

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ABDIEL SILVA

Appellant,

v.

STATE OF NEVADA

Respondent.

CASE NO. 81627

Appeal from a Judgment of Conviction After Jury Verdict
in Case CR18-1135(B)
Second Judicial District Court of the State of Nevada, Washoe County
Honorable David A. Hardy, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Attorney of Record for Appellant: Victoria T. Oldenburg, Esq.
2. Publicly held Companies Associated: None
3. Law firm appearing in the Court(s) Below:

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DATED this 22nd day of September, 2021.

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction pursuant to a jury verdict. 8 Appellant's Appendix (AA) 1790. A Notice of Appeal was filed on August 11, 2020. 8 AA 1792. This Court has appellate jurisdiction pursuant to NRAP 4(b)(1)(A).

ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(2) as it is a direct appeal of a jury verdict that involves the conviction of a category A felony.

STATEMENT OF THE ISSUES

- A. The District Court violated the Appellant's Fifth, Sixth and Fourteenth Amendment Rights to a fair trial and due process of law by permitting statements made by him in violation of his *Miranda* rights to be admitted at trial.
- B. The District Court violated the Appellant's Fifth, Sixth and Fourteenth Amendment Rights to a fair trial and due process of law by denying his right to an impartial jury.

STATEMENT OF THE CASE

The State filed a one count information against Appellant and codefendant Yiovannie Guzman with Murder with the Use of a Deadly Weapon. Appellant's Appendix (AA) Vol. 1, 0007. The State charged Appellant with the murder of Luz Linarez-Castillo by shooting her with a 9mm handgun at or near Neil Road, Reno,

Nevada, on the morning of November 2, 2017. 1 AA 007. The State charged Appellant and his co-defendant with aiding or abetting each other and/or acting as conspirators with each other in committing the murder. *Id.*

After a five-day jury trial, Appellant was found guilty of First-Degree Murder with the use of a Deadly Weapon. 2 AA 0308. The jury returned a penalty verdict of life with the possibility of parole after a minimum of 20 years had been served. 8 AA 1755. The district court sentenced Appellant to a consecutive term of 60 to 240 months on the Deadly Weapon Enhancement, and the Judgment of Conviction was entered on August 7, 2020. 8 AA 1790. On August 11, 2020, Appellant timely filed a Notice of Appeal. 8 AA 1792.

STATEMENT OF FACTS

A. Pre-Trial Motions

Appellant filed a pre-trial motion to Suppress statements made to Reno Police Department Detectives during interrogation interviews without being advised of his *Miranda* rights (1 AA 014) which was opposed by the State. (1 AA 0037). Appellant filed a Reply (1 AA 046), and thereafter oral arguments were held on the Motion to Suppress. 1 AA 0053). The district court granted the motion, suppressing all statements made during Appellant's interrogation. 2 AA 0195.

Thereafter the State filed a Motion in Limine seeking the admission of translated statements that Appellant made to his brother, Bernard Silva Guzman

(hereafter referred to as "Bernard Silva") in the interrogation room immediately following Appellant's interrogation and arrest by the police, 2 AA 0208, and a Supplement to the Motion in Limine, 2 A 0214, which was opposed by Appellant. 2 JA 0226. The State filed a Reply. 2 AA 0238. After oral argument the district court issued its order authorizing the admission of Appellant's confession to his brother immediately following his interrogation. 2 AA 0303, 0306-0307.

B. Trial

At approximately 4:50 a.m. on the morning of November 2, 2017, Reno Police Department (RPD) officers were dispatched to the area of Mazzone Avenue and Parkview Street, Reno, Nevada on reports of multiple shots fired. 4 AA 0632-0633. Responding officers located a red Dodge Charger sedan with its lights on and engine running stopped nose-in against the building of 1192 Parkview Street. The victim, Luz Linarez-Castillo ("Ms. Castillo"), was found unresponsive inside the vehicle with multiple gunshot wounds to her face, back and shoulder. 4 AA 633-640.¹ Six shell casings were located near the scene. 4 AA 0641-648. RPD also located four,

¹ The Medical Examiner testified that the victim was shot six times; the official cause of death was multiple gunshot wounds and the manner of death homicide. 4 AA 0630:23-24, 0631:1-9.

and what appeared to be fresh, cigarette butts (Marlboro "NXT,")² near the area where it was believed a potential suspect had been standing. 4 AA 0651, 0659-662.

