ORIGINAL

DAMON LAMAR CAMPBELL,)
Appellant,)
v.) CASE NO. 39127
THE STATE OF NEVADA,)
Respondent.)

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment Of Conviction
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: **Page Number:**

Nevada Revised Statutes:

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STATEMENT OF THE ISSUES

1. Whether the court's decision in instructing the jury on Defendant's theory of self-defense was improper
2. Whether the court erred in denying Defendant's Motion to Strike Aggravating Circumstances
3. Whether the aggravating circumstances enunciated in NRS 200.033 are unconstitutional
4. Whether there was sufficient evidence to convict the Defendant of first degree murder
5. Whether the court erred in allowing the admission of other bad acts against the Defendant

STATEMENT OF THE CASE

Damon Lamar Campbell, hereinafter Defendant, was charged via an Information with Murder with Use of a Deadly Weapon and two counts of Attempt Murder with Use of a Deadly Weapon. The State filed a Notice of Intent to Seek Death Penalty alleging the existence of three (3) aggravating circumstances; (1) great risk of death to more than one person; (2) the murder was committed because

of perceived race, color, religion or national origin and, in the alternative, (3) that the murder was committed upon one or more persons at random and without apparent motive. (A.A. 3-4).

The Defendant entered a plea of not guilty and went to trial. The jury returned guilty verdicts as to both counts. The jury returned verdicts of guilty as to Count I, Murder with Use of a Deadly Weapon and Count II, Attempt Murder with Use of a Deadly Weapon and a verdict of not guilty as to Count III, Attempt Murder with Use of a Deadly Weapon. Following a penalty hearing, the jury returned a verdict of life without the possibility of parole. The Defendant was thereafter sentenced to a concurrent forty-three (43) to one hundred and ninety-two (192) months on the Attempt Murder Conviction. The Judgment of Conviction was filed on January 22, 2002. The Notice of Appeal was timely filed on January 25, 2002.

STATEMENT OF THE FACTS

On the evening of Friday, July 22, 2000, Leonardo Martinez and his friends and brothers had been playing soccer. (A.A. 218). Following their soccer practice, they planned to eat tacos, watch a game and drink some beer. (A.A. 218). Leonardo Martinez and his brother Rigoberto Martinez were in the parking lot of their apartment complex drinking cans of beer.(A.A. 218). The Defendant and his friend Sheldon Hollimon drove into the parking lot, pulling the Defendant's Cadillac into the parking stall just adjacent to their apartment. (A.A. 218). The Defendant and Hollimon started walking toward the side entrance of the apartment complex but returned and approached Leonardo and Rigoberto Martinez. (A.A. 218). The Defendant was carrying a chrome automatic handgun. (A.A. 200). The Martinez brothers told the Defendant to calm down and that they did not want any problems. The Defendant responded, "I don't want to see any more fucking Mexicans here" and hit Rigoberto Martinez in the face with the hand that was holding the gun. (A.A. 219). Rigoberto called for help and went into the apartment to call the police.

(A.A. 219). In response to the call for help, several other unarmed individuals came out of the apartment to see what was happening, including Leonardo Martinez's four-year-old little boy. (A.A. 219). The Defendant immediately fired shots at them. (A.A. 220). Rigoverto Martinez and Leonardo's four year old son hid behind the a truck. (A.A. 220). Leonardo Martinez said, "Please don't shoot, don't shoot, watch my little boy." (A.A. 220). In response the Defendant stated, "So, it's a little Mexican too." (A.A. 220). The Defendant fired several shots in the direction of the individuals in the parking lot. (A.A. 220). The Defendant chased Humberto, Augustin and Javier to the back of the parking lot. (A.A. 220). Leonardo received a graze wound to his arm as he was carrying the young boy back to the apartment. (A.A. 221).

