

IN THE SUPREME COURT OF THE STATE OF NEVADA

NERY GUSTAVO FONSECA,
Petitioner,

-vs.-

EIGHTH JUDICIAL DISTRICT COURT,
Crystal Eller, District Court Judge,
Respondent,

THE CITY OF NORTH LAS VEGAS,
Real Parties In Interest.

Case No.: Electronically Filed
Nov 30 2021 03:30 p.m.
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Elizabeth A. Brown
Clerk of Supreme Court
NLVMC Case No.: CR000143-20

IN REGARDS TO A MATTER IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR CLARK COUNTY

THE HONORABLE CRYSTAL ELLER PRESIDING

APPENDIX FOR PETITION FOR WRIT OF MANDAMUS

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

NERY GUSTAVO FONSECA,
Appellant/Defendant

-vs.-

THE CITY OF NORTH LAS VEGAS,
Appellee/Plaintiff.

Case No.: C-21-356402-A
Dept. No.: 19

NLVMC Case No.: CR000143-20

Hearing Date: August 26, 2021
Hearing Time: 9:00 a.m.

AN APPEAL IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR CLARK
COUNTY, NEVADA OF A JUDGMENT IN MUNICIPAL COURT FOR THE CITY OF
NORTH LAS VEGAS, NEVADA

APPELLANT'S OPENING BRIEF

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Appellee/Plaintiff.)
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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. There are no such persons and/or entities that are required to be disclosed that are associated with the Appellant's counsel. The undersigned, Joseph P. Reiff, Esq., is and was the sole counsel of record in the above-entitled action in both the North Las Vegas Municipal Court and Eighth Judicial District Court, and will be the only counsel appearing on appeal.

Dated this ____ day of June, 2021.

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JURISDICTIONAL STATEMENT

The Eighth Judicial District Court has jurisdiction over this case pursuant to NRS 5.073, NRS 189.010, and 177.015, because the underlying criminal case in this matter is being appealed from a final judgment in the North Las Vegas Municipal Court, dated April 13, 2021. The Defendant/Appellant, herein referred to as Mr. Fonseca, timely submitted his Notice of Appeal for filing to the Clerk of the Court for the North Las Vegas Municipal Court on April 21, 2021, which was ultimately filed on May 10, 2021. J.A., at 112; and see *Transmittal of Notice of Appeal and Record on Appeal*, J.A., at 114, (explaining the delay by the Clerk's Office in file stamping the Notice of Appeal).

ISSUES ON APPEAL

- I. Were Mr. Fonseca's Constitutional rights violated when the City Prosecutor used evidence of his invocation of his prearrest right to an attorney as evidence of his guilt during their case in chief?
- II. Were Mr. Fonseca's Constitutional rights violated when the City Prosecutor used evidence of his invocation of his prearrest right to remain silent, and his actual silence, as evidence of his guilt during their case in chief?

STATEMENT OF THE CASE

The underlying case in this appeal is a criminal prosecution for one count of misdemeanor battery. J.A., at 108. Mr. Fonseca was tried in the North Las Vegas Municipal Court on April 13, 2021. *Id.*, at 1. After a bench trial that lasted several hours, the Court found Mr. Fonseca guilty of one count of misdemeanor battery. *Id.*, at 103-104. Mr. Fonseca then timely filed his Notice of Appeal. *Id.*, at 111.

STATEMENT OF THE FACTS

On or about December 03, 2019, Mr. Fonseca met with the Complainant, John Patino-Rios, herein Mr. Patino, and a witness, Edgar Roberto Medina, herein

referred to as Mr. Medina, at a parking lot located at or near Losee Road and Cheyenne Avenue in the City of North Las Vegas. J.A., at 10-11. During the meeting, an argument ensued resulting in Mr. Patino-Rios calling the North Las Vegas Police Department and alleging that Mr. Fonseca had committed a battery upon him. Id., at 11-14. Detective Forsberg responded to the alleged incident and began an investigation. Id., at 61-62. During the investigation, Det. Forsberg called Mr. Fonseca. Id., at 63. Mr. Fonseca affirmatively advised Det. Forsberg that he was invoking his right to remain silent and his right to counsel. Id.

At trial, the Deputy City Attorney, during his opening statement, made reference to the fact that Mr. Fonseca had invoked his right to remain silent and to his right to counsel. Id., at 2-3. Defense counsel objected to this reference. Id., at 3. The Court sustained the objection, and the City Attorney retracted the reference. Id. Amid the City's case in chief, the Deputy City Attorney, during the direct examination of Det. Forsberg, elicited testimony multiple times about Mr. Fonseca invoking his right to remain silent and right to counsel. Id., at 63-64. Further, Det. Forsberg testified that he determined that Mr. Fonseca had committed the battery because he had invoked his right to remain silent and requested an attorney. Id., at 64.

During cross-examination of Mr. Fonseca, the Deputy City Attorney again elicited testimony regarding Mr. Fonseca invoking his right to remain silent and right to counsel. Id., at 80. Defense counsel objected, arguing that this line of questioning violated Mr. Fonseca's right to remain silent and right to counsel. Id., 80-82. At first, the Court stated that, "if his answer -if the answer is based upon him exercising his right to remain silent at the time of the phone call, the Court certainly would take that into consideration." Id., at 81. Defense Counsel continued to argue that the City's reference to Mr. Fonseca invoking his

right to remain silent and right to counsel, was a violation of his rights because the City was using the information as evidence of his guilt. *Id.*, at 82. The Court then held that the City, "...can make the fact known that your client exercised his right to counsel on the record. Okay. But it's up to the Tier of Fact to determine whether that is even given any you know – you know any weight at all." *Id.* Ultimately, the Court overruled the objection, and the City was able to elicit evidence that Mr. Fonseca invoked his right to remain silent and right to counsel as evidence that Mr. Fonseca was guilty of the battery. *Id.*, at 82-85.

During the City's closing argument, the Deputy City Attorney argued that Mr. Fonseca must be guilty because he refused to speak to the police by invoking his right to remain silent and right to counsel, inferring that a person who is not guilty would have talked to the police. *Id.*, at 93. The Deputy City Attorney argued that Mr. Fonseca refused to talk to the police, stating, "you can talk to my lawyer. Click." *Id.* Finally, in summing up the evidence, the City argued,

"He hit John Patino in the face with a metal baton. Edgar Medina saw it. Tried to break it up. And that's why he left the scene. *And that's why he didn't cooperate with the police and that's why he's guilty of one count of battery*, Your Honor."

Id. (emphasis added).

During the Court's summation of the evidence that it relied upon in making its decision, the Court considered evidence that Mr. Fonseca had invoked his prearrest right to remain silent and right to counsel. *Id.*, at 102. The Court stated,

"And that at – when – the detective stated that he started to ask him questions about whether he had, uh, attacked or hit Mr. Patino with any weapon at that moment. Uh. He stated that Mr. Fonseca stated, 'I'm not going to answer any more questions without – you know without speaking to my lawyer first... And that he terminated the phone call.'"

Id., at 101-102, 103. The Court then went on to state that in deciding whether Mr. Fonseca was guilty, the standard of proof was, “what makes sense here.” Id., at 102. The Court went on to state that in determining guilt or innocence, it had to determine who was more credible, the City’s witnesses or Mr. Fonseca. Id., at 103. The Court ultimately found Mr. Fonseca guilty of one count of misdemeanor battery. Id., at 103-104.

SUMMARY OF THE ARGUMENT

I.

A defendant has the right to retain counsel at any time and the State may not refer in its case-in-chief to retention of counsel as, in and of itself, evidence of consciousness of guilt. *Dettloff v. Nevada*, 120 Nev. Adv. Op. No. 67, 6 (9/16/2004); see *Bruno v. Rushen*, 721 F. 2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984). Mr. Fonseca’s Sixth Amendment right to counsel was violated, over the objection of defense counsel, when City Attorneys used evidence of his prearrest invocation of his right to counsel as evidence of his guilt during their case in chief. The violation was not harmless error because the Judge considered the evidence in finding Mr. Fonseca guilty of one count of battery.

II.

Most courts, post *Salinas v. Texas*, 570 U.S. 178, 194-95 (2013), have held that where an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt. See *United States v. Okatan*, 728 F.3d 111, 118-120 (2nd Cir. 2013); *Castillo v. State*, 475 P. 3d 803, 810-811 (N.M. 2020). Mr. Fonseca’s Fifth Amendment right to remain silent was violated, over the objection of defense counsel, when City Attorneys used evidence of his prearrest invocation of his right to remain

silent, and his subsequent silence, as evidence of his guilt during their case in chief. The violation was not harmless error as the Judge considered the evidence in finding Mr. Fonseca guilty of one count of battery.

LEGAL ARGUMENT

I. MR. FONSECA'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE CITY PROSECUTOR USED EVIDENCE OF HIS INVOCATION OF HIS PRE-ARREST RIGHT TO AN ATTORNEY AS EVIDENCE OF HIS GUILT, DURING THEIR CASE IN CHIEF.

A. STANDARD ON REVIEW.

A District Court reviews a lower court's findings of fact for clear error, but the legal consequences of those factual findings, such as constitutional issues, are reviewed de novo. *Manning v. State*, 131 Nev. 206, 209-10, 348 P.3d 1015, 1017-18 (2015); *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'" *McAllister v. United States*, 348 U.S. 19, 20 (1954).

B. STANDARD FOR A PROSECUTOR'S USE OF A DEFENDANT'S INVOCATION OF HIS PRE-ARREST RIGHT TO AN ATTORNEY.

The Nevada Supreme Court has held that the Nevada Constitution's right for a defendant to pretrial retainment of an attorney is consistent with that of the United States Constitution's Sixth Amendment. *Dettloff*, 120 Nev. Adv. Op. No. 67, 6 n. 24. As such, a defendant has the right to retain counsel at any time and the State may not refer in its case-in-chief to retention of counsel as, in and of itself, evidence of consciousness of guilt. *Id.*, at 6; see *Bruno*, 721 F. 2d 1193, 1195 (a prosecutor's statement suggesting that retention of counsel is inconsistent with

innocence impermissibly infringes on a defendant's constitutional right to counsel); see also *United States v. Daoud*, 741 F.2d 478, 481 (1st Cir. 1984)(same); *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982)(same); *Jacks v. Duckworth*, 651 F.2d 480, 483 (7th Cir. 1981)(same); *United States es rel. Macon v. Yeager*, 476 F.2d 613, 615 (3rd Cir. 1973) cert. denied 424 U.S. 855 (same); *Zemina v. Solena*, 573 F.2d 1027 (8th Cir. 1978); *Marshall v. Hendricks*, 307 F.3d 36 (3rd Cir. 2002); and see *Chapman v. California*, 386 U.S. 18, 23-24 (1967)(applying the harmless error rule).

C. APPLYING THE STANDARD TO THE CASE AT BAR.

1. The City Violated Mr. Fonseca's Sixth Amendment Right To Counsel When They Used His Invocation Of The Right As Evidence Of His Consciousness Of Guilt In Their Case In Chief.

In the case at bar, the City used evidence of Mr. Fonseca's invocation of his right to retain counsel as evidence of his consciousness of guilt in their case-in-chief. On no less than four occasions, the City made reference to, and/or elicited evidence of, Mr. Fonseca's retaining counsel to prove that he had a consciousness of guilt. The City's attorneys in this case lost sight of their sworn duty to "see that justice be done" and instead took the role of "winning at all costs," even if it meant the violation of Mr. Fonseca's Constitutional rights. *Skiba v. Nevada*, 959 P.2d 959, 963 (Nev. 1998), Young concurring, citing *Bruno*, supra., at 1195. As Justice Young wrote in his concurring opinion, "the prosecutors in this State need a stern reminder of their role as representatives of the people." *Id.*

The City's improprieties started from the start with their first violation of Mr. Fonseca's rights being made during their Opening Statement. The City stated:

"Then Detective [sic] tried to reach out to the defendant. Got him on the phone. The defendant said, 'I refuse to talk to you without a lawyer. Don't call me again.' And hung up the phone. And that's why we're here today. Your Honor."

J.A., at 2-3. Defense counsel objected, and the City “retracted” the statement. Id., at 3. The Court acknowledged the retractment and ordered the statement, “removed.” Id.

The City continued its misconduct during its direct examination. During direct examination of Detective Forsberg, the City questioned Forsberg about Mr.

Fonseca’s invocation of his right to retain counsel. The colloquy went as follows:

Mr. Goswami: Did you attempt contact with the Defendant?

Mr. Forsberg: I did. I attempted – I called him on his, uh, cell phone that was provided by the victim.

Mr. Goswami: Okay. Okay. And what if it – what if anything did the defendant tell you, uh, about what occurred?

Mr. Forsberg: He told me he had went to meet with the, uh, victim to exchange some money that was owed to him. The money that he was offered was not the amount he was expecting. And he became upset. An argument ensued and then he didn’t want to talk to me without a lawyer and to not contact him again.

Mr. Goswami: And did he hang up on you?

Mr. Forsberg: He did.

J.A., at 63. The colloquy concluded as:

Mr. Goswami: And why did you determine him to be the batterer?

Mr. Forsberg: The injury present on the victim was consistent with his story and the witness’ story. And obviously I didn’t get any rebuttal from Mr. Fonseca or any explanation.

J.A., at 64.

The City Attorney continued his transgressions throughout the trial. During cross-examination, the City elicited testimony regarding his invocation of Mr. Fonseca’s right to retain counsel. The colloquy went as follows:

Mr. Goswami: Okay. And you also told the detective that you were not going to talk to him without consulting a lawyer. You told him to never call you again. And you hung up the phone on him. Correct?

Mr. Fonseca: I did not understand that well what the other person was saying. Calls kept coming in from a private number I did not recognize.

Mr. Goswami: Did you ever tell the detective on the phone that Mr. Medina and John Patino-Rios attacked you in a McDonald's public parking lot? Did you tell the detective that? Yes or no?

J.A., at 80.

Defense counsel vigorously objected to this line of questioning, arguing that it was a violation of Mr. Fonseca's right to remain silent and to counsel, because the City was using the invocation of his right to counsel as evidence of his guilt. *Id.*, at 80-82. The Judge initially held that if the City was attempting to elicit testimony concerning his right to remain silent at the time of the phone call, that it would be improper. *Id.*, at 81. However, the Court construed the line of questioning as eliciting evidence of whether or not he provided information about the incident, thus overruling the objection. *Id.*, at 82-83. The Court went on to state that the City could properly put on the record the fact that Mr. Fonseca invoked his right to remain silent and to counsel. *Id.*, at 82.

The City's final indiscretion took place during its Closing Arguments. The City Attorney argued that Mr. Fonseca's invocation of his right to counsel was evidence that he was guilty of the battery. *Id.*, at 92-93. The City argued, in pertinent part:

"Now the defendant had an opportunity to speak with Detective Forsberg ... before making any determinations, he tried to speak with the defendant ... at that point if you are the victim if you are in the parking lot beat up by – by these two big, huge guys and barely got away. And now you're on the phone with the police that's when you say. 'I'm the victim. I was beat up' ... He didn't say any of that. 'You talk to my lawyer.' Click. The next day he didn't call the police. The next day he didn't call the police. All the way

up until now he didn't call the police. At ... no point has he ever called the police ... Who was the victim, Judge?"

Id., at 92-93.