1. Neighbor Testimonies

On November 2, 2017, Mr. Vincent Vasquez lived in the area of Parkview Street and Mazzone Avenue. 3 AA 0575-0576. As Mr. Vasquez was leaving for work sometime prior to 5:00 a.m. he saw a man standing near the scene wearing all black, including a black hoodie. 3 AA 0577-0578. When the man saw Mr. Vasquez he started walking away towards a white SUV near the scene pointing the wrong way towards Neil Road. 3 AA 0579-0580. Mr. Vasquez proceeded to get in his car and head down Parkview Street, to Neil Road, to Moana and then the freeway. 3 AA 0580. As soon as Mr. Vasquez got on the freeway he received a phone call from his wife. 3 AA 0582. Kimberly Vasquez testified that as she was walking her husband out that morning she saw what looked like an SUV, which appeared to be on, pointing the wrong way towards Neil Road and saw an individual, dressed in dark colors and wearing a dark hoodie, walking near the SUV. 3 AA 0586-0595. Ms. Vasquez went back to their apartment, watched her husband leave from the balcony, went back to bed, and then heard what sounded like gunshots. *Id.* She ran to the balcony, saw the SUV was gone, and called 911 and her husband. *Id.*

² A Marlboro NXT cigarette is a regular to menthol cigarette which has a green circle on the butt of the cigarette.

Mr. Juan Gonzalez lived on Neil Road adjacent to the scene. 4 AA 0597. The morning of November 2, 2017, prior to 5:00 a.m. he had gone outside to warm up his car, which was parked on Parkview Street, and while in the car heard gunshots. 4 AA 0598. He left his car running and went back inside to avoid being shot. 4 AA 0598-0599. Approximately ten minutes later he went back to his truck to leave for work and was driving towards Moana Lane behind a gray Toyota SUV, which he testified was the only vehicle around at that time. 4 AA 0599-0600. When Mr. Gonzalez came home later that day he observed police activity and printed off from the Internet a picture of a vehicle, a Toyota Sequoia, that looked very similar to the vehicle that he saw that morning and which he provided to the police. 4 AA 0601-0602.

2. RPD Detective Testimony

RPD Detective Michael Barnes assisted in processing the scene of the crime. 4 AA 0759, 0761. Detective Rhodes investigated the source of four NXT cigarette butts found near the scene and obtained documents from a loss prevention associate from 7-eleven who researched transactions of NXT cigarette sales in Reno and Sparks from 3:00 p.m. on November 1st through 6:00 a.m. on November 2 for all local 7-eleven stores and received surveillance stills of a transaction of two packs of NXT cigarettes being sold at a 7-Eleven at Greenbrae in Sparks on November 1st, 2017 at 10:48 p.m. 4 AA 0762-0766. The still images depicted Appellant wearing

a San Francisco 49'ers hat and clothing similar to that described by witnesses and located at his and his brother's residence, including a hoody, and which also showed Appellant as the passenger in a silver SUV. 4 AA 0819-0822.