The Defendant retreated back to his apartment and told Sheldon Hollimon and two girls inside the apartment to go into the bedroom. (A.A. 200). While the Defendant was stumbling through the apartment he said, "they're fucking up my car." (A.A. 201). He went to one of the windows which overlooked his car and fired three shots out of the window. (A.A. 201, 302). One shot struck Luis Alberto Martinez in the head, killing him. (A.A. 305). The other gunshot struck Carlos Villanueva in the back through his vertebrae, paralyzing him. (A.A. 256, 264-265).

ARGUMENT

I

THE COURT'S DECISION IN INSTRUCTING THE JURY ON DEFENDANT'S THEORY OF SELF-DEFENSE WAS NOT IMPROPER

Defendant asserts that the self-defense instruction was improper. However, after objecting to the instruction, counsel agreed that the instruction proposed by the court would convey the intended defense theory to the jury. Therefore, this issue has not been preserved for appellate review.

"The failure to object or to request special instruction to the jury precludes appellate consideration." McCall v. State, 91 Nev. 556, 557, 540 P.2d 95, 95

(1975); Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991). Where a defendant fails to preserve an issue, this Court will review that issue only if it is patently prejudicial or constitutes plain error. *See* Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) (emphasis added), overruled in part on other grounds by Martinez v. State, 115 Nev. Adv. Op. No. 2, 974 P.2d 133, 135 (1999). In addition, "an improper instruction rarely justifies a finding of plain error." United States v. Still, 857 F.2d 671, 671 (9th Cir. 1988) (quoting United States v. Glickman, 604 F.2d 625, 632 (9th Cir. 1979)). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977).

In the present case, defense counsel agreed that the self-defense instruction submitted to the jury properly conveyed the intended message. In response to the court's request for additional instructions, counsel originally proposed an additional instruction to the court that provided, "a person who is attacked by more than one person has the right to act in self defense against all of his attackers." (A.A. 449) In response, the court suggested that the instruction be modified to include the plural version of assailant such that the instruction would read, "However, where a person without voluntarily seeking, provoking, inviting, or willingly engaging in the difficulty of his own free will is attacked by an assailant(s), he has the right to stand his ground and need not retreat when faced with the threat of deadly force." (A.A. 454). Defense counsel agreed that the proposed instruction properly provided that a person has the right to act in self-defense against all of the assailants. He responded, "I think the - you can't pick and nitpick when you have a group situation going on, and I would agree with the Court that adding in parenthesis S to assailant would convey that message to the jury." (A.A. 450).

This Court has stated that "when a defendant's counsel has not only failed at trial to object to jury instructions, but has agreed to them, the failure to object or to

request special instructions precludes appellate consideration . . . The only exception we have recognized to this otherwise absolute rule is one for plain error." Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980). In the instant case, defense counsel agreed that the instruction properly conveyed the message to the jury. For that reason, the issue is not properly preserved for appellate review.

Furthermore, the instruction submitted to the jury did not constitute plain error and properly conveyed the Defendant's theory of self-defense. This Court has held that "upon request, criminal defendants are entitled to jury instructions on their theory of a case so long as there is some evidence, regardless of how weak or incredible, to support their theories." Ducksworth v. State, 113 Nev. 780, 792, 942 P.2d 157, 165 (1997); citing Harris v. State, 106 Nev. 667, 670 799 P.2d 1104, 1105-06 (1990). However, this Court has consistently held that the trial court does not commit reversible error in refusing to instruct the jury on defendant's theory of the case where the offered instructions are substantially covered by the instructions given to the jury. Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000); Shannon v. State, 105 Nev. 782, 783 P.2d 942 (1989); Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986); Mulligan v. State, 101 Nev. 627, 708 P.2d 289 (1985); Ford v. State, 99 Nev. 209, 660 P.2d 992 (1983); Taylor v. State, 96 Nev. 385, 609 P.2d 1238 (1980); Roland v. State, 96 Nev. 300, 608 P.2d 500 (1980); Beets v. State, 94 Nev. 89, 575 P.2d 591 (1978); Geary v. State, 91 Nev. 784, 544 P.2d 417 (1975); Azbill v. State, 88 Nev. 240, 495 P.2d 1064 (1972).