These kinds of statements have been held to violate a defendant's right to counsel. See *Bruno*, 721 F.2d at 1194-95 (holding that "in no situation in a criminal trial such as this one do we feel the mere act of hiring an attorney is probative in the least of the guilt or innocence of defendants. '[L]awyers in criminal cases are necessities not luxuries.' *Gideon v. Wainwright*, 372 U.S. 335, 334, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and even the most innocent individuals do well to retain counsel"); see also *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Sulie v. Duckworth*, 689 F.2d 128, 131 (7th Cir. 1982).

A case on point is *Macon*, *supra*. In *Macon*, the defendant was convicted of manslaughter based upon the shooting of the victim during an altercation following a minor traffic accident. The defendant's version of the event was that he had been assaulted by the victim and his friends, and his gun went off accidentally during the struggle. In summation, the prosecutor commented on the defendant's conduct after the shooting, arguing that his actions were consistent with his claim of innocence. Among the prosecutor's remarks were the following:

"He goes home and puts the shirt down in the chest, a torn shirt. Then he goes to bed He says he had trouble sleeping. He gets up the next morning and lo and behold, what does he do? He calls his lawyer. These are acts of innocence?"

Macon, at 614. In reversing the defendant's conviction, the Court of Appeals held that these kinds of references violate the defendant's right to counsel. *Id.*, at 613-15. The references made by the City in the case at bar, are nearly identical to those the *Macon*, *supra*., Court found unconstitutional. *Id.* Therefore, this Court should

likewise find that the City's statements and arguments violated Mr. Fonseca's right to retain counsel. *Id.*

2. The City's Misconduct Was Not Harmless Error.

The City may argue that the violation of Mr. Fonseca's Constitutional rights was harmless error. The Supreme Court has stated that an error of constitutional dimension is not harmless if "there is a reasonable possibility that it might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, and see *Dettloff*, at 6 n.24; *Macon*, at 616-17.

In the case at bar, the record clearly shows that the error was not harmless. In making his decision, even though Judge Hoeffgen acknowledged that the City had violated Mr. Fonseca's Constitutional rights, he considered the City's evidence that Mr. Fonseca's invocation of his right to retain counsel was not consistent with his claim to innocence. J.A., at 101-102. Judge Hoeffgen stated that he considered Detective Forsberg's testimony concerning this phone call with Mr. Fonseca, inferring that his invocation of his right to counsel was not consistent with his claim to be innocent. *Id.* Judge Hoeffgen stated in pertinent part,

"When the detective stated that the moment that he started to ask him about whether he had, uh, attacked or hit Mr. Patino with any weapon at that moment. Uh. He stated that Mr. Fonseca stated, 'I'm not going to answer any more questions without – you know without speaking to my lawyer first.'"

Id. Judge Hoeffgen, ignoring Constitutional mandates not to do so, went on to state that Mr. Fonseca's testimony was not credible because he had an opportunity to tell the police he was a victim, but instead invoked his right to counsel. *Id.*, 102-103. Judge Hoeffgen determined that Mr. Fonseca was not credible because his actions, in invoking his right to counsel, were not consistent with his claim to be

innocent. *Id.* Therefore, the Court should hold that the violation of Mr. Fonseca's right to counsel, pursuant to both the United States and Nevada Constitutions, was not harmless error and reverse Judge Hoeffgen's finding that Mr. Fonseca was guilty of one count of battery. *Bruno*, 721 F.2d at 1195; *Daoud*, 741 F.2d at 481; *Milstead*, 671 F.2d at 953; *Duckworth*, 651 F.2d at 483; *Macon*, 476 F.2d at 615.

II. MR. FONSECA'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE CITY PROSECUTOR USED EVIDENCE OF HIS INVOCATION OF HIS PRE-ARREST RIGHT TO REMAIN SILENT AS EVIDENCE OF HIS GUILT, DURING THEIR CASE IN CHIEF.

A. STANDARD ON REVIEW.

A District Court reviews a lower court's findings of fact for clear error, but the legal consequences of those factual findings, such as constitutional issues, are reviewed de novo. *Manning v. State*, 131 Nev. 206, 209-10, 348 P.3d 1015, 1017-18 (2015); *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' " *McAllister v. United States*, 348 U.S. 19, 20 (1954).

B. STANDARD FOR A PROSECUTOR'S USE OF A DEFENDANT'S INVOCATION OF HIS PRE-ARREST RIGHT TO REMAIN SILENT.

The Fifth Amendment prohibits prosecutors from commenting on an individual's silence where that silence amounts to an effort to avoid becoming a witness against himself. *Salinas v. Texas*, 570 U.S. 178, 194-95 (2013)(Breyer, Ginsburg, Sotomayor, and Kagan dissenting). In *Salinas*, supra., the United States Supreme Court recently held that a criminal defendant must affirmatively invoke

his right to remain silent to take advantage of the Fifth Amendment's privilege against self-incrimination. *Id.*, at 183-184 (2013).

While the Supreme Court did not resolve the division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief, leaving the pre-*Salinas* state of the law to exist, it did clarify the issue is properly analyzed in two parts. *Id.*, at 183; and see *United States v. Okatan*, 728 F.3d 111, 118 (2nd Cir. 2013). The Supreme Court stated that the proper standard to determine the issue is, first, whether the defendant properly asserted his right to the privilege against self-incrimination, and second, if so, whether the prosecution may use that assertion as part of its case in chief. *Ibid.* The Nevada Supreme Court has not ruled on this specific issue, but it is likely that it would side with the majority of the Federal Circuit and State Supreme Court's holding that a prosecutor may not do so. See *Dettloff*, 120 Nev. Adv. Op. No. 67, at 5 n.23, 24; *Boehm v. State*, 944 P.2d 269, 271 (Nev. 1997)(holding that the Nevada Constitution guarantees the same rights as the Fifth Amendment); and see *Okatan*, at 118-119, n. 2-3 (explaining the state of the issue *post-Salinas*); Anna Strandberg, *Asking For It; Silence and Invoking the Fifth Amendment Privilege Against Self-Incrimination After Salinas v. Texas*, 8 *Charleston L. Rev.* 591, 614 (2014)(*same*).

C. APPLYING THE STANDARD TO THE CASE AT BAR.

1. Mr. Fonseca Affirmatively Asserted His Right To Remain Silent.

In the case at bar, Mr. Fonseca affirmatively asserted his Fifth Amendment right to the privilege against self-incrimination. First, during his phone conversation with Detective Forsberg, Mr. Fonseca told the detective that he did not want to speak with the detective any further without a lawyer, and "not to contact me

again.” J.A., at 63, 80. Detective Forsberg recognized that Mr. Fonseca was invoking his Fifth Amendment right to remain silent, because the detective never contacted him again. Id.

Secondly, Mr. Fonseca invoked his right to remain silent at the moment that the detective asked the question, whether or not he had struck the Complainant with a weapon. Id., at 63, 80, 101-102. Under these conditions, Mr. Fonseca affirmatively invoked his right to the privilege against self-incrimination. See *Salinas*, at 181-82, 202; *Fare v. Michael*, 442 U.S. 707, 719 (1979); *Emspak v. United States*, 349 U.S. 190, 194 (1955); *Okatan*, at 118-119; *State v. Costillo*, 475 P. 3d 803, 810 (NM 2020).

2. The City Impermissibly Used Mr. Fonseca’s Silence As Evidence Of His Consciousness of Guilt.

Prior to *Salinas*, the Federal Circuit and State Supreme Courts were divided over whether the government could use a defendant’s simple prearrest silence in its case in chief, but no Court had yet ruled that the prearrest invocation of the Fifth Amendment, and subsequent silence, was admissible evidence in the prosecution’s case in chief. *Okatana*, at 120 n.3. Since that time, and prior thereto, most of the courts that have decided the issue have held that where an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt. See *Okatana*, at 118-119, 120 n.3 (listing those Circuits ruling favorably on the issue including the First, Second, Sixth, Tenth, and Seventh); and see *People v. Ramos*, 216 Cal.App.4th 195, 206-7 (Cal. App. 4th 2013); *Castillo*, at 810-811(N.M.); *State v. Schiller-Munnema*, 377 P.3d 554, 560-61 (OR 2016); *State v. Tsujimura*, 400 P.3d 500 (Haw. 2017); *State v. Anderson*, 475 P.3d 967 (UT App. 2020); *State v.*

Anderson, Case No. 3557675-5-III, 7-9 (WA App. 9/17/2019) (unpublished).

While the Nevada Supreme Court has not yet ruled on the issue, it is likely that it will join these Federal Circuits and State Supreme Courts.

In the case at bar, as argued above, the City commented on, and elicited evidence of, Mr. Fonseca's prearrest invocation of his Fifth Amendment right to remain silent and actual prearrest silence, presenting it as evidence of his guilt no less than four times during trial. See *Supra.*, at 6-10. This included the City's statement during the Opening Argument, eliciting testimony from Detective Forsberg, eliciting testimony from Mr. Fonseca, and the City's statements during Closing Argument. *Id.* This was a violation of Mr. Fonseca's Fifth Amendment right to remain silent. *Okatana*, at 118-119; *Castillo*, at 810-811.

3. City's Violation of Mr. Fonseca's Fifth Amendment Rights Was Not Harmless Error.

An error of constitutional dimension is not harmless if "there is a reasonable possibility that it might have contributed to the conviction." *Fahy*, 375 U.S. at 86-87. The State must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, and see *Dettloff*, at 6 n.24; *Macon*, at 616-17.

In the case at bar, the record clearly shows that the City's misconduct was not harmless error. In making his decision, Judge Hoeffgen relied upon the City's evidence that Mr. Fonseca's invocation of his right to remain silent, and his actual silence, was not consistent with his claim to innocence. *J.A.*, at 101-102. Judge Hoeffgen stated that he considered Detective Forsberg's testimony concerning this phone call with Mr. Fonseca, inferring that his invocation of his right to remain silent, and his actual silence, was not consistent with his claim to be innocent. *Id.* He also considered the fact that the detective testified that he established probable cause, in part, through Mr. Fonseca's invocation of his right

to remain silent, and his actual silence. *Id.* Judge Hoeffgen stated in pertinent part,

“When the detective stated that the moment that he started to ask him about whether he had, uh, attacked or hit Mr. Patino with any weapon at that moment. Uh. He stated that Mr. Fonseca stated, ‘I’m not going to answer any more questions’...that he terminated the phone call... it’s clear from the detective’s testimony that, uh, Mr. Fonseca didn’t take the time or utilize the opportunity to – to provide him information, uh, in particular about him being a victim of crime.”


Id.

Judge Hoeffgen, went on to state that Mr. Fonseca’s testimony was not credible because he had an opportunity to tell the police he was a victim, but instead invoked his right to remain silent. *Id.*, 102-103. Judge Hoeffgen determined that Mr. Fonseca was not credible because his actions, in invoking his right to remain silent, were not consistent with his claim to be innocent. *Id.* Therefore, the Court should hold that the violation of Mr. Fonseca’s right to remain silent, pursuant to both the United States and Nevada Constitutions, was not harmless error and reverse Judge Hoeffgen’s finding that Mr. Fonseca was guilty of one count of battery. *Okatana*, at 120-121; *Castillo*, at 811-812.

CONCLUSION

For the foregoing reasons, this Court should **GRANT** Mr. Fonseca’s appeal, and issue an order **REVERSING** the North Las Vegas Municipal Court’s Order finding Mr. Fonseca guilty of one count of misdemeanor battery and **REMAND** the case back to the lower Court with instructions to provide Mr. Fonseca with a new trial.

Dated this / day of July, 2021.



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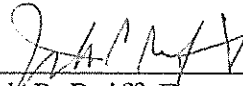
CERTIFICATE OF COMPLIANCE

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) because this brief has been prepared in a proportionally spaced typeface using Microsoft 365 Word in 14 point “Times New Roman.”

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30pages.

3. Finally, 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)(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 7 day of July, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that I did serve a true and correct copy of the Appellant/Defendant's Opening Brief on the Appellees/Plaintiffs via electronic mail to:

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Dated this ____ day of July, 2021.



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**IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

NERY GUSTAVO FONSECA,
Appellant/Defendant

-vs.-

THE CITY OF NORTH LAS VEGAS,
Appellee/Plaintiff.

26

Case No.: C-21-356402-A

Dept. No.: 19

AN APPEAL IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR CLARK
COUNTY, NEVADA OF A JUDGMENT IN MUNICIPAL COURT FOR THE CITY OF
NORTH LAS VEGAS, NEVADA

JOINT APPENDIX

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

NERY GUSTAVO FONSECA,)
Appellant/Defendant)
)
-vs.-)
)
THE CITY OF NORTH LAS VEGAS,)
Appellee/Plaintiff.)
_____)

Case No.: C-21-356402-A

Dept. No.: 19

NLVMC Case No.: CR000143-20

Hearing Date: August 26, 2021

Hearing Time: 9:00 a.m.

AN APPEAL IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR CLARK
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- Judge Hoeffgen: All right. Good afternoon. All right. We are here – we're here in the matter of Nery Gustavo Fonseca CR14320. We are scheduled for trial today. All right. And –
- Mr. Goswami: Thank you very much, Your Honor. City is ready to proceed to trial.
- Judge Hoeffgen: All right. And will any party be invoking the exclusion rule?
- Mr. Reiff: The defense does, Your Honor.
- Judge Hoeffgen: Okay. So, if you've been subpoenaed to testify at this trial today you are instructed by the Court to go wait out in the hallway. Please do not discuss the case while you're waiting to be called into trial. All right. And will there be any opening statements by either party?
- Mr. Goswami: I'll waive if ready to proceed to trial.
- Judge Hoeffgen: Mr. Reiff?
- Mr. Reiff: Judge, I would like to, uh, but I just have a couple, uh, exhibits. I – I have them marked at the time.
- Mr. Goswami: Then we'll give an opening statement as well, Your Honor.
- Judge Hoeffgen: Okay. So, you're going to give an opening statement?
- Mr. Goswami: Yes, Judge.
- Judge Hoeffgen: Okay.
- Mr. Goswami: I don't think defense is even permitted to give one if the prosecution waives, but that's fine. We'll – we'll give one.
- Judge Hoeffgen: Okay.
- Mr. Goswami: May – may I please the Court, Your Honor? May I proceed?
- Judge Hoeffgen: Yes.
- Mr. Goswami: Thank you, Your Honor. Your Honor, the evidence will show that on December 3, 2019, uh, the victim in this case, Mr. Patino-Rios, agreed to meet – meet the defendant at a McDonald's here in North
-

Los Vegas. The evidence is going to show you, Your Honor, that the reason that the victim chose the McDonald's was because it was a public place, and he was aware that the defendant had a propensity for anger and, uh, temper issues.

He asked a friend to go with him and the reason that they were meeting at this McDonald's, Your Honor, was to discuss payment for a job that they had done together. The evidence will show you that when the victim arrived at the McDonald's with his friend the defendant was not there yet. And, uh, the friend went into the McDonald's to use the bathroom. When he came out the defendant was already there and had arrived.

The evidence will show, Your Honor, that the defendant was very upset with the victim because he felt that the victim was not paying him what he was owed. The defendant, uh – victim brought some records to show him why he felt the payment was appropriate. The defendant did not like that, Your Honor. He became angry, he became irate, and at a – at some point, Your Honor, he produced, uh, an – an item which he used as a weapon. Uh.