RPD Detective Ben Rhodes was in charge of the crime scene. 4 AA 0698-0701. Detective Rhodes searched the residence of Appellant and his older brother Bernard Silva and located clothes consistent with clothes they were looking for from the 7-Eleven surveillance video obtained from the night of November 1, 2017 (a dark colored sweatshirt/hoody), and also located a 9-millimeter firearm, Taurus brand, a marriage certificate between Ms. Castillo and Bernard Silva, and ammunition which was the same brand as that found at the crime scene, Sphere, but a different caliber. 4 AA 0721-0726; the 9-millimeter firearm and ammunition was located in Bernard Silva's room, as well as an empty gun holster and a .40-caliber handgun. 4 AA 0746. Detective Rhodes searched a blue Lexus sedan registered to Appellant and found a cigarette butt in the trunk with a green circle consistent with that found on the four Marlboro NXT butts from the scene. 4 AA 0727-0730. When Appellant was arrested RPD Detectives took clothing from him including a black hoodie and a 49er's cap but never tested the items for GSR. 5 AA 0873, 6 AA 1272-1273.

Detective Rhodes located a gray Toyota Sequoia registered to Sylvia and Arturo Guzman, the parents of co-defendant Yiovannie Guzman, cousin to Bernard and Richard Silva. 4 AA 0730-0741.

During his investigation Detective Rhodes learned that Ms. Castillo was having an affair, that there was a "big fight" between Ms. Castillo and Bernard Silva, that he had shot himself in the chest, that he had been released from the hospital days before Ms. Castillo was shot, and that Ms. Castillo had obtained a Temporary Protection Order against Bernard Silva while he was in the hospital. 4 AA 0741-0742. In addition, he learned that the ex-girlfriend of the man with whom Ms. Castillo was having a romantic affair, Arturo Manzo, did not care for Ms. Castillo and Mr. Manzo and his ex-girlfriend were having significant issues. 4 AA 0750-0751.

Detective Kazmar and Detective Thomas initially interviewed Appellant on November 8, 2017. 5 AA 0854-0855. At that time the Detectives collected a water bottle from Appellant to have it tested for DNA. 5 AA 0856, 0865. During the interview Appellant informed Detectives he was never in the area of Mazzone Avenue and Parkview Street. 6 A 1235-1236.

Appellant was again interviewed on November 16, 2017. Detective Thomas testified that at some point after the arrest of Appellant on November 16, 2017, Appellant asked to speak with his brother, Bernard Silva. 6 AA 1247. During the

testimony of Detective Thomas evidence was presented regarding a recorded conversation on November 16, 2017 between Appellant and Bernard Silva in the interrogation room (immediately after Appellant's arrest) including statements by the Appellant that he and Ms. Castillo were having an affair, that is why he did it, and that he did not mean to kill her, he wanted to kill the dude. 6 AA 1256-1257, 6 AA 1289-1290 (testimony of translator). Appellant also made a statement to his mother during a jail call that they were trying to find the pistol and they aren't going to find it – he already got rid of it. 6 AA 1291-1293.

Detective Thomas also testified regarding his interview with Bernard Silva on November 2, 2017. 6 AA 1258. Detective Thomas found it "off" that Bernard Silva did not asked what had happened to Ms. Castillo until about 50 minutes into the interview. 6 AA 1261. From the interview Detective Thomas learned that there was a contentious relationship between Bernard Silva and Ms. Castillo, that there were allegations of physical violence and of Bernard stalking Ms. Castillo, and about the physical altercation between the two on October 20, 2017 wherein Bernard Silva shot himself in the chest; Bernard Silva learned of the affair with Mr. Manzo when he was in the hospital recovering from his wound. 6 AA 1260-1263. Detective Thomas also learned that Bernard Silva had sent Ms. Castillo 325 text messages from October 24 to November 1, 2017, and also made a significant amount of telephone calls to Ms. Castillo during that time period. 6 AA 1267-1268. Detective

Thomas also testified that during the interview Bernard Silva was wearing a black outfit including a black hoodie; however, Bernard Silva's clothes were not collected for testing. 6 AA 1268-1270.