Instruction No. 29 was proper because the defendant would have been entitled to an acquittal if the jury had accepted his theory of the evidence. The Defendant contends that "the jury could have been confused into believing that Campbell's action could not be shown to be self-defense, unless the specific individuals with the weapons were the ones that were shot." (A.A. 17) However, the instruction submitted to the jury is devoid of any such distinction. Nothing in Instruction No. 29 suggests that self-defense would only be available to the

defendant if his actions were directed at those victims who possessed weapons. Rather, the instruction provided that the defendant was entitled to self-defense against any assailants, provided that the defendant was not the original aggressor. Thus, if the jury had accepted the Defendant's theory that the defendant was originally attacked by a mob of assailants, he would have been entitled to an acquittal. The Defendant's conviction, therefore, resulted from the factual determination by the jury that the victims were not shot in self-defense. For that reason, Instruction No. 29 does not entitle the Defendant to a reversal of his conviction.

II

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES

The Defendant contends that he filed a Motion to Strike Aggravating Circumstances in which he argued that insufficient evidence existed to support the allegations in the State's Notice of Intent. (Appellant's Opening Brief, p. 18). However, even a cursory perusal of Defendant's motion reveals that it failed to address with particularity the aggravating circumstances alleged in the State's Notice (AA 18-23). Instead, it merely advanced a general attack on NRS 200.033. Inasmuch as Defendant failed to present argument with respect to the anticipated evidence supporting the aggravators alleged in the State's Notice, the district court did not err in denying Defendant's boilerplate motion.

In his opening brief, Defendant fails to direct his argument to the specific aggravators alleged in this case. Instead the Defendant bases his argument on the bare allegation that the instant case was not a capital case but was only tried as one to gain a tactical advantage over the defense. However, this allegation lacks merit. The State aggressively pursued the death penalty during the guilt phase and alleged three aggravating circumstances to justify the imposition of a death sentence, two of which were alleged in the alternative. First, the state alleged that the killing was

based upon a racial motive, based in part on the statements the Defendant made prior to the shooting. Alternatively, the State argued that if the jury did not believe that the killing was based upon race, that the killing was random and without apparent motive. Second, the State alleged that an aggravating circumstance existed in that the defendant, through his course of conduct, created a risk of death or bodily harm to more than one person by firing a multitude of gunshots at various individuals. In fact, the jury returned a special verdict that this aggravating circumstance was proved beyond a reasonable doubt. (Respondent's Appendix, 32-33). Thus, Defendant's contention that this was not properly prosecuted as a capital case is belied by the record. The fact that the Defendant was ultimately spared the death sentence lends no credence to the argument that the Defendant's case was not a capital case. The state actively sought the death penalty because the Defendant's actions were abhorrent enough to justify the most severe form of punishment. Therefore, the Defendant's proposition that the state unjustly sought a death sentence is unfounded.

Furthermore, a defendant's Sixth Amendment right to a fair and impartial jury is not violated when the jury is "death qualified." Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758 (1986); Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Neither is there a presumption that a death qualified jury is biased in favor of the prosecution, as defendant erroneously contends by alleging that a jury is more prone to convict and is therefore not impartial. McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985). The burden rests upon the defendant to prove that a jury that convicted the defendant was not fair and impartial. Williams v. State, 103 Nev. 227-231, 737 P.2d 508, 512 (1987); Summers v. State, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986).

NRS 175.552 expressly provides that

> Upon a finding that a defendant is guilty of murder of the first degree, the court shall conduct a separate penalty hearing to determine whether the defendant shall be sentenced to death or to life imprisonment with

> or without possibility of parole. The hearing shall be conducted in the trial court before the trial jury . . .

It is now axiomatic that any juror who would be automatically opposed to the imposition of the death penalty regardless of the evidence or whose attitude concerning the death penalty would prevent or substantially impair his performance of his duties is not a juror who is able to follow the applicable law of capital cases. Hence, such a juror is properly the subject of a challenge for cause. See Witherspoon, supra, and Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). Any juror who cannot at least consider the full range of punishments provided in this state for murder of the first degree is not a juror who can render equal and exact justice to both parties.