The victim is going to tell you that he recognized that item because he had seen it in the defendant's shop before. He took that item, Your Honor, and he swung, uh, several times. He missed the witness, but he did strike the victim in the nose, Your Honor. And – and Judge you're going to see – you're going to see photos of the injuries. And also, what I think is important, Your Honor, is the evidence is – is going to show that it was the victim – the victim is the one that called on 911.

So, Detective Forsberg arrives along with Officer Aguilar. And you're going to see, Your Honor, the evidence is going to show you that the defendant is the one that fled the scene. Didn't stick around. Uh. Detective Forsberg gets there, Judge. He sees the injuries. He talks to, uh, the victim. Officer Aguilar talks to the witness, Your Honor, in accordance with their training they separate the witnesses just to make sure everybody – they can hear both sides of the story without them being in their – in their own presence.

And both officers will tell you, Your Honor, that both statements corroborated the injuries and what occurred. Um. And it was consistent with what – what the victim said, and the witness said. Then Detective tried to reach out to the defendant. Got him on the

phone. The defendant said, "I refuse to talk to you without a lawyer. Don't call me again."

And hung up the phone. And that's why we're here today, Your Honor. I believe that the defense is going to try to present you an argument that, uh, because the victim in this case may not have been –

Mr. Reiff: Objection, Your Honor. The – what I am going to present is not what the evidence is going to be presented – the State is arguing – I'm sorry. The State's – the City's opening statement –

Mr. Goswami: I'll retract, Your Honor. Move on.

Judge Hoeffgen: Okay. Removed.

Mr. Goswami: The – the evidence is going to show, Your Honor, that all that matters in this case is did a battery occur? And in this case, we're going to prove to you beyond a reasonable doubt, Your Honor, that a battery did occur. He battered the victim.

There was a witness that was present. And when the detective arrived and officers arrived, they took photos and everything that was said was consistent with what the victim and the witness said, Your Honor. Thank you, Judge.

Mr. Goswami: Okay. Mr. Reiff?

Mr. Reiff: Judge Hoeffgen, thank you and good afternoon. **[Clears throat]** The evidence today will show that there are two victims in this case. My client and the City of North Los Vegas. The evidence will point out how on the night in question there was a disagreement between the two parties.

The alleged victim in this case, my client, over a job that was contracted by the alleged victim, Mr. Patino-Rios, without a license and a home in which he sought my client's expertise and skill to do 75% of the work because my client was the only type – the only person qualified to do the work.

Mr. Goswami: And, Your Honor, I'm going to object to this. That has no relevance. They're going to try to bring in some type of evidence that the victim wasn't a licensed contractor. That has no relevance to this case. It doesn't tend to prove or disprove a fact that is of

consequence to this case. Did a battery occur?

Judge Hoeffgen: Okay.

Mr. Reiff: But Judge, that's – he can make that objection at trial.

Judge Hoeffgen: [clears throat] Okay.

Mr. Goswami: No, it's not relevant. They're trying to get it into open statements.

Judge Hoeffgen: Well, I mean it's – it's – yeah. What is germane about whether the alleged victim had a license or not?

Mr. Reiff: It has to do with credibility. If the alleged victim gets up on the stand, credibility is always an issue. The City wants to present the victim as somebody who was a – a victim of a crime while he was engaged in a crime. So, when he gets up on the stand es – his credibility is always an issue. So, whether or not the Court will accept that, that remains to be seen.

Judge Hoeffgen: Yeah. I mean I – at this point I mean whether someone had a business license or not that's – you know I understand where you're trying to go with that, but I'm not going to give all that much weight to it.

Mr. Reiff: Sure. That I appreciate, Your Honor. But the evidence will show that after the job was completed my client attempted to get his agreed upon payment and that the alleged victim would not answer his calls. And then ultimately days after he got paid, perhaps a week, the alleged victim contacts my client, Mr. Fonseca, and says, "Meet me at McDonald's."

As opposed to meeting him at his home where Mr. Patino-Rios came to my [clears throat] client's home on a regular basis because they had to coordinate, and he relied so much upon my client to do this job. He knew where his house was. And then when my client went to the scheduled appointment, because of the phone call on the day in question, my client was without having been paid and without the tools that he used that were at the site that were collected by Mr. Patino-Rios.

He was not happy about what was occurring at that point in time. When he arrives not only is Mr. Patino-Rios there, but Mr. Patino will admit that he brought another gentleman. Both of these

gentleman are considerably bigger than my client and both younger. For muscle. Maybe he won't say it in those terms, but that's what the evidence will show. To intimate my client.

And when my client and Mr. Patino-Rios engage in a conversation and it did get heated about why Mr. Patino-Rios is not going to give him the money, the second gentleman, Mr. Edgar Medina, began to intimidate my client. And not long after they both started to rough him up. At which time my client, fearful of what the consequences were, fled. Got in his vehicle and drove home. My client had a considerable scratch abrasion on his neck from being roughed up. The evidence will also show –

Mr. Goswami: Your Honor, I'm going to object to that. If there's any photos they haven't been presented to the City as to any –

Mr. Reiff: I indicated that I wanted to mark proposed –

Mr. Goswami: Judge, we're going to object to that. Today is the first time that we're seeing this photo. We have provided discovery to defense counsel. This hasn't been provided to us, um, and – and it was not reported at the scene that there was any injury to this defendant. We're going to object to that. That shouldn't be allowed in trial.

Judge Hoeffgen: Well, it's not being offered as – for admission at the moment, so I'm going to overrule your objection. Defense always has a right to maybe mark exhibits, but when they move to have it admitted that's when you can state your objection and the fact that you –

Mr. Goswami: But they never provided this to us even in discovery.

Judge Hoeffgen: I understand. Yeah. But I haven't seen the photos. I'm not going to see the photos until they're actually admitted into evidence.

Mr. Goswami: Okay. I'll put on the rule – the record pursuant to rules of discovery, counsel never provided that to us.

Mr. Reiff: The evidence will also show that Mr. Patino-Rios told the officer that my client had brass knuckles and my client reached into his pocket with his right hand, which his brass knuckles were around, and pulled out a club, if that's possible, and –

Mr. Goswami: Objection. That's argumentative, Your Honor. This is going beyond the scope of opening.

Judge Hoeffgen: Okay. So, what was the last statement? The evidence is going to show that –

Mr. Reiff: Mr. Rios –

Judge Hoeffgen: Yeah.

Mr. Reiff: Patino-Rios reported that my client had two weapons. Brass knuckles and a club. And that he wielded both with the same hand. Evidence will also show that Mr. Patino-Rios told the police that not only did my client hit him with the club and cause the scratch on the bridge of his nose.

That my client his him with his van as he left and struck him in the leg. And the police officer could not identify any injury whatsoever on Mr. Patino-Rios' leg that day. [Clears throat] Nothing further, Your Honor.

Judge Hoeffgen: Okay. All right. So, um, City are you prepared to call your first witness?

Mr. Goswami: Yes, Your Honor. City is ready to proceed.

Judge Hoeffgen: Who are you calling?

Mr. Goswami: City will call John Patino-Rios to the stand.

Judge Hoeffgen: Harry, was he in vestibule the whole time?

Harry: Yes, sir.

Judge Hoeffgen: Okay. Why were you not following my instructions to go into the hallway?

Mr. Goswami: Your Honor, he's in the vestibule. He can't hear what's going on.

Judge Hoeffgen: Well, I don't know about that, but.

Mr. Reiff: Does he speak English?

Mr. Goswami: Yeah, he does. But Judge he doesn't know what's going on. It's not his responsibility to do that. If you're in here talking about where people should go, Judge.

Mr. Reiff: Objection, Your Honor. You made a clear -- you made a clear directive to the gentleman.

Mr. Goswami: No, you didn't. He wasn't here.

Judge Hoeffgen: Well, no, no. Actually, I didn't. Hold. I'll stop. He actually was not in the courtroom.

Mr. Goswami: He was not.

Judge Hoeffgen: Okay.

Mr. Goswami: So, get your facts right, Joe.

Judge Hoeffgen: Okay. No, I just -- I just --

Mr. Goswami: Judge, is this how we're going to start off the trial? He's -- he's accusing --

Judge Hoeffgen: Mr. Goswami, please calm down.

Mr. Goswami: Yeah. But he's saying that you had a direct --

Judge Hoeffgen: No, hold on. Mr. Goswami, why are you --

Mr. Goswami: Because I don't appreciate him saying --

Judge Hoeffgen: Don't listen. No, no, no, no. What it is, is he's reacting to what I said. Okay?

Mr. Goswami: Trying to take advantage here.

Judge Hoeffgen: And I'm not actually asking either one of you to react to what I say.

Mr. Goswami: Fair enough, Judge.

Judge Hoeffgen: Okay. I made instructions to all witnesses that they needed to remain outside in the hallway and not to discuss the case while they're waiting for whatever, so.

Mr. Goswami: And he wasn't in the courtroom, Judge.

Judge Hoeffgen: Yeah. So, okay. So, come on forward. All right. So, if you'll raise

your right hand and face the clerk.

Ms. Hawes: Do you swear or affirm that the testimony you're about to give on this day is the absolute truth?

Mr. Patino-Rios: Yes. Thanks, Your Honor.

Judge Hoeffgen: All right. Go ahead and have a seat.

Mr. Patino-Rios: Thank you.

Judge Hoeffgen: All right. Mr. Goswami, proceed with your questioning.

Mr. Goswami: Thank you, Judge. Uh. Sir, could you please state your name for the record?

Mr. Patino-Rios: Uh. John Patino.

Mr. Goswami: All right. And Mr. Patino – do you need spelling of that, Your Honor? Madam Clerk?

Ms. Hawes: Yes, thank you.

Mr. Goswami: Okay. Can you please spell that for the Madam Clerk, Mr. Patino?

Mr. Patino-Rios: Okay.

Mr. Goswami: Your last name?

Mr. Patino-Rios: John Patino.

Mr. Goswami: Okay. And can you spell Patino for the Madam Clerks?

Mr. Patino-Rios: It's P as in Peter. A as in Apple. T as in Tom. I as in India. N as in Nancy. O.

Mr. Goswami: Okay. And your first name is?

Mr. Patino-Rios: John. J-O-H-N.

Mr. Goswami: Okay. Okay. Thank you. Um. Mr. Patino, do you see the individual seated at defense counsel table in between the interpreter and his defense attorney? Do you recognize who that individual is?

Mr. Patino-Rios: Yes, it is Nery Fonseca.

Mr. Goswami: All right. And, uh, how do you know Mr. Fonseca?

Mr. Patino-Rios: Oh, we used to work together.

Mr. Goswami: Okay. How long have you known him for?

Mr. Patino-Rios: More or less like about four years.

Mr. Goswami: Okay. And, um, I would like to direct your attention to the date in question December 3, 2019. Do you recall that date?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. On that date did you have an occasion to meet the defendant at a McDonald's located in 911 East Cheyenne Ave?

Mr. Patino-Rios: Yes, sir.

Mr. Goswami: And is that here in the City of North Las Vegas?

Mr. Patino-Rios: Yes, sir.

Mr. Goswami: All right. Now, did you pick the location to meet the defendant at?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. And why did you pick McDonald's?

Mr. Patino-Rios: Because it was a public place.

Mr. Goswami: Okay. Was there anything that concerned you about the defendant that prompted you to want to meet in a public place?

Mr. Patino-Rios: Yeah. Because he was, um, very – he was a person of – to react very easily in a negative manner.

Mr. Goswami: Okay. Okay. And so, you had concerns about meeting in a private place.

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. And did you ask a friend or anybody to accompany you to

that location?

Mr. Patino-Rios: Yes.

Mr. Goswami: Who did you ask?

Mr. Patino-Rios: Edgar.

Mr. Goswami: And what is Edgar's last name?

Mr. Patino-Rios: Medina.

Mr. Goswami: Okay. And you and Mr. Medina are friends?

Mr. Patino-Rios: Oh, yes.

Mr. Goswami: Okay. And you and Mr. Medina have worked together in the past as well?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. I want to go to that date of December 3, 2019 at approximately 6:00 p.m. When you arrived at that McDonald's location was the defendant there?

Mr. Patino-Rios: No, he wasn't.

Mr. Goswami: Okay. And who did you arrive there with?

Mr. Patino-Rios: I arrived there with, uh, Mr. Medina.

Mr. Goswami: Okay. And when you arrived at the McDonald's where did you go to meet the defendant?

Mr. Patino-Rios: We were right there in the parking lot.

Mr. Goswami: Okay. And, uh, defendant was not there when you arrived.

Mr. Patino-Rios: Defendant was not there when we arrived.

Mr. Goswami: Okay. At any point did, uh, Mr. Medina leave the parking lot to go somewhere?

Mr. Patino-Rios: Yeah. He went to -- to the restroom.

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- Mr. Goswami: Okay. And after he left to the restroom did the defendant arrive shortly thereafter?
- Mr. Patino-Rios: Yes.
- Mr. Goswami: Okay. And when he arrived tell me about how the conversation began.
- Mr. Patino-Rios: We had – trying to – basically I was trying to show him like the – like how much did I need to give him. And, uh, and I guess he was – he wasn't – how do I put this? Um. He wasn't agreeing. Um. Um. Mr. Fonseca.
- Mr. Goswami: Okay. He was not agreeable to the amount?
- Mr. Patino-Rios: He was not agreeing he was not agreeable with all – what I was – what I was telling – telling him.
- Mr. Goswami: Did you bring any type of records with you to show him what it is that you owed him?
- Mr. Patino-Rios: Yes, I did.
- Mr. Goswami: Okay. Um. Your Honor, may I approach the witness?
- Judge Hoeffgen: Sure.
- Mr. Goswami: Thank you, Judge. I'm – may I approach the witness, Your Honor?
- Judge Hoeffgen: Yeah.
- Mr. Goswami: All right. I'm showing what the marked identification is Plaintiff's Exhibit No. 4 and 5. I'm going to do that in order. Can you recognize what is depicted in these items?
- Mr. Patino-Rios: Yes. It's, uh – that's a book where I used to keep like all my numbers. And every time that I used to give him money, he used to sign for it.
- Mr. Goswami: Okay. And do these photos fairly and accurately depict the books that you took to the location?
- Mr. Patino-Rios: Yes.
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Mr. Goswami: And were these photos taken at or near the time of the events in question?

Mr. Patino-Rios: Yes.

Mr. Goswami: And who were they taken by?

Mr. Patino-Rios: They were taken by a police officer.

Mr. Goswami: Okay. Your Honor, may I approach the witness and publish these to the Court?

Judge Hoeffgen: Yeah.

Mr. Goswami: Now when you began to explain to the defendant what it was that you owed – that you owed him, how did he react?

Mr. Patino-Rios: He got heated, basically.

Mr. Goswami: And when you say heated, how would you describe his demeanor?

Mr. Patino-Rios: He's – his temper turned like, uh, into a person I didn't want to be next to.

Mr. Goswami: Was he saying anything to you?

Mr. Patino-Rios: Excuse me?

Mr. Goswami: What was he saying to you?

Mr. Patino-Rios: He just basically wasn't agreeing to what I was showing him through the books.

Mr. Goswami: Was he calm or was he angry?

Mr. Patino-Rios: He was angry.

Mr. Goswami: And at any point did Mr. Medina come out of the bathroom and back into the parking lot?