3. Testimony of Arturo Manzo

Ms. Castillo was staying with Mr. Manzo the night of November 1, 2017. 5 AA 0875-0877 On the morning of November 2, 2017 Mr. Manzo walked Ms. Castillo to her car, returned to his apartment, heard gunshots and attempted to call Ms. Castillo. 5 AA 0878. Mr. Manzo knew of Bernard Silva and was informed Bernard Silva had struck Ms. Castillo on October 20, 2017. 5 AA 0883. Around that time Mr. Manzo had a telephone conversation with Bernard Silva and informed him that he and Ms. Castillo were dating; Mr. Manzo was subsequently contacted by Appellant who asked if he was dating Ms. Castillo and Mr. Manzo confirmed his relationship with Ms. Castillo, that conversation was the same day Bernard Silva had shot himself. 5 AA 0885-0891. Mr. Manzo also testified regarding his ex-girlfriend and the fact she had problems because he was with Ms. Castillo and that there was a physical fight between his ex-girlfriend and Ms. Castillo a few weeks before Ms. Castillo was killed. 5 AA 0896. Mr. Manzo testified that when he learned Ms. Castillo had been killed and police asked if he had any idea who could have done it his first response was it could have been his ex-girlfriend. *Id.*

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4. Forensic Witnesses

Ms. Ashlyn Burke, forensic investigator with the Washoe County Crime Lab at the time of the homicide, processed the crime scene, including the NXT cigarette butts, a Camel cigarette butt, six Sphere 9-millimeter Luger casings found at the scene, and bullets/fragments collected from the victim. 4 AA 0672-685. Ms. Kendra Baum, criminalist with the Washoe County Sheriff's Office Forensic Science Division also testified. 6 AA 1189. Ms. Baum examined three of the Marlboro NXT cigarettes butts from the scene and the water bottle obtained by police from Appellant on November 8, 2017³, using reference samples from Bernard Silva, Arturo Manzo, and Appellant. 6 AA 1202, 1203. The DNA profiles on the three cigarette butts and the water bottles were the same. 6 AA 1207. Ms. Baum matched two of the cigarette butts to Appellant with an estimated frequency of the matching DNA profile as 1 in 8.217 octillion individuals. Ms. Baum also analyzed two cigarette butts found in the area which matched to an unknown female DNA profile. 6 AA 1210. Ms. Baum was never asked to compare the unknown female DNA to Mr. Manzo's ex-girlfriend. 6 AA 1216. Ms. Baum was never asked to do DNA testing on the casings or bullets found at the scene.⁴ 6 AA 1214-1215.

³ Ms. Baum concluded Appellant was the source of the DNA profile obtained from water bottle swabs. 6 AA 1211.

⁴ The bullet fragments and casings were never matched to a weapon.

5. Testimony of Co-Defendant Yiovannie Guzman

Mr. Guzman was initially charged with Murder with the Use of a Deadly Weapon. Mr. Guzman made a deal with the State in exchange for his testimony and plead to Conspiracy to Commit Murder and Battery with the Use of a Deadly Weapon. 5 AA 0989. Mr. Guzman was aware, at the time of his testimony, that his final deal with the State, made one week prior to trial, could entitle him to probation and he could walk away a free man. 6 AA 1146-1147.

Mr. Guzman is Appellant's first cousin on his father's side. 5 AA 0997. Mr. Guzman stated that on Halloween night, October 31, 2017, he was smoking marijuana and snorting cocaine. 5 AA 1004. That evening he drove his vehicle, a gray Toyota Sequoia, to Paul's Market. 5 AA 1006-1006. While at Paul's Market he observed Appellant pulling in to the market with some friends. 5 AA 1008. He and Appellant had a conversation. Mr. Guzman testified that Appellant asked to borrow Mr. Guzman's car that night as he had "a mission to do and had to body somebody." 5 AA 1010-1011. Mr. Guzman agreed to let Appellant borrow his car that night and Appellant told him he would call him later in the evening. *Id.* Mr. Guzman testified he called Appellant later that evening and Appellant was at a friend's house on 4th and Greenbrae. 5 AA 1012. Mr. Guzman went to the house to let Appellant borrow his car. 5 AA 1013-1014. Mr. Guzman testified that he had a conversation at the home with Appellant and Appellant informed him he was going