As stated earlier, these issues have been previously raised and rejected. The court in its hearing on October 1, 2001 rejected the Defendant's motion to strike aggravating circumstances. As such, the defendant is not entitled to a new trial simply because the State justifiably pursued a death sentence.

III

THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 ARE NOT UNCONSTITUTIONAL

As noted in argument II, prior to trial, the Defendant filed a Motion to Strike Notice of Aggravating Circumstances, in which he alleged that the aggravating circumstances enunciated in NRS 200.033 are unconstitutional as they fail to truly narrow the categories of death eligible defendants. The trial court subsequently denied the Defendant's motion, ruling that the Nevada Supreme Court had already determined the statutory scheme is constitutional. (A.A. 34). The Defendant now challenges the ruling on appeal. However, the constitutionality of the statute in question is well established. Therefore, the Defendant's claim lacks merit.

The Constitution requires that the penalty of death must not be imposed in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2736

(1972). Subsequent to Furman, the United States Supreme Court was called upon to determine the constitutionality of the death penalty statute that was previously struck down in Furman v. Georgia, supra. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). The revised Georgia statute provided that a killing occurring during a burglary is deemed to be an aggravating circumstance. Id. 428 U.S. at 165, 96 S.Ct. at 2921. The court explained:

> "In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by carefully drafting a statute that ensures that the sentencing authorities is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with the standards to guide its use of the information."

Id. 428 U.S. at 195, 96 S.Ct. at 2935. The high court rejected Gregg's claim that the statute was so broad and vague that it allowed jury's to act arbitrarily and capriciously in deciding whether to impose the death penalty. Id. 428 U.S. at 200, 96 S.Ct. 2938.

Once again, during the same term as Gregg v. Georgia, *supra*, the United States Supreme Court upheld the constitutionality of Florida's death penalty statute. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). Florida's statutory scheme was almost identical to our present statute. More specifically, Florida's legislature also made the killing of a human being during the perpetration or attempted perpetration of a burglary an aggravating circumstance. Id. 428 U.S. 250, 96 S.Ct. at 2965. Proffitt argued that "The enumerated aggravating mitigating circumstances are so vague and so broad that virtually any capital defendant becomes a candidate for the death penalty . . . " Id. 428 U.S. at 255, 96 S.Ct. at 2968. The high court upheld the constitutionality of Florida's statute by stating "Thus, in Florida, as in Georgia, it is no longer true that there is 'no meaningful basis for distinguishing the

few cases in which [the death penalty] is imposed from the many cases from which it is not." (Citations omitted) Id. 428 U.S. at 253, 96 S.Ct. at 2967.

Likewise, our Nevada Supreme Court has held that our statutory scheme which closely matches the Georgia and Florida statutes passes constitutional muster. Bennett v. State, 106 Nev. 135, 787 P.2d 797, cert. denied, 498 U.S. 925, 111 S.Ct. 307 (1990); Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987); Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985); Ibarra v. State, 100 Nev. 167, 679 P.2d 797 (1984); Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979); Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979).

The clear weight of authority supports the constitutionality of NRS 200.033. Accordingly, Defendant's contention that the aggravating circumstances enunciated in the statute are unconstitutional lacks merit.

IV

THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF FIRST DEGREE MURDER

Defendant argues that his conviction for First Degree Murder with Use of a Deadly Weapon was not supported by sufficient evidence. However, there was ample evidence for a jury to find Defendant guilty of the crime charged.

The standard of review for sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Lisle v. State, 113 Nev. 540, 937 P.2d 473 (1997)(quoting Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994)).