Mr. Patino-Rios: Mmm. Yes. He – he came out.

Mr. Goswami: Okay. And what was happening at this point?

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- Mr. Patino-Rios: At that point, uh, the defendant he was – he was like already upset. And, uh, he had basically him on his backpack.
- Mr. Goswami: Did he ever go back to his car to retrieve anything to the best of your recollection?
- Mr. Patino-Rios: Yes, before – before, uh – basically before Mr., uh – Mr. Medina came.
- Mr. Goswami: Okay. What did he do?
- Mr. Patino-Rios: He went. He goes – he went straight to his car. Then came back. When he came back, he had his, uh, right hand into his backpack. I looked back, uh, and I kind of saw like an object. It was maybe measured like anywhere between 12 to 14 inches. From that point I think I recall it I saw something like that on his garage where he used to work.
- Mr. Goswami: What did you see? What – you've seen the item –
- Mr. Patino-Rios: It was – yeah.
- Mr. Goswami: The item he took out you had seen it before?
- Mr. Patino-Rios: Yeah, I'd seen it before.
- Mr. Goswami: Where did you see it before?
- Mr. Patino-Rios: I saw it at his place of work. Uh. At his – at his garage.
- Mr. Goswami: Can you look at the Judge and describe for the Court what it was?
- Mr. Patino-Rios: It was like about a piece like this. He had came down like a point to this. And it came like this. And, uh, what I assume because what I saw on his garage it was a kickstand of a bicycle. The measures – the measurement of that is anywhere between 12 to 14 inches.
- Mr. Goswami: And did he modify that kickstand in any way?
- Mr. Patino-Rios: He – he used to have a grinder on his garage. Like a table grinder. And, uh, what I was thinking and what I told in that – the way that he modified it. He went into the grinder and he sharpened it making it look at a point.
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- Mr. Goswami: And was there anything tied to it to grasp onto to hold onto?
- Mr. Patino-Rios: Oh, he had – he had like some type of twine so he could – he could put it by his wrist and basically swing you know all the – so he wouldn't come out – so it wouldn't come out loose from his hand.
- Mr. Goswami: Okay. So, describe what he did when he took that out of his – off his person.
- Mr. Patino-Rios: Oh, he just start swinging like this. And then when I went like this, he already have hit me on my – on my nose.
- Mr. Goswami: Did – did he strike Mr. Medina to the best of your knowledge?
- Mr. Patino-Rios: To the best – to the best of my knowledge, no.
- Mr. Goswami: Okay. And but he struck you?
- Mr. Patino-Rios: Yes.
- Mr. Goswami: And – and can you describe how he struck you with your hand for the Court?
- Mr. Patino-Rios: He just start swinging at me like this. Hit me right here on my nose.
- Mr. Goswami: And did you feel – did you feel it immediately?
- Mr. Patino-Rios: Not at that moment. I didn't feel it because everything was right there. Like so he was up – I wasn't even – I wasn't even expecting that, uh – maybe I was expecting a reaction from him. But I never thought it was going to be true.
- Mr. Goswami: Did he hit you intentionally with the item?
- Mr. Patino-Rios: Yes, he did.
- Mr. Goswami: Now when he struck you what did you do next?
- Mr. Patino-Rios: I tried to – to avoid him. I tried to avoid him. Um. And then, um, second time he hit me basically he hit me right here on the chest. But when – when he hit me right here on the chest, I thought he was like maybe a swing like that. And then – and then like in the
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following day I start seeing like a little mark right here by my chest.

It was like a black and blue. And then later around it started showing like the physical tint of – and it shows like basically the – the mark of, uh – of the brass knuckles that he was wearing that day.

Mr. Goswami: Okay. Now, back up. When he struck you on the nose, uh, did you react by defending yourself?

Mr. Patino-Rios: Oh, yeah.

Mr. Reiff: Question, Your Honor.

Mr. Goswami: What did you do as a result?

Judge Hoeffgen: Hand.

Mr. Goswami: Sorry, Judge, Your Honor. What did you do as a result of being struck in the nose?

Mr. Patino-Rios: I tried to push him. I tried to push him, and I tried to – basically I grabbed on my hoodie – he was wearing a hoodie. So, I grabbed him by the hoodie just like to try to push him like to stay away from me.

Mr. Goswami: Okay.

Mr. Patino-Rios: Because I didn't want – I didn't want to get to that point. And it was already going very physical and –

Mr. Goswami: In – in addition to striking you with that club, what else did he strike you with?

Mr. Patino-Rios: Um.

Mr. Goswami: Did he have anything else on him?

Mr. Patino-Rios: [sighs] What else did he have? He – he was wearing, uh, brass knuckles.

Mr. Goswami: And – and did he hit you with that?

Mr. Patino-Rios: He did hit me on my – on my left, uh – on my left, uh, side of the chest.

Mr. Goswami: Okay. And then at any point were you fighting with him then?

Mr. Patino-Rios: Um. I was just trying to push him off.

Mr. Goswami: Okay. And who if anybody was trying to stop this?

Mr. Patino-Rios: Oh, Edgar.

Mr. Goswami: What was he trying to do?

Mr. Patino-Rios: He was trying to keep us apart. Basically, he was trying like to – it didn't have to go to that point or whatever. He was just trying to – to avoid any confrontation right there in that moment.

Mr. Goswami: Okay. And what happened next?

Mr. Patino-Rios: What happened next, I go trying to get away from him. I go – I go to my car. Um. He comes to his car. He goes and he gets in his car. Instead of driving off to the street, he just drives out by cars and then comes straight into me.

Mr. Goswami: Okay. Did he graze you with the car?

Mr. Patino-Rios: Yeah. He did.

Mr. Reiff: Objection, leading question.

Mr. Patino-Rios: Ob

Mr. Goswami: What did he – what –

Mr. Reiff: He might as well testify.

Mr. Goswami: [sighs] Objection, argumentative. But I'll move on, Judge.

Mr. Patino-Rios: He hit me right –

Mr. Goswami: It's not argumentative.

Judge Hoeffgen: Okay. Hold on.

Mr. Reiff: There's – there's a line of questioning, Your Honor.

Judge Hoeffgen: I ruled on your objection. Did you even hear it?

Mr. Reiff: Thank you, Judge.

Judge Hoeffgen: You said it and I said it – I said sustained and there should be nothing else. Okay. So.

Mr. Goswami: I'll rephrase, Judge. And what did he do with his vehicle?

Mr. Patino Rios: His vehicle? He came and struck me on my lower – on my lower leg.

Mr. Goswami: Okay. And then where did he go after that? What did he do after that?

Mr. Patino-Rios: After that he just basically just backed up and just took off.

Mr. Goswami: Took off. Okay. Uh. Your Honor, may I approach the witness, Your Honor?

Judge Hoeffgen: Yeah.

Mr. Goswami: Thank you, Judge. I'm showing you what has been marked for identification I'm sorry, Your Honor.

Mr. Patino-Rios: Yeah. Go ahead.

Mr. Goswami: Yeah. As Plaintiff's Exhibit No. 1. Can you identify who is depicted in that photo?

Mr. Patino-Rios: That's me.

Mr. Goswami: And is does photo fairly and accurately depict the injury that you sustained as a result of this defendant's actions?

Mr. Patino-Rios: Yes.

Mr. Goswami: And was this taken at or near the time and event of question?

Mr. Patino-Rios: It was taken right there on the location by, um – by the officer.

Mr. Goswami: Okay. And who took that photo?

Mr. Patino-Rios: Uh. The officer.

Mr. Goswami: Okay. I'm showing you what's been marked for identification as Exhibit No. 2. Can you identify who is in that picture?

Mr. Patino-Rios: Yeah. That's me again.

Mr. Goswami: And does this photo fairly and accurately depict the injury that you sustained as a result of this defendant's actions?

Mr. Patino-Rios: Yes. Yes, it does.

Mr. Goswami: And was this taken at or near the time of the event in question?

Mr. Patino-Rios: It was taken right there on the location by – by the officer.

Mr. Goswami: And I want to show you what's marked for identification as Plaintiff's Exhibit No. 3. Can you identify whose leg that is in there?

Mr. Patino-Rios: That's mine.

Mr. Goswami: Okay. And what does that photo depict?

Mr. Patino-Rios: That's where basically he struck me with a – with a car.

Mr. Goswami: Okay. And does that photo fair and accurately depict the injury you sustained on the date in question?

Mr. Patino-Rios: Yes, it does.

Mr. Goswami: Okay. And then I'm going to show you what's been marked for identification as Plaintiff's Exhibit No. 7. Can you identify who is in this photo?

Mr. Patino-Rios: That's me.

Mr. Goswami: And is it – what does this picture depict?

Mr. Patino-Rios: Um. The picture, uh, I took it – I took it in my bathroom.

Mr. Goswami: Okay. And what does it show?

Mr. Patino-Rios: It shows the bruise and the mark of the, uh, brass knuckles.

Mr. Goswami: Okay.

Mr. Patino-Rios: Where – where he struck me.

Mr. Goswami: Okay. This photo fairly and accurately depicts the injury you received as a result of this incident?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. And then I'm going to have you explain this to Court in one moment. What does this photo show?

Mr. Patino-Rios: That's the parking lot of the location.

Mr. Goswami: Okay. And this fairly and accurately depicts the parking lot where this occurred?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. Taken at or near the time in question?

Mr. Patino-Rios: Yes.

Mr. Goswami: Taken by – who is this taken by?

Mr. Patino-Rios: Uh. It was taken by the officer.

Mr. Goswami: All right. Your Honor, the City is going to move for introduction of these exhibits.

Mr. Reiff: Your Honor, may I see the photos that are in question?

Judge Hoeffgen: Yes, of course.

Mr. Reiff: I'd like to know which of the photos were the one – is the photo where Mr. Patino-Rios indicated that he – he sustained an injury by being struck by a vehicle. [Shuffles papers] And also, he talked about a picture – a photo where he was – an injury that he took later. There's no foundation for when that photo was taken. There's nothing – he's said he took it. We don't know when it was taken.

Mr. Goswami: He just testified he took it the very next day, Your Honor. And he

also testified the direct foundation is it was after when the injury showed up.

Judge Hoeffgen: Okay. So, it sounds like they laid the foundation. He testified he took the picture the next day.

Mr. Goswami: The City will move for introduction of these pictures, Your Honor.

Mr. Reiff: Obj –

Judge Hoeffgen: All right.

Mr. Reiff: With regard to the picture, he said he took the next day, there is a date stamped on it, December 5, which is two days later.

Judge Hoeffgen: Okay. All right. So, what's the objection then? If –

Mr. Reiff: The – the foundation is contradictory. The photo – the witness is testifying that it was taken on the 4.

Mr. Goswami: That's all we asked is at or near the time of the event in question. He said it took a day for the bruise to show up.

Judge Hoeffgen: Yeah. So, tell you what. We'll admit all the photos taken by the officer. City, if you want to lay a foundation for the photo that he took, I'll allow you to do that.

Mr. Goswami: Okay. Okay. If it possible that you took this on December 5, two days after the incident?

Mr. Patino-Rios: Yeah.

Mr. Goswami: Okay. And did it take a day to two days for the bruise to show up?

Mr. Patino-Rios: Yeah, because I started seeing – I started seeing the bruise. And then finally it just came – came out and reacted to what it was, which it shows right there. It shows the mark of the brass knuckles.

Mr. Goswami: Okay. The City will move to admit, Your Honor.

Judge Hoeffgen: All right. So, exhibits are admitted.

Mr. Goswami: Thank you. Judge, may I approach the podium?

Judge Hoeffgen: Yes.

Mr. Goswami: And, Your Honor, I'm just going to separate this into four so you can see these are the ones the officer took. And then I'll put this over here.

Judge Hoeffgen: Okay.

Mr. Reiff: Your Honor.

Judge Hoeffgen: Yes.

Mr. Reiff: I would just like to know which of the photos, uh, depicts – what is it? Alleged to be a mark so that I may refer to it in the, um, cross-examination.

Judge Hoeffgen: For which – which one?

Mr. Reiff: The mark from being struck by the vehicle.

Judge Hoeffgen: That would be City's Exhibit 3.

Mr. Reiff: Thank you, Your Honor.

Judge Hoeffgen: Yeah. [Shuffles papers] Okay. All right. Mr. Goswami.

Mr. Goswami: May I proceed, Your Honor?

Judge Hoeffgen: Yes.

Mr. Goswami: Thank you, Judge. And Mr. Patino, this McDonald's that you met the defendant at. That is in North Los Vegas. Correct?

Mr. Patino-Rios: That's the one in North Las Vegas, yes.

Mr. Goswami: Okay. Now after you were struck by the defendant did you call 911?

Mr. Patino-Rios: I called 911.

Mr. Goswami: Okay. And, uh, you waited at the scene? Where – where did you call 911 from?

Mr. Patino-Rios: I used my cell phone.

Mr. Goswami: And where – and where were you when you called 911?

Mr. Patino-Rios: I was right there on the scene.

Mr. Goswami: Okay. And did an officer – officers arrive?

Mr. Patino-Rios: Yes, they did.

Mr. Goswami: And you spoke to them?

Mr. Patino-Rios: I spoke to both of them. Yes.

Mr. Goswami: Okay. Is it safe to say this happened very fast? This whole incident?

Mr. Patino-Rios: Yeah. Happened very fast.

Mr. Goswami: Okay. Um. Court indulgence, Your Honor.

Judge Hoeffgen: Sure.

Mr. Goswami: Um. No further questions. We pass to witness, Your Honor.

Judge Hoeffgen: All right. Mr. Reiff. Questions for the witness here?

Mr. Reiff: Yes, Your Honor. Mr. Patino-Rios, how tall are you?

Mr. Patino-Rios: I think I'm about 5'10". 5'11".

Mr. Reiff: How much do you weigh, sir?

Mr. Patino-Rios: Right now? Right now, I just went to a doctor today. 283.

Mr. Reiff: Do you know how much you weighed on December 3, 2019?

Mr. Patino-Rios: [sighs]

Mr. Reiff: Approximately, sir.

Mr. Patino-Rios: Approximately I was thinking like maybe about – maybe about 230. 240. Around there.

Mr. Reiff: And your friend Edgar Medina. He was present on December 3,

2019 at the scene of this event. Is that correct?

Mr. Patino-Rios: Yes.

Mr. Reiff: Do you know how tall he is?

Mr. Patino-Rios: He must be about my height.

Mr. Reiff: Do you know if he weighs as much as you?

Mr. Goswami: Objection. Speculation, Your Honor. He'll be here to testify.

Judge Hoeffgen: Yeah. I'll sustain.

Mr. Goswami: Mr. Reiff can ask him.

Mr. Reiff: Mr. Patino-Rios, you testified that this – there was an argument over the amount of money that was to be paid. Isn't that correct?

Mr. Patino-Rios: Mm-hmm.

Mr. Reiff: Does that mean yes, sir?

Mr. Patino-Rios: Yes.

Mr. Reiff: And the – where – where was the money – what was that all about? What did it derive from? What money? Did you make a bet on something?

Mr. Goswami: Objection, Your Honor. Relevance.

Judge Hoeffgen: I'm going to overrule the objection. I'll allow this line of questioning to a point.

Mr. Patino-Rios: The money was from – it was from a job that was done to a friend of mine and I asked for his help. And I asked for Mr., uh, Fonseca's assistance.