to kill that Ms. Castillo that night and asked Mr. Guzman if he could be the driver. 5 AA 1014-1015. Mr. Guzman testified that Appellant was going to kill Ms. Castillo because she was threatening to take the kids away from his brother, Bernard Silva, and that Ms. Castillo had evidence to put Bernard away in prison for a long time. 5 AA 1015. Mr. Guzman testified that he agreed to drive Appellant, and the plan was they were going to go to the residence where she might be and kill her. 5 AA 1016-1017. Mr. Guzman said that Appellant stated he planned on doing it the same night, just later (early morning), and that Appellant knew what time she worked so at around that time they would go searching for her. 5 AA 1021. Mr. Guzman stated that the same evening he and Appellant went to a 7-11 on Greenbrae, in Mr. Guzman's vehicle with Mr. Guzman driving, so that Appellant could purchase cigarettes; Mr. Guzman stated that Appellant smoked Marlboro cigarettes in a black box with green lettering. 5 AA 1023. Mr. Guzman testified that he went home that evening, sometime past midnight, to sleep for a couple of hours and then drive to Appellant's home and go looking for Ms. Castillo but that did not occur because he slept through his alarm. 5 AA 1024-1026. Mr. Guzman stated he recalled Appellant sending text messages that morning asking where he was, stating it was "too late," and arranging for Mr. Guzman to sleep over at Appellant's home that evening. 5 AA

1026-1029.⁵ Mr. Guzman stated he went to Appellant's home that evening. 5 AA 1029-1030. That evening he and Appellant drove to Ms. Castillo's residence but her red Charger was not there, so they drove to Mr. Manzo's residence and observed her red Charger; Mr. Guzman stated Appellant knew of Mr. Manzo's residence from a co-worker at the DMV.⁶ 5 AA 1031-1034. Mr. Guzman testified that he and Appellant went back to Appellant's home and went to sleep. 5 AA 1034. Mr. Guzman stated that Bernard Silva was also in the home and knew about the plan to kill Ms. Castillo. 5 AA 1035-1037. Subsequently, on November 16, 2017, Mr. Guzman confessed to the police that he was the one who drove his gray Toyota Sequoia on November 2, 2017 and participated in the murder of Ms. Castillo. 5 AA 1060.

Mr. Guzman testified that the next morning he and Appellant got up and drove to the area of Parkview Street and Mazzone Avenue, parking his car on the north side of the street facing east towards Neil Road, where he was able to visually see

⁵ RPD Detective Josh Watson, Computer Crimes Unit (5 AA 0919), testified as to text messages between Appellant and co-defendant on November 1, 2017 at 4:28 a.m. where Appellant reached out to Mr. Guzman asking where he was, Mr. Guzman replying he had overslept, Appellant stating it was "too late" and arrangements being made to have Mr. Guzman stay with Appellant that evening. 5 AA 0936-0939.

⁶ Louise Roberts, former head of vehicle registration programming, testified that Appellant, an employee at DMV, had another employee run a license plate on October 36, 2017 on Arturo Manzo which provided information including residences and addresses. 5 AA 0903-0914.

Ms. Castillo's car. 5 AA 1039-1045. Mr. Guzman testified that he and Appellant waited in the vehicle, anywhere from 30 minutes to an hour, until Ms. Castillo came around the corner at the stop sign, and that Appellant exited the vehicle once during that time and recalled seeing him on the northeast corner of Mazzone Avenue and Parkview Street. 5 AA 1045-1047. Mr. Guzman stated he saw Appellant smoking in the area where the shooting occurred and also next to his vehicle. 5 AA 1055. Mr. Guzman testified that Appellant told Mr. Guzman Ms. Castillo was coming and Appellant waited near the corner of Mazzone Avenue. 5 AA 1047-1048. Mr. Guzman could see Appellant in his left rear-view mirror, saw Ms. Castillo arrive at the stop sign, and saw Appellant on her driver's side window firing the first shot, looked away, and heard another five shots fired. 5 AA 1049. Mr. Guzman stated that after the shots were fired he looked in his middle rear view and saw Appellant coming and the red car continue towards the curb. 5 AA 1051. Mr. Guzman stated that Appellant then entered the vehicle and they exited the area. 5 AA 1052. Mr. Guzman testified that he never saw a firearm. 6 AA 1132, 1169.