It is the province of the jury to decide how they will interpret the testimony given at trial. "[I]t is for the jury to determine what weight and credibility to give various testimony." Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994). This function is exclusively within the province of the trier of fact. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20 (1981); Guy v. State, 108 Nev. 770, 776, 839

P.2d 578, 582 (1992); Doyle v. State, 112 Nev. 879, 921 P.2d 901, 910 (1996); Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). Moreover, the jury's verdict will not be disturbed on appeal if there is substantial evidence to support it and if the jury, acting reasonably, could have been convinced of the Appellant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328 (1974).

In State v. Walker, 109 Nev. 683, 857 P.2d 1 (1993), this Court offered sage advice on the proper standard of review in the face of an insufficiency challenge:

> Insufficiency of the evidence occurs where the prosecutor has not produced a minimum threshold of evidence upon which a conviction may be based. Therefore, even if the evidence presented at trial were believed by the jury, it would be insufficient to sustain a conviction, as it could not convince a reasonable and fairminded jury of guilt beyond a reasonable doubt. Id. at 685, 857 P.2d at 2.

In the instant case, Defendant was convicted of First Degree Murder with Use of a Deadly Weapon. In order to find one guilty of First Degree Murder with Use of a Deadly Weapon the fact finder must determine the murder is perpetrated by means of any kind of willful, deliberate, and premeditated killing as required by NRS 200.030. In addition, the fact finder must determine that the defendant utilized a deadly weapon which is readily capable of causing substantial bodily harm or death.

The jury was supplied with ample amounts of evidence and testimony sufficient to find Defendant guilty. "It is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay, 110 Nev. at 1192. Sufficient evidence was established that Defendant committed first-degree murder and thereby acted with willfulness, deliberation, and premeditation. The jury was properly instructed on the elements of murder in the first degree and reached a guilty verdict based on a factual determination that the Defendant's actions fit that definition. (A.A. 75). Eyewitness

testimony described how the Defendant initially confronted the individuals standing in the parking lot and confronted them stating, "I don't want to see any more fucking Mexicans here," before striking the victim on the head with the gun. (A.A. 219). The Defendant began shooting despite protests from one individual that a little boy was in the vicinity. (A.A. 219). The testimony from the Defendant's companion, Sheldon Hollimon, revealed that after shooting at the individuals in the parking lot, the Defendant went back into the apartment before firing three more rounds of the window, killing Carlos Villanueva. Seven bullet cartridge cases matching the gun the Defendant was carrying were found in the parking lot. In addition, this evidence was corroborated by testimony of eyewitnesses who said they saw the Defendant firing at Luis Alberto and Carlos Villanueva out in the parking lot. The evidence adduced at trial sufficiently demonstrated that the Defendant acted with willfulness, deliberation and premeditation. As a result, this Court should not second guess the jury merely because Defendant is dissatisfied with the outcome of their deliberation.

V

THE COURT DID NOT ERR IN ALLOWING THE ADMISSION OF OTHER BAD ACTS AGAINST DEFENDANT

Defendant claims that the State improperly inquired into Defendant's plea in the case. However, defense counsel opened the door on the issue by soliciting testimony about the Defendant's character. (A.A. 399-400) The State, therefore, had the right to cross-examine the witness about the Defendant's prior conduct .

Prior to trial the State filed a Motion to Admit Evidence of other crimes, seeking to introduce evidence that on April 10, 2000, the Defendant observed an individual entering his car in the parking lot and fired four shots out of the bathroom window at the individual. The court conducted a Petrocelli hearing to consider the motion and reserved ruling on the admissibility until further testimony

could be heard at trial. At the conclusion of the State's case, the Court reexamined the issue and ruled that the incident was inadmissible, but stated that since the issue was a "close call" it was more practical to "err on the side that will not get the case reversed." (A.A. 364).

Nevada Revised Statute 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Pursuant to NRS 48.045(1)(a) evidence of a person's character or trait is admissible if it is offered by the accused and similar evidence is also admissible if offered by the prosecution to rebut such evidence. In the present case, defense counsel solicited evidence about the Defendant's character during the direct examination of John Woodring. The pertinent portion of the transcript reads:

Q: As far as you were concerned, Mr. Campbell was nothing more man a paying tenant, correct?