Mr. Reiff: How long did that job take to complete, sir?

Mr. Patino-Rios: Uh. It was supposed to be – it was supposed to be a three week job and it took like almost – it took like almost three months. Wow.

Mr. Reiff: Did Mr. – did – the truth is Mr. Fonseca worked all three months,

didn't he?

Mr. Goswami: Your Honor, objection. Relevance. This just doesn't tend to prove or disprove whether a battery occurred.

Mr. Reiff: Judge, it's highly relevant to talk about – these are facts that lead to – that are helpful to a determination of what they were arguing about and what the legality of this confrontation – what was the basis for it. I'm trying to prove to the Court that my client didn't do anything out of the ordinary when he confronted, uh, Mr. Patino-Rios.

Mr. Goswami: That has nothing to do with the job or how much money –

Judge Hoeffgen: Well, I'm going – like I said, I'm going to overrule the objection because it may go to motivations as to why the people – the parties were there. It certainly is a motivation as to people's temperament while they're on scene.

Mr. Goswami: I'd also like to establish that there was a motive to lie today.

Mr. Reiff: Objection. This is are – what's the objection? This is argument.

Judge Hoeffgen: Well, yeah. This is just your cross-examination.

Mr. Reiff: Thank you, Judge.

Judge Hoeffgen: Okay.

Mr. Reiff: My client believed – he demanded more money from you, isn't that, right?

Mr. Patino-Rios: Hmm? Um. How do I put this? It was something that wasn't agreeable since the beginning and there was no more money to be from.

Mr. Reiff: You got paid from the person that the job was performed. You got paid, didn't you?

Mr. Patino-Rios: My friend, everybody got paid.

Mr. Reiff: No, I'm asking whether you got paid.

Mr. Patino-Rios: I got paid. Everybody got paid.

Mr. Reiff: When you say everybody got paid are you talking about the person who had the – so, the foreman paid, my client paid, other workers were paid all separately?

Mr. Patino-Rios: I got paid and – and your client signed what he got paid.

Mr. Reiff: So, you gave my client money?

Mr. Patino-Rios: Yes.

Mr. Reiff: And once the job was completed you gave him money?

Mr. Patino-Rios: He got money.

Mr. Reiff: After the job was completed?

Mr. Patino-Rios: He got money.

Mr. Reiff: How much?

Mr. Patino-Rios: He got money when – I don't know much he got. But he got money from the job.

Mr. Reiff: \$10 or \$100. Do you know?

Mr. Patino-Rios: I cannot recall honestly.

Mr. Reiff: And he was also – was it your opinion he was upset because he didn't get his tools back, too?

Mr. Patino-Rios: The tools from where?

Mr. Reiff: The tools that he used to perform the job.

Mr. Patino-Rios: I don't know what tools you're talking about honestly.

Mr. Reiff: You don't know anything about any tools?

Mr. Patino-Rios: I don't know anything about any tools.

Mr. Reiff: Well, what kind of work did Mr. – did my client perform? You enlisted his services. Do you know what he did even?

- Mr. Goswami: Objection again. Relevance, Your Honor. What is the relevance of this?
- Mr. Reiff: He doesn't even know how much he's paid? He doesn't know – he's vague about what was going on. I'm just trying to find out what he knows. He's the person – he said it was his friend that he contracted the job from. This is all relevant to find out what was really at the heart of this – this discussion. I'm trying to show that my client –
- Judge Hoeffgen: Okay. Let me – let me – let me stop you there. I am curious because we are approaching, I think 4:00. How much time are you going to spend about the job?
- Mr. Reiff: 10.
- Judge Hoeffgen: Are we going to spend an hour about the job before we get into the facts or particulars of the incident – alleged incident? Or where are we going? Because I'll be honest with you. You certainly are establishing the cause of why your client was certainly upset. Right?
- Mr. Reiff: I understand what the Court is saying, yes.
- Judge Hoeffgen: [laughs] So, I mean how far do we need to go into the job particulars itself? I'm – I'm satisfied so far that this gentleman has stated on the record under oath he doesn't remember how much Mr. Fonseca got paid. He doesn't know anything about tools. And so far, he's not really forthcoming about what job Mr. Fonseca did.
- Mr. Reiff: Can I proceed?
- Judge Hoeffgen: Yeah.
- Mr. Reiff: Mr. Patino-Rios. Before December 3, 2019 how many times did my client threaten you to do harm to you?
- Mr. Goswami: Objection to relevance. What does anything before December 3 have to do with anything?
- Mr. Reiff: I'll bag the question.
- Judge Hoeffgen: Okay. Instructed.
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- Mr. Reiff: So, Mr. Edgar Medina was present too. Right? On the night in question.
- Mr. Patino-Rios: Yes.
- Mr. Reiff: And you told the police didn't you that you had Mr. Medina show up to protect you because you were afraid of my client?
- Mr. Patino-Rios: Yeah, because of his reaction. As I say – as I mentioned before.
- Mr. Reiff: What reaction?
- Mr. Patino-Rios: The reaction that he has – that he had a temper.
- Mr. Reiff: How many times – change – I'm asking you a question. You brought – you brought Mr. Medina for the specific purpose of protecting you from my client. Is that right?
- Mr. Patino-Rios: Yes. To – to avoid any confrontation basically with your client.
- Mr. Reiff: Okay. So, you had reasonable believe that my client might do you physical harm. Is that what you're saying?
- Mr. Patino-Rios: Yes.
- Mr. Reiff: Okay. What other indication other than him being argumentative with you did he ever give you that he would do physical harm to you?
- Mr. Patino-Rios: Oh, I wish I – I wish I wouldn't have lost the – the messages and the, uh – and the text messages that he sent. And a lot of times when, um – when he called me many times, he talk he hang up the phone. But meanwhile he leave his phone open, and I could just hear his seek to anger. His temper. His anger. That he wasn't – he was a person just to be – just to have the other person in front. And I know from what he was saying he was maybe – it could become reality.
- Mr. Reiff: How many times did he direct those directly to you?
- Mr. Patino-Rios: Huh?
- Mr. Reiff: Of any kind to you. In what words?
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Mr. Patino-Rios: He was – actions – just – just his actions. And the and the temper.

Mr. Reiff: What actions?

Mr. Patino-Rios: Actions. Actions like maybe when I went to – to his garage and, uh, to check on the project and the project that we were doing. And, uh, and a couple more things.

Mr. Reiff: Mr. Patino-Rios, the truth is that you brought –

Mr. Patino-Rios: Patino-Rios.

Mr. Reiff: I'm sorry. Mr. Patino-Rios. My apology.

Mr. Patino-Rios: But thank you.

Mr. Reiff: Mr. Patino-Rios, the truth is that you brought Mr. Medina as muscle to intimidate my client and to protect you from any argument over this money isn't that true?

Mr. Patino-Rios: No.

Mr. Reiff: Objection. Asked and answered, Your Honor. He keeps asking –

Judge Hoeffgen: No, I'm – I'm going to overrule the objection. That wasn't – wasn't quite the question before. So – so, can you answer the question?

Mr. Reiff: Do you understand the question, sir?

Mr. Patino-Rios: Yes. The question. The reason why I brought him it was just to – to – not to do any bullying or to do any harm to anybody. Just to avoid. Just to avoid any – any confrontation because I'm not the type of person.

Mr. Reiff: You told the police and you testified today that my client had brass knuckles.

Mr. Patino-Rios: Yes, he did.

Mr. Reiff: Was he wearing them?

Mr. Patino-Rios: Yes, he did.

Mr. Reiff: And he had them on his right hand or his left hand?

Mr. Patino-Rios: I can't recall, but I know I saw them.

Mr. Reiff: And he reached into his pocket on the hand that he had brass knuckles and pulled out a club. Right?

Mr. Patino-Rios: Yes, he did.

Mr. Reiff: Okay. And why would he have brass knuckles on if he swung the club?

Mr. Patino-Rios: I don't know if he had them in that hand or if he had them in the other one. I am just -- I just know that I just happened to saw them on him. I can't recall from the -- it has been two years. Three years really. I can't recall if it was on the right hand or on the -- on the -- in the -- in the left hand. The only thing that I could recall from that night that he was wearing them, and he struck me on my chest.

Mr. Reiff: Did you ever see him take the brass knuckles off?

Mr. Patino-Rios: Like they -- he's not gonna -- he's not gonna take them off right there in front of me.

Mr. Reiff: Did you give a written statement to the police? Let me ask it a different way. You gave a written statement to the police, didn't you?

Mr. Patino-Rios: Yeah. We gotta make the statement.

Mr. Reiff: Pardon me, sir?

Mr. Patino-Rios: They took the statement.

Mr. Reiff: Did you write down a little description about what happened on that night?

Mr. Patino-Rios: Yes, I did.

Mr. Reiff: And did you talk about any weapons?

Mr. Patino-Rios: Yes, I did.

Mr. Reiff: Did you talk about two weapons?

Mr. Patino-Rios: Yes, I did.

Mr. Reiff: And you described brass knuckles?

Mr. Patino-Rios: Yes, I did.

Mr. Reiff: Okay. And what other -- what other weapon did you describe in your statement?

Mr. Patino-Rios: The club that he was wearing.

Mr. Reiff: Okay. I'm going to approach, Your Honor.

Mr. Patino-Rios: Yes.

Mr. Reiff: Mr. Patino-Rios, take a look at this. Do you recognize it?

Mr. Patino-Rios: Yeah.

Mr. Reiff: Does it -- do you recognize the signature?

Mr. Patino-Rios: Yes.

Mr. Reiff: Who signed it?

Mr. Patino-Rios: I did.

Mr. Reiff: That's the statement that you wrote. Right?

Mr. Patino-Rios: Mm-hmm.

Mr. Reiff: In there you talk -- you -- you draw an arrow to brass knuckles. Right? Is there an arrow on that statement that you drew?

Mr. Patino-Rios: Oh, yeah.

Mr. Reiff: And it's pointed right at brass knuckles?

Mr. Patino-Rios: Yes.

Mr. Reiff: And where does that arrow start? Where does the beginning of it start? What words? You don't know?

Mr. Patino-Rios: No, I see it.

Mr. Reiff: What words?

Mr. Patino-Rios: You say pointy sharp object.

Mr. Reiff: And – and –

Mr. Patino-Rios: Plus – and if you can see it has a plus brass knuckles.

Mr. Reiff: Pointy sharp object.

Mr. Patino-Rios: Plus, brass knuckles.

Mr. Reiff: It's a – does it say plus, sir?

Mr. Patino-Rios: It says plus. You see?

Mr. Reiff: Where does it say plus?

Mr. Patino-Rios: Don't you see a plus right there?

Mr. Reiff: No, I don't. Does it say P-L-U-S, sir?

Mr. Goswami: There's a plus right –

Mr. Patino-Rios: No.

Mr. Reiff: It is an arrow.

Mr. Patino-Rios: It has – it has the symbol of plus.

Mr. Goswami: It's right here. A plus right there.

Mr. Reiff: I see an arrow. An arrow is the symbol for plus? Is that what you're telling the Court?

Mr. Patino-Rios: It has a plus right here. Plus, the arrow showing the brass knuckles. It has plus, arrow, brass knuckles.

Mr. Reiff: Okay. So, you are telling the Court that you interpret an arrow to mean plus?

Mr. Patino-Rios: No. It has a plus, plus the arrow.

Mr. Goswami: Judge, I'm going to object to this. This is misleading. I'll present the statement to the – to the Court if you want to admit it. Mr. Reiff, there is a plus right there Judge. It can't be anymore clearer.

Judge Hoeffgen: Okay.

Mr. Goswami: I don't know what it is that you're not seeing, Joe. Right next to the arrow.

Mr. Reiff: I see an arrow. I see an arrow.

Mr. Goswami: That's a plus he's saying. There's an arrow next to it saying –

Mr. Patino-Rios: He's not reading as plus. It has a plus sign.

Mr. Reiff: God. [Clears throat] So, your testimony is that my client attacked you with not only a club that was you said 12 inches long?

Mr. Patino-Rios: Yeah. It was like about – that's about the – the length of the – that's about how long is the kickstand of a bicycle.

Mr. Reiff: And he was wearing brass knuckles?

Mr. Patino-Rios: Yes, he was wearing brass – brass knuckles.

Mr. Reiff: And your friend did nothing about that?

Mr. Patino-Rios: Huh?

Mr. Reiff: Your friend did nothing about that other than just step in front of him?

Mr. Patino-Rios: Uh. My friend he was – he was trying to separate us.

Mr. Reiff: There came a point in time that my client left the scene where this scuffle took place?

Mr. Patino-Rios: Oh, yeah. He left. He left after he did the harm.

Mr. Reiff: And was it that when he left and got in his vehicle you were close to him? Did you chase after him?

Mr. Patino-Rios: I chased? No. He came – he came straight into me with his vehicle.

Mr. Reiff: You said you went to your car on direct examination.

Mr. Patino-Rios: Yeah. I went – I went to my car. I didn't get inside of my car. I guess I stayed right in front of my car.

Mr. Reiff: You pursued my client, isn't that correct?

Mr. Patino-Rios: Huh? I never – I didn't chase him. I went to my car.

Mr. Reiff: Which is where he was.

Mr. Patino-Rios: Huh?

Mr. Reiff: Which is where he was.

Mr. Patino-Rios: No, he wasn't. He wasn't – he wasn't in my car.

Mr. Goswami: Judge, objection. He keeps asking the same question. He said he didn't go to the other car. He went back to his car. It's asked and answered. We'll be here all day, Judge.

Judge Hoeffgen: I'll sustain the objection. I think he's answered that question twice.

Mr. Reiff: Okay. Thank you, Judge. Mr. Patino-Rios You both had cars there that night. Correct?

Mr. Patino-Rios: Excuse me?

Mr. Reiff: You both had vehicles. My client and you both had vehicles there that night?

Mr. Patino-Rios: Oh, yes.

Mr. Reiff: How far apart were they parked?

Mr. Patino-Rios: It was like maybe, uh, how big is a parking space? Oh, maybe about 6, 8 feet away on the same lane.

Mr. Reiff: What part of my vehicle struck your – your leg?

Mr. Patino-Rios: On the front of the – with the front bumper of the vehicle.

Mr. Reiff: And how was it that you were in front of the vehicle?

Mr. Patino-Rios: Because he came straight into me. [Laughs]

Mr. Reiff: You were standing in front of the vehicle?

Mr. Patino-Rios: No. No. It wasn't like that. Your client instead of going out the way that he was parked the only thing he had to do was drive to a – to the right side and then make another left. And then straight into a street. But meanwhile what he did was he came out, did like a U-turn and then – then came against me.

Mr. Reiff: And his front bumper hit your leg?

Mr. Patino-Rios: Yes, sir.

Mr. Reiff: how hard was it?

Mr. Patino-Rios: Huh?

Mr. Reiff: How hard?

Mr. Patino-Rios: Oh. No, it wasn't hard. No. Believe me if he – if he would have hit me hard enough the damage wasn't – wasn't only that, that you see in the picture.

Mr. Reiff: That wasn't my question, sir.

Mr. Patino-Rios: Yes.

Mr. Goswami: It is. He answered.

Mr. Patino-Rios: Yeah, you asked me how hard he hit me.

Mr. Goswami: He didn't like the answer. He said it wasn't that hard, Judge, or it would have been a lot worse in the picture. He answered the question.

