NO. 30166-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

NIKOLAS F. CAMPBELL,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

Dennis W. Morgan WSBA #5286
Attorney for Appellant
PO Box 1019
Republic, Washington 99166
(509) 775-0777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

RULES AND REGULATIONS

ARGUMENT

The State's brief misstates the law in several instances and fails to address at least one (1) case which wholly supports Nikolas F. Campbell's position concerning the issue of same criminal conduct.

The State relies upon *State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996) in its argument that the law of the case doctrine is inapplicable under the facts and circumstances of Mr. Campbell's case. The State is wrong.

The *Worl* case relates to reconsideration by an appellate court of a decision in a prior appeal. It does not address the application of the law of the case doctrine to jury instructions.

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), as set forth in Mr. Campbell's original brief, is the correct analysis of the law of the case doctrine concerning jury instructions.

The State also relies upon *Personal Restraint of Brockie, slip opinion* 86241-9 (September 26, 2013) in its argument that a jury instruction containing an alternative means not set forth in the charging document cannot be considered in the absence of Mr. Campbell demonstrating "actual and substantial prejudice." Again, the State is in error.

The *Brockie* case came before our Supreme Court as a personal restraint petition (PRP). The Court, in an *En Banc* decision took great pains to distinguish between the burden of proof on a PRP and the burden of proof on a direct appeal.

The State has the burden of proof to establish that error in jury instructions is harmless error. The State's brief fails to establish harmless error.

The *Brockie* Court was clear when it stated "We continue to apply the rules developed through our jury instruction cases." (p. 3)

The *Brockie* Court went on to declare that the two-prong *Kjorsvik* [*State v. Kjorsvik,* 117 Wn.2d 93, 812 P.2d 86 (1991)] test is inapplicable to jury instruction cases (p. 5).

The State asserts that Mr. Campbell's failure to cite RAP 2.5(a) somehow detracts from his ability to raise an issue on appeal. There is no need to cite the rule when case law is clear. A RAP 2.5(a) analysis is not needed unless it is an issue that has not been previously been decided by an appellate court.

Moreover, Mr. Campbell fully outlines in his initial brief the problems with the jury instructions and the impact that the erroneous instructions had with regard to the outcome of his case. *See: State v. Bertrand,* 165 Wn. App. 393, 400, l. 8, 267 P.3d 511 (2011).

The confusion created by the jury instructions, insofar as they pertain to "firearms" and "deadly weapons" can be seen in the State's own brief and the argument concerning the issue. The final amended information relied upon the "pipe" as the "deadly weapon." Yet, the State contends that the jury could have found that the "firearm" was a "deadly weapon." *See:* State's brief, *fn.* 5, p. 11.

If the State itself is confused, then what must the jury have understood the instructions to mean?

The State attempts to sidestep the "deadly weapon" issue by claiming that the "pipe" was mere surplusage in the Information and instructions. The State ignores the fact that inclusion of surplusage and/or a nonessential element places the burden of proof upon it to establish that nonessential/surplus element beyond a reasonable doubt.

> In a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction.

State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005).

As presented to the jury, the State had to prove, beyond a reasonable doubt, that a "pipe" was used, attempted to be used, or threatened to be used as a deadly weapon in the commission of the robbery and the burglary.

Additionally, the State was required to prove, beyond a reasonable doubt, that either Mr. Campbell or Mr. Rice was armed with a deadly weapon.

The "pipe" is not a *per se* deadly weapon. The evidence presented is insufficient to establish that the "pipe" was used as a deadly weapon, attempted to be used as a deadly weapon, or threatened to be used as a deadly weapon.

Finally, concerning the same criminal conduct analysis, the State fails to respond to Mr. Campbell's Additional Statement of Authorities. In the absence of a response Mr. Campbell asserts that the State concedes the accuracy of the decision in *State v. Williams, slip opinion* 29931-7-III (August 15, 2013).

DATED this 8th day of November, 2013.

Respectfully submitted,

s/Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, Washington 99166
Phone: (509) 775-0777/Fax: (509) 775-0776
nodblspk@rcabletv.com

NO. 30166-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	BENTON COUNTY
Plaintiff,	)	NO. 10 1 00425 8
Respondent,	)	
	)	**CERTIFICATE**
v.	)	**OF SERVICE**
	)	
NIKOLAS F. CAMPBELL,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 8th day of November, 2013, I caused a true and correct copy of the *APPELLANT'S REPLY BRIEF* to be served on:

RENEE S. TOWNSLEY, CLERK — E-FILE
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

BENTON COUNTY PROSECUTOR'S OFFICE E-file (per agreement)
Attention: Terry Bloor
7122 W Okanogan Pl, Bldg A
Kennewick, Washington 99336
prosecuting@co.benton.wa.us

NIKOLAS F. CAMPBELL #871762 U.S. MAIL
Washington State Penitentiary
1313 N 13th Ave, GW-206
Walla Walla, Washington 99362

s/Dennis W. Morgan

Dennis W. Morgan, Attorney at Law
DENNIS W. MORGAN LAW OFFICE
PO Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE