claims that Campbell opened the door on direct examination. The sequence of testimony was actually that the prosecutor implied that John Woodring did not like the "Mexican" people, to which Woodring indicated that they were paying their rent but were a "pain" because of the messy parties. (3 APP 399-400). It was on re-direct examination that Campbell was described as just a rent paying tenant and that did not cause Woodring the problems that the others caused him. (3 APP 401-402)

Contrary to the assertion of the State, it was the prosecutor that opened the line of questioning by alleging that Woodring was prejudicial against the Mexicans. Campbell was only trying to show that Woodring's opinion was not race related. The State should not be allowed to initially raise

1 the issue during it's cross-examination and then claim that
2 Campbell opened the door.

3 The State was improperly allowed to elicit testimony from
4 a prior incident that was not relevant to the facts of the case
5 at bar. Campbell did not open the door but was rather
6 clarifying the cross-examination of the State. It was
7 prejudicial error to admit the testimony and the case must
8 therefore be reversed.

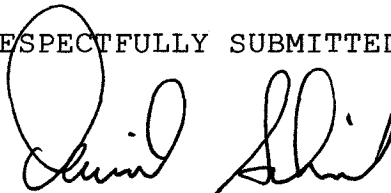
David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

CONCLUSION

Based on the authorities herein contained and in the Opening Brief heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of DAMON CAMPBELL and remand the matter to District Court for a new trial.

Dated this 3rd day of December, 2002.

RESPECTFULLY SUBMITTED:

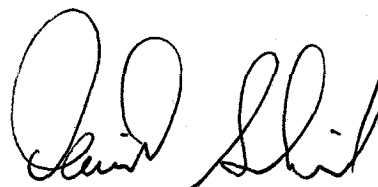


DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
302 E. Carson, Ste. 600
Las Vegas NV 89101
702-382-1844
Attorney for CAMPBELL

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to 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 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: 12-3-02



BY

DAVID M. SCHIECK, ESQ.
Nevada Bar No. 0824
The Law Office of David M. Schieck
302 East Carson, Suite 600
Las Vegas, Nevada 89101
702-382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

David M. Schieck
Attorney At Law
302 E. Carson Ave., Ste. 600
Las Vegas, NV 89101
(702) 382-1844

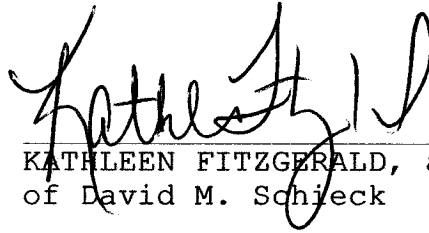
CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply Brief was made this 3rd day of December, 2002, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

District Attorney's Office
200 S. Third Street
Las Vegas NV 89101

Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

DATED: 12-3-02



KATHLEEN FITZGERALD, an employee
of David M. Schieck