Mr. Patino-Rios: Yes. I answered your question.

Judge Hoeffgen: Next question. [Laughs]

Mr. Reiff: How fast was his vehicle traveling when it struck your leg?

Mr. Patino-Rios: I don't know. Like maybe [scoffs] 2, 3 miles an hour. Maybe 5. Maybe 5.

-
- Mr. Reiff: Maybe 5?
- Mr. Patino-Rios: Maybe. But I don't think that you could get that far in that – in that situation right there.
- Mr. Reiff: So, from where the vehicles were parked. So, when you were talking with Mr. Fonseca and Mr. – Mr. Medina was standing. What was the distance?
- Mr. Patino-Rios: From where we're talking?
- Mr. Reiff: From where you were talking to where the two vehicles were parked.
- Mr. Patino-Rios: Oh, we were talking right there. Right in front of my vehicle.
- Mr. Reiff: You were talking right in front of your vehicle the whole time?
- Mr. Patino-Rios: Okay. At what point?
- Mr. Reiff: When you – when the argument ensued.
- Mr. Patino-Rios: When the argument – when the argument started, we were talking right in front of my hood of my vehicle. On the hood of my vehicle.
- Mr. Reiff: So, nobody followed anybody. When – when – when Mr. – Mr. Fonseca left he was – you were – he didn't have anywhere to go. His car was right there. Is that what you're saying?
- Mr. Patino-Rios: He – he went to his car and then he came back. And that's when he came back with the object.
- Mr. Reiff: I'm talking about after the object and after the argument. Where were you?
- Mr. Goswami: I'm going to object to the question, Your Honor. There's no – what – what part of this whole transaction is he talking about? When the defendant got back in his car and tried to – and drive into him? Or what – or at the beginning. What are – I'm confused.
- Judge Hoeffgen: Yeah. Maybe clarify what – at what point were you talking about at this moment.
-

Mr. Reiff: Yeah. Yeah. Mr. Patino-Rios. What's the furthest the two of you, yourself and Mr. Fonseca, moved away from the parked vehicle?

Mr. Patino-Rios: From the parked vehicles? We maybe moved to maybe about 10, maybe about 12 feet.

Mr. Reiff: 12 feet?

Mr. Patino-Rios: Yeah.

Mr. Reiff: Okay. And after my client allegedly struck you with a – with a club across the bridge of your nose how long after that did he go back to his vehicle?

Mr. Patino-Rios: Uh. He went back to his vehicle after he followed me to – to my car. When I went to my – I went to my car. And I was right there. Like I was – I was wondering basically if I was going to live. I got to my car. Then he got to his car and – and kind of I saw the reaction that he's coming basically doing a U-turn and coming against me. That's when he hit me on my leg.

Mr. Reiff: So, Mr. Patino-Rios, your testimony is that when you were 10 or 12 feet away and after my client allegedly struck you, you're the one who went back first. Is that your testimony?

Mr. Patino-Rios: To my car.

Mr. Reiff: To your car. He was –

Mr. Patino-Rios: He – and you – and you – and your client follow me to my car. He then went to his car where he wasn't supposed to go. He follow me to my car then he went to his car. Tried to struck me.

Mr. Reiff: Did you get in your vehicle?

Mr. Patino-Rios: Huh?

Mr. Reiff: Did you get in your vehicle?

Mr. Patino-Rios: Yeah. After – after he left and after the police got there. Yeah. I got in my – in my vehicle. But not – not in the – at the whole time. When the whole situation was happening never got into my vehicle.

Mr. Reiff: Well, my client just attacked you with a serious weapon. Didn't he?

Mr. Patino-Rios: Yes. And?

Mr. Reiff: And you're -- yes or no?

Mr. Patino-Rios: Yes, he did.

Mr. Reiff: But you got to your vehicle right after that. Right?

Mr. Patino-Rios: I went close to my vehicle. I didn't get inside my vehicle.

Mr. Reiff: Okay. And you could have got in your vehicle and drove off. Isn't that, right? To avoid any further injury. Isn't that correct?

Mr. Patino-Rios: Oh, but I wasn't -- I was going to wait him out. I was going to wait for the police to get there.

Mr. Reiff: You were going to wait until the police got there?

Mr. Patino-Rios: Yeah. Because --

Mr. Reiff: In the meantime, you weren't afraid of my client?

Mr. Patino-Rios: Oh, he already -- he already did what he wasn't supposed to do.

Mr. Reiff: I have nothing further, Your Honor.

Judge Hoeffgen: Okay. Any redirect?

Mr. Goswami: Yeah. You stayed at the scene. You didn't flee, did you?

Mr. Patino-Rios: I didn't. I didn't leave. Never left.

Mr. Goswami: He ran from the scene, didn't he?

Mr. Patino-Rios: He ran from the scene.

Mr. Goswami: Your Honor, may I approach the witness?

Judge Hoeffgen: Yeah.

Mr. Goswami: The defense attorney tried to confuse you and misrepresent to the

Court. What is that symbol right there?

Mr. Patino-Rios: Plus.

Mr. Goswami: And what did you write – did you –

Mr. Reiff: Objection, Your Honor. This mischaracterizes my – my cross-examination of attempting to confuse him. I didn't attempt to confuse anybody, Your Honor.

Mr. Goswami: Judge, he tried to represent to this Court there's no –

Judge Hoeffgen: Yeah. I'm gonna overrule the objection. Allow him to have him look at his statement to give a clarification if any.

Mr. Goswami: Is there a plus on this statement?

Mr. Patino-Rios: It's a plus, yes.

Mr. Goswami: And then in addition to that you wrote pointy sharp project and –

Mr. Patino-Rios: And.

Mr. Goswami: – you pointed to brass knuckles.

Mr. Patino-Rios: Yes.

Mr. Goswami: Your Honor, I'll stipulate introduction to this statement if the council will.

Mr. Reiff: I have no objection, Your Honor.

Mr. Goswami: May I approach, Your Honor.

Judge Hoeffgen: Well, you gotta – you gotta mark it and do all that.

Mr. Goswami: So, when you spoke to the, uh, officer you did tell the officer that there were two weapons used.

Mr. Patino-Rios: Oh, yeah, I told.

Mr. Goswami: Is that what you're saying?

Mr. Patino-Rios: Yes. I told I think it was a lady.

Judge Hoeffgen: What's the number?

Mr. Goswami: It's No. 8.

Judge Hoeffgen: Okay.

Mr. Goswami: Thank you. I'm sorry. Say that again, sir.

Mr. Patino-Rios: I think it was a, uh, the female officer that came that day.

Mr. Goswami: Your Honor, there's a picture that I have presented to the Court. Can I just get that back into the parking lot? I just want to show the witness that. Thank you, Judge. Actually, for more indication it's Plaintiff's Exhibit No. 6. It's already been introduced into evidence. I'm going to present it to the Court this way. There's a vehicle there. That's obviously not the defendant's vehicle. Right?

Mr. Patino-Rios: No, that's not it.

Mr. Goswami: But that's where he pulled into?

Mr. Patino-Rios: That's where he pulled into. After he left that vehicle pulled in there.

Mr. Goswami: Okay. When the vehicle – the defendant's vehicle was in that spot can you show the Court exactly how is it pulled out and struck you? Judge, would you let me put this on the alamo or can I have the witness stand up and present to the Court?

Mr. Reiff: Your Honor, I think it would be proper if Mr. Goswami would show me what exhibit he's talking about.

Judge Hoeffgen: Yeah. So, we'll publish it. Make sure everybody is caught up. Make sure that's working.

Mr. Reiff: Okay. Thank you.

Judge Hoeffgen: I don't know if you want to – hopefully it'll – Perry, if you can make sure his screen is on, too.

Mr. Reiff: As long as there's no pictures.

Judge Hoeffgen: So, do you have a picture on the thing yet?

Mr. Goswami: I – I don't. I'll put it up there.

Judge Hoeffgen: Yeah. See if it'll work. [Laughs] [Clears throat]

Mr. Goswami: Hey, Perry –

Mr. Perry: Right there.

Judge Hoeffgen: There we go. And then, however you guys want to lay it out.

Mr. Goswami: Judge, can you see that, okay?

Judge Hoeffgen: It's all right.

Mr. Goswami: All right. Um.

Judge Hoeffgen: So, just make sure, uh, maybe when you're pointing to something, Mr. Goswami, you can do it there, so we all know what you're point at.

Mr. Goswami: Okay. Yes, Judge. So, this vehicle right here, Mr. Patino-Rios. This is – this was – this is not the defendant's vehicle. Correct?

Mr. Patino-Rios: yeah, correct.

Mr. Goswami: this is just the car that pulled in after.

Mr. Patino-Rios: Yes.

Mr. Goswami: But this was the spot that the defendant pulled into?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. Now prior to the time that he struck you with the vehicle, grazed you with it, how did he pull out of the parking spot? Can you describe for the Court how he did it.

Mr. Patino-Rios: Basically, what he did instead of – if he was going to leave the only thing that he had to do was go to his right, a left, and he'd be – and he would be on the street.

Mr. Goswami: So, pulling out like backwards and then going in that way?

Mr. Patino-Rios: Yeah. But instead -- instead of going that way he went straight, he went back, and then he came back. He did like a -- a U-turn to come back facing me.

Mr. Goswami: Okay. So, if I was to use my pen to depict that. He pulls out this way and then he came this way?

Mr. Patino-Rios: Yes.

Mr. Goswami: Okay. And whose vehicle is this?

Mr. Patino-Rios: This one is mine.

Mr. Goswami: That's your vehicle?

Mr. Patino-Rios: Yes.

Mr. Goswami: And that's where you were standing?

Mr. Patino-Rios: Yes.

Mr. Goswami: All right. And you never followed him to his vehicle?

Mr. Patino-Rios: No.

Mr. Goswami: All right. No further questions, Your Honor. Thank you, Judge.

Judge Hoeffgen: Okay. Any subject to recall for this witness?

Mr. Goswami: No, Your Honor.

Judge Hoeffgen: Mr., uh, Reiff?

Mr. Reiff: Can you leave the photo up, please, officer?

Mr. Perry: Sure. Yeah.

Mr. Reiff: Mr. Patino-Rios.

Mr. Patino-Rios: Yes.

Mr. Reiff: Um. Drawing your attention to the photo. You already identified your vehicle as the one that's on the far left.

Mr. Patino-Rios: Yes.

Mr. Reiff: At any point in time prior to the police arriving, did you ever move that vehicle?

Mr. Patino-Rios: Never.

Mr. Reiff: You could have simply drove away at any time, couldn't you? Without even having to back up. Isn't that true?

Mr. Patino-Rios: I never moved it.

Mr. Reiff: You what?

Mr. Patino-Rios: Never moved the vehicle.

Mr. Reiff: No, that's not my question, sir. I already asked that question. I asked you a question whether or not you could have just simply drove away without even backing up at any point in time. Isn't that true?

Mr. Goswami: I'm going to object to that, Your Honor. That would have been fleeing the scene of a crime. That's a crime.

Judge Hoeffgen: What all – okay. Hold on. What are you asking him, Mr. Reiff? At what point are you saying he could have drove away?

Mr. Reiff: At any point after their confrontation. Whatever it was. You could have simply drove away without backing up. That's my question.

Judge Hoeffgen: Okay.

Mr. Goswami: I don't understand that and I'm going to object to that.

Judge Hoeffgen: Are you saying he had an obligation to leave the scene?

Mr. Reiff: No, not whatsoever. Not whatsoever.

Judge Hoeffgen: To figure out – so, after the alleged incident you're saying – you're asking the question why didn't you – why didn't you just drive away?

Mr. Reiff: No, I'm metalating, Your Honor. First of all, I can establish that there was nothing to prevent him from simply driving away.

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- Judge Hoeffgen: When?
- Mr. Reiff: After the confrontation in which he's saying my client attacked him with a pointy club that was probably just long, a regular kickstand, in which could – including serious bodily injury.
- Judge Hoeffgen: Okay. Okay. So, the question I guess is after you – you were supposedly stuck by the defendant, why didn't you leave?
- Mr. Patino-Rios: Well, because I wasn't the one who did the harm.
- Judge Hoeffgen: Okay. That's not answering the question. Is it? Why didn't you leave?
- Mr. Patino-Rios: Why didn't I leave? Because honestly – honestly, I didn't thought there was a – it was a need for me to – to – to leave since I wasn't the person who did the harm. Right there – something happened right there. I was going to stay because I was going to call the police because I also want to call the police.
- Mr. Reiff: One last question, Your Honor. So, at that point in time you no longer feared my client?
- Mr. Patino-Rios: Huh?
- Mr. Goswami: At what point in time?
- Mr. Reiff: At that point in time –
- Mr. Goswami: After he was struck?
- Mr. Reiff: After the alleged confrontation when you moved back to your vehicle you were no longer in fear of my client. Correct?
- Mr. Patino-Rios: Well, I would have to be in fear if I was run – I was trying to avoid him.
- Judge Hoeffgen: That's a yes or no question. Can you just – were you in fear of Mr. Fonseca after the incident?
- Mr. Patino-Rios: Huh? I was – honestly, yes. I was – I was in fear. I was in fear, but I wasn't going to – I wasn't going to leave. That's why I picked that area and that place. It was a public place.
-

Mr. Reiff: I have nothing further, Your Honor.

Judge Hoeffgen: Okay. Anything else for the witness?

Mr. Goswami: I mean – I – tried to clarify for the Court as much as I could. You stayed because you were the victim. Correct?

Mr. Patino-Rios: Yes.

Mr. Reiff: Objection, that's a leading question, Your Honor.

Mr. Goswami: You stayed because you called the police.

Mr. Patino-Rios: Yes. And that's why – that's why I keep on saying. Because I wasn't – I wasn't – I wasn't the one who did wrong in that – in that place.

Mr. Goswami: I think we have established. Thank you, Judge.

Judge Hoeffgen: Okay. All right. Are we done with this witness?

Mr. Goswami: Yes.

Judge Hoeffgen: Okay. And I heard no subject to recall. So, you're all – you're free to go if you need to leave. Okay?

Mr. Patino-Rios: Okay. Thank you.

Judge Hoeffgen: All right. Thank you.

Mr. Reiff: Thank you, officer.

Judge Hoeffgen: All right. City, how many more witnesses are you calling?

Mr. Goswami: I've got a witness to the scene, Your Honor. And then, uh – one more definitely and I could call two.

Judge Hoeffgen: Okay.

Mr. Goswami: I can try to go with just one more, Judge. And I can go –

Judge Hoeffgen: Well, I'm not – I'm not meaning to cut it.

Mr. Goswami: No, no.

Judge Hoeffgen: I just want to make people aware of the time. If we need to recess for another day, I have no problem with that.

Mr. Goswami: No, I mean I – I'd like to resolve it today, Judge. I'll get – I'll get through Mr. Medina quickly. Just depends on how long he's going to cross-examine every witness for.

Judge Hoeffgen: Okay.

Mr. Goswami: Okay.

Judge Hoeffgen: So, you want – who is your next witness you're going to call?

Mr. Goswami: Mr. Medina.

Judge Hoeffgen: Okay.

Mr. Perry: Medina. You can sit up here.

Mr. Medina: Okay.

Mr. Perry: Here's the light. You know what I mean? It's important.

Mr. Medina: Okay.