On cross Mr. Guzman testified as to his knowledge of the volatile relationship between Bernard Silva and Ms. Castillo, that Ms. Castillo was hurting Bernard physically and emotionally, that Bernard was angry, that Ms. Castillo was cheating on Bernard Silva, and that Bernard Silva shot himself after getting into an argument

with Ms. Castillo. 6 AA 1150-1151. Mr. Guzman stated that Ms. Castillo was breaking up the family. 6 AA 1151.

6. Juror No. 1

After the verdict was rendered on Friday, February 28, 2020, the following Monday, prior to the penalty hearing, the district court received information that Juror No. 1 had contacted the police the preceding Friday evening as he had believed he was being followed by someone on his way home from jury duty. 8 AA 1560, 1569. The Juror reported to the police that he knew a family member of the defendant and that the person worked with his wife. 8 AA 1569. The district court canvassed Juror 1 as to the circumstances of the incident and related matters. 8 AA 1608-1611. The incident was serious enough that the police had extra police presence Friday evening near the Juror's home. 8 AA 1611. The Juror stated that Friday evening the officers asked if he knew anyone related to the defendant and he said that he did, there's a person that knows his wife that he believes is family of the defendant, and that this person was a co-worker with his wife. 8 AA 1611-1612. The person he believed was family of the was also discussed at the beginning of trial. *Id.*⁷ While Juror No. 1 stated he could still be fair and impartial during the penalty hearing, he also stated he had felt threatened, and that going in to the penalty hearing that day he felt unease as to what happened on Friday maybe occurring again or

⁷ See Jury Questions During Trial; No Court Response, 2 AA 0310.

something worse possibly happening. 8 AA 1614-1616. Trial counsel challenged Juror No. 1 for cause which was denied by the district court. 8 AA 1617-1622.

SUMMARY OF THE ARGUMENT

The district court violated Appellant's constitutional rights by allowing evidence at trial of Appellant's inculpatory statements to his brother, Bernard Silva, made immediately after the illegal interrogation. The conversation between Appellant and his brother constituted the functional equivalent of continued police interrogation, and the statements were the fruit of the suppressed statements and therefore should have been excluded from the trial.

In addition, the district court erred by not excluding Juror No. 1 from the penalty hearing. Based upon the totality of the circumstances, it was apparent Juror No. 1 could not be impartial given his connection to a family member of the Appellant and the fact he felt threatened, quite possibly by that family member, and therefore expressed unease going into the penalty phase of the hearing.

LEGAL AUTHORITIES

- A. The District Court violated the Appellant's Fifth, Sixth and Fourteenth Amendment Rights to a fair trial and due process of law by permitting statements made by him in violation of his *Miranda* rights to be admitted at trial.**

1. Standard of Review

A trial court's determination of whether a defendant is "in custody" for *Miranda* purposes as well as the voluntariness of the defendant's statements presents

a mixed question of fact and law subject to the Supreme Court's *de novo* review. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

2. Argument

Prior to trial, Appellant filed a Motion to Suppress his statements made to the police during an interrogation on November 16, 2017 including his confession. 1 AA 0014. The district court granted the Motion, finding that all statements made during Appellant's interrogation were inadmissible as they were obtained in violation of his *Miranda* rights. 2 AA 0195.⁸