A. Exactly

Q: As long as he didn't violate your rules, you didn't have no problem with him being there?

A: I didn't have no problem with Damon Campbell at all starting any kind of trouble at all.

...

Q: Did you have any problems with any of your Mexican tenants?

A: Yes, I did.

Q: And your problems with your Mexican tenants were what?

A: Drinking, partying too much, urinating on the buildings, causing fights between other tenants. (A.A. 401-403).

The line of questioning by defense counsel attempts to draw a contrast between the character of the Defendant compared with that of the victims and eyewitnesses. Since defense counsel solicited the evidence of Defendant's

character, it was proper to allow the State to cross-examine the witness about the prior incident in order to rebut such evidence. The questioning that was ultimately admitted was a direct rebuttal of the witness' prior testimony about the Defendant's character. The re-cross examination of the witness reads:

Q: Sir, you say that Mr. Campbell was a good tenant?

A: Yes, he was.

Q: No problems?

A: No problems.

...

Q: Were you aware that during the evening hours or early morning hours of April 10th, 2000, Mr. Campbell's Cadillac was stolen from the north parking lot?

A: Yes, we heard about that it got stolen.

Q: Were you aware as the person was driving away Mr. Campbell went to the bedroom window, pulled out a gun, and started firing out of the bedroom or bathroom window of apartment No. 2?

A: I can't recall that at all. I might not have been there that day.

Q: Did you hear about it from Mr. Campbell?

A: I believe they told us about it, someone tried to steal his car or did steal his car, and he was waiting to see if he could get it back through the police.

Q: Mr. Campbell pulled out a .22 caliber rifle and started firing out the back windows of his apartment at the vehicle, right?

A: That much I don't remember him doing. (A.A. 403-404).

...

Q: It is pretty dangerous when you shoot a gun at a moving vehicle with a person in it, right?

A: That's pretty dangerous, yes, it is.

Q: You have a lot of tenants in those apartments?

A: Yes, lot of children.

Q: Pretty dangerous to be firing a gun in that parking lot as well, isn't it?

A: Yes, it is. (A.A. 405).

"The trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error." Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995), *citing* Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). Furthermore, NRS 47.040 provides that other than plain error, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected," and "in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of the objection." The prosecution's re-cross examination of the witness was directed at the credibility of the witnesses' statement during re-direct examination, in which he stated that he had no problems with the Defendant as a tenant. It did not address further character evidence that might have been admitted, including numerous arrests for possession of various firearms. (A.A. 437). Rather, the testimony elicited under re-cross examination was limited to an incident to which the witness had personal knowledge and challenged his assertion that he had no prior problems with the Defendant.

"It is within the trial court's sound discretion whether evidence of a prior bad act is admissible, and such decisions will not be disturbed on appeal unless they are manifestly wrong." Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 351 (1995) (overruled on other grounds by State v. District Court, 114 Nev. 739, 964 P.2d 48 (1998)) (citing Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67 (1991)). See also, Hill v. State, 95 Nev. 327, 594 P.2d 699 (1979); Brinkley v. State, 101 Nev. 676, 708 P.2d 1026 (1985); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), cert. denied, 479 U.S. 871, 107 S.Ct. 246 (1986). The court in its Petrocelli hearing determined that the admissibility of the prior incident was a "close call" but ruled in favor of excluding the evidence. (A.A. 66). Defense counsel then opened the door to the incident by pursuing a line of questioning intended to establish that, unlike the victims and eyewitnesses, the Defendant's tenancy in the apartment complex

had progressed without incident. Therefore, the re-cross examination challenging the witness' prior statement was a proper rebuttal to the evidence of the defendant's character. Accordingly, the prosecutor's proper line of questioning does not entitle the Defendant to a reversal.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Defendant's conviction.

Dated this 3rd day of October 2002.

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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 this 3rd day of October 2002.

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By 
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on October 3, 2002.

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