Judge Hoeffgen: Stand right here and raise your right hand.

Ms. Hawes: Do you swear or affirm that the testimony you're about to give on this date is the absolute truth?

Mr. Medina: Yes.

Judge Hoeffgen: All right. Mr. Goswami. If you want to proceed with your questioning.

Mr. Goswami: Thank you, Judge. I'll try to get through this quickly. Mr. Medina can you please state your full name for the Court?

Mr. Medina: Edgar Roberto Medina.

Mr. Goswami: And Mr. Medina, where do you currently work?

Mr. Medina: I'm public safety. I'm, um, a security officer at Cosmopolitan and Circus Circus as security officer as well.

Mr. Goswami: Okay. And how long have you worked at the Cosmopolitan for?

Mr. Medina: About five months.

Mr. Goswami: And how long have you worked at Circus for?

Mr. Medina: Two and a half years.

Mr. Goswami: Okay. And do you see the individual seated at defense counsel's table?

Mr. Medina: Yes.

Mr. Goswami: Who is that individual?

Mr. Medina: That's, uh, Nery Gust – uh. Gustavo, uh, Fonseca.

Mr. Goswami: Okay. Can you point to him and identify an article of clothing he's wearing.

Mr. Medina: Right here. Uh. Grey suit, white shirt, black mask.

Mr. Goswami: Okay. Your Honor, may the record reflect defendant's been identified in open Court?

Judge Hoeffgen: It will.

Mr. Goswami: Okay. Uh. On December 3, 2019 at approximately 6:00 p.m. Did you have an occasion to be at the McDonald's at 911 East Cheyenne?

Mr. Medina: Yes.

Mr. Goswami: Okay. And who did you go there with?

Mr. Medina: Uh. John Patino.

Mr. Goswami: Okay. And who asked you to go to that meeting?

Mr. Medina: Uh. John Patino asked me to.

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- Mr. Goswami: Okay. And did Mr. Patino advise you of why he asked you to go there?
- Mr. Medina: Yes, sir.
- Mr. Goswami: Why was that?
- Mr. Medina: He asked me to go there because, um, Mr. Fonseca here is kind of irate and, um, he needed, uh, to be safe and he wanted to be there in McDonald's in a public area as well.
- Mr. Goswami: Okay. So, you agreed to go with them?
- Mr. Medina: Yes, sir.
- Mr. Goswami: Okay. And, uh, let me ask you this question. When you arrived at the McDonald's you arrived there with Mr. Patino?
- Mr. Medina: Yes, sir.
- Mr. Goswami: Okay. Together. And --
- Mr. Medina: No, no. I had my own car.
- Mr. Goswami: Oh, your own car.
- Mr. Medina: Yes, sir.
- Mr. Goswami: You took your own car. Okay. And when you arrived there was the defendant there?
- Mr. Medina: Yes. No, uh, he -- he wasn't there. I went straight to the restroom.
- Mr. Goswami: Okay. So, when you arrived the defendant was not there. And you -- you said you left the -- where were you at? Parking lot?
- Mr. Medina: Yeah. Parking lot and I told John that I was going to go to the restroom real quick. And when I came back from the restroom than Mr. Fonseca was there.
- Mr. Goswami: And -- and when -- how long were you in the restroom for you would say? Probably about --
- Mr. Medina: Maybe about three or four minutes at the most.
-

Mr. Goswami: Okay. Now when you arrived and you came out of the restroom, uh, can you describe if – if I – Your Honor, may I approach the witness?

Judge Hoeffgen: Yes.

Mr. Goswami: Okay. Uh. Mr. Medina, I'm going to approach you. Okay. I'm gonna have you stand up. Show me exactly – show me exactly where the parties were positioned. If I – if you, were you, I am the defendant, and this is the victim. Where were – when you walked out of the bathroom show us the positioning.

Mr. Medina: You're the defendant. That's the victim. You will stand here. And there was a vehicle right here. Right in between them. And then when I arrived, I arrived right here.

Mr. Goswami: Okay. And can you describe for the Court what the defendant's demeanor was like?

Mr. Medina: Very irate. Very disorderly conduct. Um.

Mr. Goswami: When you say irate, what do you mean by irate?

Mr. Medina: He was like very mad like very bad demeanor.

Mr. Goswami: Okay. So, at any – did you say anything at this point?

Mr. Medina: Uh. Yes. I tried to break up – break it up. I asked him what was going on and all this stuff. And asked by John Patino as well. And he just kept going at it. I tried to break it up. Couldn't – you know to defuse the situation, but it keep escalating.

Mr. Goswami: And what, if anything, was he saying? The defendant.

Mr. Medina: He was telling him that, um – that John Patino was a liar. That he owed him more money than what it was and all that stuff. That he did the job and that's about it. And the rest of it I don't really remember.

Mr. Goswami: Okay. At any point during the argument did it become physical?

Mr. Medina: Uh. After a couple minutes, yes.

Mr. Goswami: What happened?

Mr. Medina: Um. Mr. Fonseca grabbed a little – like a club thing. Sharp. Like maybe 8 to 10 inches and struck John Patino right in the nose.

Mr. Goswami: Okay. Did he – did he – can you describe how he was swinging the item or how he was holding it?

Mr. Medina: He was swinging like right around and then just – just struck him right in the nose.

Mr. Goswami: Did you see him strike the victim?

Mr. Medina: Yes, I did.

Mr. Goswami: Okay. Where did he strike the victim?

Mr. Medina: Right on top of the nose.

Mr. Goswami: Okay. And, uh, did he swing at you?

Mr. Medina: Yes, I – yes, he did.

Mr. Goswami: Did he strike you?

Mr. Medina: Negative.

Mr. Goswami: Okay. So, what happened after the victim was struck? What did he do? What did John do?

Mr. Medina: Uh. Well, he stepped back and, um, he was just saying names both ways. And then he came over here with the brass knuckles and I saw the brass knuckles. Hit him right in the chest.

Mr. Goswami: Okay. And then what happened after that?

Mr. Medina: After that, well, that's when the altercation came in. And I stepped back when he struck at me. I stepped back. That's what I was trained you know to do. Step back and defuse the situation. You know. And, um, so since I saw a weapon, I just had to step back. And they just started fighting. They just started fighting. I went in there and just tried to break it up. He – they were both really mad. He steps back.

Mr. Goswami: Who is he?

Mr. Medina: John Patino steps back and tries to go to his car. And he gets in his car.

Mr. Goswami: Who is he?

Mr. Medina: Uh. Fonseca.

Mr. Goswami: Okay. Defendant.

Mr. Medina: On second. Yes, sir. And, um, tried to run him over.

Mr. Goswami: Okay.

Mr. Medina: Tries to run him over.

Mr. Goswami: Now did he strike the victim with the vehicle to the best of your knowledge?

Mr. Medina: I don't remember. I don't recall. But I saw John turn around and he was touching his knee of some sort you know. But I don't really – really remember.

Mr. Goswami: Okay. Okay. And where did the – what happened after the defendant was in his vehicle and struck the – the victim? What did the defendant do?

Mr. Medina: The defendant? Um. What do you mean??

Mr. Goswami: Like what happened next after he drove the vehicle.

Mr. Medina: Oh, he just fled the scene.

Mr. Goswami: Okay.

Mr. Medina: He fled the scene. I tried turning his car off and everything. Tried to put it in park and defuse the situation. He told me, oh, it's not against – he was against him.

Mr. Goswami: Okay. And he left the scene?

Mr. Medina: Yes, sir.

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- Mr. Goswami: Okay. Now I want to ask you a very important question. Let's just get this out there. Were you muscled there to intimidate the defendant?
- Mr. Medina: Negative.
- Mr. Goswami: Okay. And why did you stay there after this incident occurred?
- Mr. Medina: Because I wanted John Patino to you know, um, be safe and just thinking about it.
- Mr. Goswami: Okay. So, did you – did you wait for police to arrive?
- Mr. Medina: Yes.
- Mr. Goswami: Okay. Did you tell the police what happened?
- Mr. Medina: Yes.
- Mr. Goswami: Okay. Okay. And, um. Your Honor, may I just approach the – the bench one more time?
- Mr. Medina: Yeah.
- Mr. Goswami: This is the photo I want to show.
- Judge Hoeffgen: Yeah. Which photo do you want?
- Mr. Goswami: Just the injury.
- Judge Hoeffgen: Oh. Oh, here.
- Mr. Goswami: Thank you, Your Honor. Um. It will be marked for identification as Plaintiff's Exhibit No. 1. The photo. Is that – uh. Is this your – who is in this photo?
- Mr. Medina: John Patino.
- Mr. Goswami: And does that photo fairly and accurately depict the injury that was sustained as a result of his actions?
- Mr. Medina: That's accurate for right there. You know that – what he did. Yes.
- Mr. Goswami: Okay. And it was taken at or near the time of the event in
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question?

Mr. Medina: Yes, sir.

Mr. Goswami: Okay. And he did it intentionally?

Mr. Medina: Yes, sir.

Mr. Reiff: Objection, calls for speculation, Your Honor.

Judge Hoeffgen: Sustained.

Mr. Goswami: Have you ever seen anybody – may I lay a foundation for that, Judge?

Judge Hoeffgen: Sure.

Mr. Goswami: Have you ever seen in your experience as a security officer somebody hit somebody else?

Mr. Medina: Yes.

Mr. Goswami: Have you seen situations where somebody intentionally hit somebody else?

Mr. Medina: Yes.

Mr. Goswami: Did the defendant act in the same manner on this occasion?

Mr. Medina: Yes.

Mr. Goswami: No further questions. I pass the witness.

Judge Hoeffgen: All right. Mr. Reiff. Any cross-examination?

Mr. Reiff: Yes. Good afternoon, Mr. Medina.

Mr. Medina: Good afternoon, sir. How are you?

Mr. Reiff: Good. So, how long have you known Mr. Patino?

Mr. Medina: Around three years. Fairly around three years.

Mr. Reiff: How do you know him?

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- Mr. Medina: Uh. We used to work together when he worked together with us as well. But he worked in a different department.
- Mr. Reiff: So, you're saying you testified that you were at McDonald's on December 3, 2019?
- Mr. Medina: Yes, sir.
- Mr. Reiff: At the request of Mr. Patino-Rios.
- Mr. Medina: Yes, sir.
- Mr. Reiff: You also testified that he wanted – Mr. Patino-Rios wanted you there because he wanted to be safe because my client you testified is irate. Yes?
- Mr. Medina: That is correct.
- Mr. Reiff: And you said, "Okay. I'll be there."
- Mr. Medina: That is correct.
- Mr. Reiff: Did you ever inquire as what's the – what's at the bottom of this? What's going on here? Why is he going to be irate? What is the nature of this –?
- Mr. Medina: John Patino explained the situation. He explained everything to me. And I, uh – I fairly agreed with him.
- Mr. Reiff: And Mr. Patino-Rios told you that he owed my client money and he told you also that my client was protesting all the money that was owed. Isn't that correct?
- Mr. Medina: That is correct.
- Mr. Reiff: Besides my client being irate, what did Mr. Patino-Rios tell you why you should be there?
- Mr. Medina: Uh. Because he was – he felt threatened by Mr. Fonseca.
- Mr. Reiff: How so? Why?
- Mr. Medina: How so? He's always been irate. He's a short – has a short fuse.
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Mr. Reiff: Did he ever tell you about any – any times, if ever, that my client ever did anything harmful to Mr. Patino-Rios?

Mr. Medina: Negative. Why? Because they never worked together before in just that time.

Mr. Reiff: How long have you been a security officer?

Mr. Medina: Two and a half years, sir.

Mr. Reiff: What's a take down, sir? What does that mean?

Mr. Medina: A take down. It means take the person down.

Mr. Goswami: I'm going to object to relevance, Your Honor.

Judge Hoeffgen: Yeah. What's the relevance of this line of questioning?

Mr. Reiff: Okay. Okay. We'll – we'll find out.

Judge Hoeffgen: Okay.

Mr. Reiff: Um. I'm sorry. I'll withdraw the question, Your Honor.

Judge Hoeffgen: Okay. Great.

Mr. Reiff: You testified that my client was swinging a – a large pointy object at Mr. Patino-Rios. Right?

Mr. Medina: Affirmative.

Mr. Reiff: And you also had brass knuckles – you saw the brass knuckles in his hand which hand?

Mr. Medina: The right hand, sir.

Mr. Reiff: Which hand was he using to swing the – the pointy club?

Mr. Medina: The same one, sir.

Mr. Reiff: Okay. And did he have the brass knuckles on while he was putting the –

Mr. Medina: Affirm.

Mr. Reiff: And your reaction was to step back. That's what you're testifying?

Mr. Medina: Affirm.

Mr. Reiff: Your test – are you trained in your profession that when one individual is attacking another individual with deadly weapons to step back and don't do anything?

Mr. Medina: Negative. I stepped back because he swung on me first.

Mr. Reiff: And you stayed back.

Mr. Medina: That is correct.

Mr. Reiff: You let Mr. Fonseca continue to attack Mr. Patino-Rios with no –

Mr. Medina: Everything – everything happened very fast.

Mr. Reiff: Mr. Patino – I'm sorry. Mr. Medina would you please let me ask the question before you answer?

Mr. Medina: Go ahead.

Mr. Reiff: So, my client swung a pointy object while wearing brass knuckles and you did nothing other than step back?

Mr. Goswami: I'm going to object to that, Your Honor. He testified that he was stepping back so he didn't get hit. It was pretty clear.

Mr. Reiff: My question is to confirm what – that's what he said. Is that your testimony, sir?

Mr. Medina: That's correct, sir.

Mr. Reiff: You never intervened beyond that?

Mr. Medina: Negative, sir. Everything happens too fast. Can I ask you a question, sir?

Judge Hoeffgen: Uh. No, you can't.

Mr. Medina: Okay. Okay.

Mr. Reiff: There came a point in time, even though it happened fast where this conflict, whatever we want to call it, ceased. Is that correct? My client stopped swinging the weapon or did he keep swinging it forever?

Mr. Medina: He stopped swinging the weapon because John Patino started fighting with him as well. So, they got in an altercation?

Mr. Reiff: You said what?

Mr. Medina: They both got in an altercation and started fighting. Everything happened very fast. I don't remember.

Mr. Reiff: When you say fast, how long did it last? Maybe – the altercation when they started fighting?

Mr. Medina: Maybe around 30 seconds or so. 45 for the most.

Mr. Reiff: Once it ceased what happened next?

Mr. Medina: Mr. Fonseca got in his car. He was very mad. Very irate. Turned – went in reverse then pushed forward. Tried hitting, um, John Patino with the car.

Mr. Reiff: So, you're saying Mr. Fonseca went to his car and intentionally backed up to try to hit Mr. Patino-Rios. Is that what you're telling us?

Mr. Medina: Let me explain. Can I get up, sir?

Judge Hoeffgen: Sure. Take your time.

Mr. Medina: Okay. This is the parking lot. So, he backs up like this and tires to hit him with the front end of his car.

Mr. Reiff: Between Mr. Patino's car and Mr. Fonseca's car, how close were they together?

Mr. Medina: About two spots away maybe. Three at the most. If I remember.

Mr. Reiff: And they had – and they had their argument, their confrontation, how far away from the vehicle?

Mr. Medina: Um. I don't recall.

Mr. Reiff: Was it on the other side of the parking lot?