After the illegal interrogation concluded and Appellant was arrested, and while appellant was still in the interrogation room at the Reno Police Department, Appellant asked to speak to his brother, Bernard Silva. 2 AA 0209. During that audio and video recorded conversation Appellant made incriminating statements to Bernard Silva including that Appellant and Ms. Castillo were having an affair and that is why he did it, and that he did not mean to kill her, he wanted to kill the dude. 6 AA 1256-1257, 6 AA 1289-1290. The State filed a Motion in Limine to admit those statements, 2 AA 0208, which was opposed by Appellant. 2 AA 0226. The district court granted the Motion, finding:

This Court finds Mr. Silva voluntarily requested to speak to his brother after he confessed to the alleged crime. There is no indication the police initiated the conversation between Mr. Silva and his brother. To the contrary, the police seemed uncertain about allowing the contact,

⁸ *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

asking Mr. Silva why he wanted to speak to his brother and expressing concerns over Mr. Silva's safety. The police ultimately facilitated the conversation at Mr. Silva's request. While Mr. Silva was in custody during his conversation with his brother, it does not appear the police intended to use this exchange as a strategic interrogation technique or to elicit further incriminating statements....

2 AA 303, 306.

As previously set forth, the incriminating statements were admitted at trial. 6 AA 1256-1257, 6 AA 1289-1290.

The law is clear that when a confession is obtained in violation of a defendant's constitutional rights it shall be excluded at trial. *Silverthorne Lumber Co., v. United States*, 251 U.S. 385, 40 S.Ct. 182 (1920). The *Miranda* safeguards come into play whenever a person in custody is subjected to express questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980). The term "interrogation" under *Miranda* refers to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Id.* In *Arizona v. Mauro*, the United States Supreme Court suggested that a private third party's questioning of a person in police custody could constitute the functional equivalent of a police interrogation. *Arizona v. Mauro*, 481 U.S. 520, 526, 107 S.Ct. 1931 (1987).

It is undisputed that the interrogation and the illegally obtained confession had just finished when Appellant asked Detective Kazmar to speak to his brother; Detective Kazmar asked Appellant what he wanted to talk to him about and

Appellant stated he wanted to be the first to tell his brother what he told the officers. i.e. that he killed Ms. Castillo. 2 AA 0245, 0278; 2 AA 0226, 0227. The conduct of the detectives in asking Appellant what he wanted to speak to his brother about and allowing Appellant to speak to his brother knowing he was going make inculpatory statements by informing his brother of his confession operated as the functional equivalent of continued questioning, especially given that Appellant was still in the interrogation room where he was subject to audio and video recording.

In addition, the statements should have been excluded as fruit of the suppressed statement. Absent a direct infringement on fifth amendment rights, a violation of the rules of *Miranda* will not support the exclusion of evidence derived from the suppressed statement. *Rhodes v. State*, 91 Nev. 17, 22, 530 P.2d 1199, 1202 (1975); *Michigan v. Tucker*, 417 U.S. 433, 445-446, 94 S.Ct. 2357, 2364-65, 41 L.Ed.2d 182 (1974). Here, the statements can be traced back to a fifth amendment violation. If Appellant had been given his *Miranda* rights when he first invoked those rights, there would not have been a recorded encounter with his brother, his right to remain silent would have been protected, and the incriminatory statements to his brother would never have been made.

Because the conversation with Bernard Silva, which the Detectives reasonably knew would elicit a confession, constituted the functional equivalent of continued police interrogation, and the fact the statements were the fruit of the

suppressed statements, the district court erred in permitting the admission of Appellant's inculpatory statements to Bernard Silva.

B. The District Court violated the Appellant's Fifth, Sixth and Fourteenth Amendment Rights to a fair trial and due process of law by denying his right to an impartial jury.

1. Standard of Review

A district court has broad discretion in conducting *voir dire* and the court will generally not overturn its decision regarding impartiality of the jury absent an abuse of discretion. *Azucena v. State*, 135 Nev. 269, 271, 448 P.3d 534 (2019).

2. Argument

The right to a trial by jury means the right to a fair and impartial jury. *McNally v. Walkowski*, 85 Nev. 696, 700, 462 P.2d 1016, 1018 (1969). A district court should err in favor of seating an impartial jury whenever doubts remain as to the juror's impartiality. *Bryant v. State*, 72 Nev. 330, 333, 305 P.2d 360, 361 (1956).

As set forth above, Juror No. 1 had contacted the police the Friday evening after the verdict had been rendered as he had believed he was being followed by a person or persons on his way home from jury duty. 8 AA 1560, 1569. The Juror reported to the police that he knew a family member of the defendant and that the person worked with his wife. 8 AA 1569. The district court canvassed Juror 1 as to the circumstances of the incident and related matters. 8 AA 1608-1611. The incident was serious enough that the police had extra police presence Friday evening

near the Juror's home. 8 AA 1611. The Juror stated that Friday evening the officers asked if he knew anyone related to the defendant and he said that he did, there's a person that knows his wife that he believes is family of the defendant, and that this person was a co-worker with his wife. 8 AA 1611-1612. The person he believed was family of the Appellant was also discussed at the beginning of trial when Juror No. 1 recognized the person at the trial. *Id.*⁹ While Juror No. 1 stated he could still be fair during the penalty hearing, he also stated he had felt threatened, and that going in to the penalty hearing that day he felt unease because what happened on Friday might occur again or something worse (Juror No. 1 did not affirm he could be impartial). 8 AA 1614-1616. Trial counsel challenged Juror No. 1 for cause which was denied by the district court. 8 AA 1617-1622.

Of concern, the district court did not ask Juror No. 1 how he became aware that an assumed family member of Appellant, whom he said he recognized at trial, was a co-worker of his wife. It can certainly be implied that Juror No. 1 had a conversation with his wife regarding the person he assumed was a family member of Appellant and that Juror No. 1 had more intimate knowledge of Appellant and his family than was disclosed to the district court.

The email from Sparks Police that was provided to the prosecutor indicated that Juror No. 1, when questioned by the police, associated the person who was

⁹ See Jury Questions During Trial; No Court Response, 2 AA 0310.

following him with the family member of the defendant. 8 AA 1568-1569.¹⁰ Based upon the totality of the circumstances it is reasonable to conclude that Juror No. 1 could not be impartial if he felt he had been threatened by a family member of Appellant. In addition, given Juror No. 1's connection, at the very least through his wife, to a family member of Appellant, the fact he felt threatened, and his continued unease going into the penalty phase of the hearing could certainly negatively affect his thought process in determining Appellant's sentence and give rise to bias. Therefore, the district court erred in not removing Juror No. 1 from the penalty hearing.

CONCLUSION

The District Court violated the Appellant's Fifth, Sixth and Fourteenth Amendment Rights to a fair trial and due process of law by permitting statements made by him to his brother, Bernard Silva, in violation of his *Miranda* rights to be admitted at trial. Such statements constituted the functional equivalent of continued police interrogation and were the fruit of the suppressed statements.

In addition, the District Court violated the Appellant's Fifth, Sixth and Fourteenth Amendment Rights to a fair trial and due process of law by denying his right to an impartial jury. The district court erred by not removing Juror No. 1 under

¹⁰ According to the record the family member was later identified as Appellant's sister. 8 AA 1617.

facts that established Juror No. 1 could not be fair and impartial. Therefore, due to the constitutional errors Appellant's conviction should be reversed.

DATED this 22nd day of September, 2021.

VICTORIA T. OLDENBURG, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and it contains 6,029 words.

3. Finally, I certify that I have read the 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) (1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 22nd day of September, 2021.

VICTORIA T. OLDENBURG, ESQ.
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CERTIFICATE OF SERVICE

Electronically

I hereby certify that on this date the foregoing document was filed electronically with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Washoe County District Attorney
Jennifer P. Noble, Chief Appellant Deputy

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DATED this 22nd day of September, 2021.

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