Mr. Medina: It was maybe about 6 to 8 feet from the vehicles.

Mr. Reiff: Just a few steps away?

Mr. Medina: Yeah.

Mr. Reiff: And your testimony is when my client backed up Mr. Patino-Rios was positioned behind my client's vehicle?

Mr. Goswami: No, it's not – it mischaracterizes testimony.

Judge Hoeffgen: Yeah. I'm going to sustain that. That's not what his testimony is.

Mr. Reiff: I'm telling you I'm not sure because I just don't know what he said.

Judge Hoeffgen: I don't think he actually stated, uh, Mr. Patino's position when your client – when he testified that your client backed out of the space. I don't think he specified where he –

Mr. Reiff: Oh, I'm sorry.

Judge Hoeffgen: Where Mr. Patino was located.

Mr. Reiff: Well, I'm trying to find out.

Mr. Medina: He was right – the parking –

Mr. Reiff: Was it the back or parallel to the front?

Mr. Medina: Back of the car is McDonald's over here.

Mr. Reiff: No, no. I'm saying this box, which is the back.

Mr. Medina: This is the front.

Mr. Reiff: This is the front.

Mr. Medina: This is the front.

Mr. Reiff: Okay.

Mr. Medina: Okay. Should I write it on it?

Judge Hoeffgen: No, no. Please don't. [Laughs]

Mr. Medina: Okay. So, he backs away from the parking. John Patino is on this side. It goes like this. He hits John Patino.

Mr. Reiff: Do you have the exhibit, um, with the vehicles?

Judge Hoeffgen: Yeah. Bailiff? Or whoever wants to come get it. Do you want it up on the device, Mr. Reiff, so he can see it? Okay. All right. So, it should come up in just a moment. There it is. Okay.

Mr. Reiff: Do you recognize any of the vehicles in this depiction, Mr. Medino?

Judge Hoeffgen: Medino or Medina?

Mr. Medina: Medina.

Judge Hoeffgen: With an A?

Mr. Medina: M-E-D-I-N-A.

Judge Hoeffgen: With an A. Okay.

Mr. Medina: Yes, sir.

Judge Hoeffgen: So, the question is do you recognize any of the vehicles depicted in this picture?

Mr. Medina: Yes, I do. John Patino's is right here on the left side.

Judge Hoeffgen: Is it the vehicle on the far left?

Mr. Medina: Yes, sir.

Judge Hoeffgen: Okay.

Mr. Reiff: Do you see Mr. Fonseca's vehicle in this picture?

Mr. Medina: No. He fled the scene before the picture was taken. Right?

Mr. Reiff: Okay. So, his picture is not in – I'm sorry. His vehicle is not in this picture. Is that correct?

Mr. Medina: That's correct, sir. I don't remember.

Mr. Reiff: Do you recall where his vehicle was with relation to this picture?

Mr. Medina: I don't remember. I think it was on the left side of that picture to the right. I don't remember, sir.

Mr. Reiff: You testified they were about 8 feet apart. Didn't you?

Mr. Medina: I did, sir.

Mr. Reiff: Okay. But you don't know if it was to the left or the right?

Mr. Medina: That's correct.

Mr. Reiff: But he was in one of these spaces?

Mr. Medina: Yes, sir.

Mr. Reiff: Nothing further, Your Honor.

Judge Hoeffgen: Any redirect?

Mr. Goswami: I – just do you have any doubt in your mind that the defendant struck the victim with that –

Mr. Medina: Yes.

Mr. Goswami: Any doubt in your mind?

Mr. Medina: Any doubt in my mind. I don't have any doubt that he did what he did.

Judge Hoeffgen: Okay. All right.

Mr. Goswami: Sorry, Judge. That was bad on my – no further questions, Your Honor. We pass the witness.

Judge Hoeffgen: All right. Any subject to recall by either party?

Mr. Goswami: No, Your Honor.

Judge Hoeffgen: Mr. Reiff?

Mr. Reiff: No, Your Honor.

Judge Hoeffgen: Do you intend to maybe call him later on?

Mr. Reiff: No.

Judge Hoeffgen: No? Okay. So, Mr. Medina you're excused. You're free to go if you need to.

Mr. Medina: Thanks, sir.

Mr. Goswami: And Judge, I think I can go with one officer as opposed to two.

Judge Hoeffgen: Okay. All right. So, what I want to do is take a recess. So, if anybody needs to use the facilities or make any phone calls with recess. And we'll come back.

Mr. Goswami: Okay.

Judge Hoeffgen: Right, Perry? All right.

Mr. Goswami: Thank you, Judge.

Judge Hoeffgen: Okay. So, we're back on the record. Uh. Mr. Goswami are you prepared to call your next witness?

Mr. Goswami: Yes. Yes, Judge. And thank you for that bathroom break. City is ready to call Detective Forsberg, Your Honor. How do you spell the Forsberg?

Judge Hoeffgen: Please raise your right hand.

Ms. Hawes: Do you swear or affirm that the testimony you're about to give on this date is the whole truth?

Mr. Forsberg: I swear.

Judge Hoeffgen: Have a seat. All right. Mr. Goswami, if you want to proceed with your questions.

Mr. Goswami: Thank you, Your Honor. Um. Detective, can you please state your

name for the record?

Mr. Forsberg: Detective Shane Forsberg.

Mr. Goswami: And Detective, how long have you been, uh, with North Los Vegas Police Department?

Mr. Forsberg: Uh. Nearly 14 years.

Mr. Goswami: And you're currently a detective with North Los Vegas Police Department?

Mr. Forsberg: Correct.

Mr. Goswami: Okay. Uh. Detective, I'd like to direct your attention to the date of December 3, 2019. On that day at approximately 18:50 hours, did you have an occasion to respond to 911 East Cheyenne in reference to a battery?

Mr. Forsberg: I did.

Mr. Goswami: And is that McDonald's?

Mr. Forsberg: It is.

Mr. Goswami: And is that located in the City of North Los Vegas?

Mr. Forsberg: Yes.

Mr. Goswami: Okay. And do you recall who it was that made the 911 call?

Mr. Forsberg: Uh. John Patino.

Mr. Goswami: And that's the victim in the case?

Mr. Forsberg: Yes.

Mr. Goswami: Okay. When you arrived at the scene, uh, did you arrive with a partner?

Mr. Forsberg: Yes.

Mr. Goswami: Okay.

Mr. Forsberg: De – Officer Aguilar.

Mr. Goswami: Okay. And did you make contact with an individual by the name of John Patino?

Mr. Forsberg: Yes.

Mr. Goswami: All right. And when you saw John Patino, did you notice anything unusual about his persons?

Mr. Forsberg: About what?

Mr. Goswami: About his face or his persons?

Mr. Forsberg: Yeah. He had a small abrasion on the bridge of his nose that was, uh, slightly bleeding.

Mr. Goswami: Okay. And did it appear in your, uh, experience to be fresh or old?

Mr. Forsberg: Fresh.

Mr. Goswami: Okay. And, uh, did he advise you of what occurred?

Mr. Forsberg: He did.

Mr. Goswami: Okay. And then there was another witness at the scene?

Mr. Forsberg: Yes.

Mr. Goswami: And, uh, your partner spoke to the other witness?

Mr. Forsberg: Yes, she did.

Mr. Goswami: Okay. And were they interviewed together or interview separately?

Mr. Forsberg: Separately.

Mr. Goswami: And why do you interview separately?

Mr. Forsberg: So, they couldn't hear each other's stories.

Mr. Goswami: And after they were interviewed separately did you – did you make an attempt – was the defendant present at the scene?

Mr. Forsberg: No.

Mr. Goswami: Did you attempt contact with the defendant?

Mr. Forsberg: I did. I attempted – I called him on his, uh, cell phone that was provided by the victim.

Mr. Goswami: Okay. Okay. And what if it – what if anything did the defendant tell you, uh, about what occurred?

Mr. Forsberg: He told me he had went to meet with the, uh, victim to exchange some money that was owed to him. The money that he was offered was not the amount he was expecting. And he became upset. An argument ensued and then he said he didn't want to talk to me without a lawyer and to not contact him again.

Mr. Goswami: And did he hang up on you?

Mr. Forsberg: He did.

Mr. Goswami: Okay. Um. At the point that the – when you were talking to the defendant, I want to ask you a very important question, Detective. Did the defendant ever tell you, "I was the one that was battered"?

Mr. Forsberg: No.

Mr. Goswami: Did the defendant ever tell you, "I was the one that was attacked"?

Mr. Forsberg: No.

Mr. Goswami: Did the defendant ever tell you that, "I have injured, and I need to come and show you these injuries or can you come and take photos of them"?

Mr. Forsberg: No. He told me specifically not to contact him.

Mr. Goswami: After you interviewed the victim and Officer Aguilar, uh, the witness did you make a determination as to whether battery occurred?

Mr. Forsberg: I did.

Mr. Goswami: And who did you determine to be the batterer?

Mr. Forsberg: Uh. Mr. Fonseca.

Mr. Goswami: And why did you determine him to be the batterer?

Mr. Forsberg: The injury present on the victim was consistent with his story and the witness' story. And obviously I didn't get any rebuttal from Mr. Fonseca or any explanation. And the witness present – having an eyewitness present, um, contributes to that as well.

Mr. Goswami: Okay. Um. Enough – I'm sorry, Your Honor. Court's indulgence. Did – did you find a weapon at the scene?

Mr. Forsberg: No.

Mr. Goswami: Is that unusual?

Mr. Forsberg: Uh. No. It would be highly unusual to find the weapon at a scene that the suspect fled.

Mr. Goswami: Okay, i.e., the suspect usually takes the weapon with them?

Mr. Forsberg: Correct.

Mr. Goswami: Okay. No further questions, Your Honor. We pass the witness.

Judge Hoeffgen: Mr. Reiff, any cross-examination?

Mr. Reiff: Thank you. **[Clears throat]** Excuse me. Thank you, uh, Judge. Good afternoon off – Detective Forsberg.

Mr. Forsberg: Yes, sir.

Mr. Reiff: So, you made a determination on, uh – on December 3, 2019 that my client committed a battery. Is that correct?

Mr. Forsberg: A probable cause of determination, yes.

Mr. Reiff: Based upon what specific facts?

Mr. Forsberg: There was an injury present to the person reporting/victim that was consistent with his and the witness' story. There was a witness present. And upon attempting to contact Mr. Fonseca, he offered no rebuttal.

Mr. Reiff: Based on your investigation, were any weapons used?

Mr. Forsberg: Yes.

Mr. Reiff: What weapons?

Mr. Forsberg: It was described as a small metal object similar to a small baton or club with a pointed end.

Mr. Reiff: How — when you say small, approximate — did you have a description about how long it was?

Mr. Forsberg: Uh. I did. I don't recall the exact — I think I estimated 6 to 8 inches. Something like that.

Mr. Reiff: Any other weapons?

Mr. Forsberg: Uh. It was alleged that a vehicle was used to, uh, run into the victim, but I didn't find probable cause that occurred.

Mr. Reiff: Any other weapons, sir?

Mr. Forsberg: Uh. It was alleged that Mr. Fonseca had brass knuckles, but initially it was said that they weren't used to batter anybody.

Mr. Reiff: So, there was, based upon your investigation and determination by you, that none of the weapons were used as part of the battery?

Mr. Forsberg: No. What —

Judge Hoeffgen: Wait. Wait. Can you rephrase the question? Are you — is the question based on what he just testified to?

Mr. Reiff: I'll rephrase the question.

Judge Hoeffgen: Yeah, please.

Mr. Reiff: Was there probable cause — did you — did you find probable cause with regard to this day and this event that a battery occurred with the use of a deadly weapon?

Mr. Forsberg: With the use of a weapon, yes.

Mr. Reiff: Which weapon?

Mr. Forsberg: The small metal baton that I described to you.

Mr. Reiff: Court's indulgence, Your Honor. Thank you, detective. Nothing further.

Judge Hoeffgen: Any redirect?

Mr. Goswami: No, Your Honor.

Judge Hoeffgen: Any subject to recall?

Mr. Goswami: No, Your Honor.

Judge Hoeffgen: Mr. Reiff. Any subject for recall for this witness?

Mr. Reiff: No, Judge.

Judge Hoeffgen: All right. Thank you, detective. Your testimony is done you're free to go if you need to leave.

Mr. Forsberg: Thank you, sir.

Judge Hoeffgen: Thank you.

Mr. Forsberg: I can stay in then? Okay.

Judge Hoeffgen: If you wish. Just -- just wait outside. Or if -- actually, any objection? If he's not going to be recalled I don't have a problem with him sitting in the courtroom.

Mr. Goswami: Oh, yeah, of course.

Mr. Reiff: None, Your Honor.

Judge Hoeffgen: Yeah. So, if you want to observe that's fine.

Mr. Goswami: Thank -- thank you, Judge.

Judge Hoeffgen: Yeah. Okay. Um. Anything else, Mr. Goswami?

Mr. Goswami: The Court will be happy to know, Your Honor, I'm good. I'll do it with one officer.

Judge Hoeffgen: Okay. [Laughs]

Mr. Goswami: So, I think that takes care. City will rest, Your Honor.

Judge Hoeffgen: Okay. All right. Mr. Reiff, uh, now is the time for the defense to present its case or his case I should say. Um. Do you have witnesses that you intend to call aside from your client?

Mr. Reiff: No, Your Honor.

Judge Hoeffgen: All right. Also, now I'll need to, uh, inquire whether the defense intends to call Mr. Fonseca as a witness.

Mr. Reiff: Thank you, Your Honor. As counsel on behalf of Mr. Fonseca, I have advised him of his unfettered right and his constitutional right to elect to take the stand on his own behalf or to remain silent, in which case in the latter event the Court would not use, um, that election against him. He has elected to testify, Judge.

Judge Hoeffgen: Okay. And you have advised him of the obviously rights in that regard?

Mr. Reiff: Completely.

Judge Hoeffgen: Okay. Then you may call your witness.

Mr. Reiff: And I did advise him with the assistance of the Court appointed interpreter in Spanish. His native – his native language.

Judge Hoeffgen: Yes.

Mr. Reiff: Uh. Defense calls, uh, Mr. Fonseca to the stand.

Judge Hoeffgen: Okay.

Mr. Reiff: Nery Fonseca.

Judge Hoeffgen: Yes. No, no. I want him in the witness box, please.

Ms. Hawes: Do you swear or affirm that the testimony you're about to give on this date is the whole truth?

Mr. Palomo: Yes.

Judge Hoeffgen: All right. Go ahead and have a seat. Mr. Reiff, if you would like to begin your questioning.

Mr. Reiff: Thank you, Judge. Mr. Fonseca. We've been talking about December 3, 2019. Do you recall that day?

Mr. Palomo: Yes.

Mr. Reiff: And did you have any conversations that day with John Patino-Rios?

Mr. Palomo: Yes.

Mr. Reiff: Uh. One or more than one?

Mr. Palomo: More than one.

Mr. Reiff: When was the first conversation?

Mr. Palomo: When he called me to set up a meeting at that place.

Mr. Reiff: Which place?

Mr. Palomo: McDonald's. On Losee and Cheyenne McDonald's.

Mr. Reiff: Did you go to the meeting?

Mr. Palomo: Yes.

Mr. Reiff: How long after the call did you go to the meeting?

Mr. Palomo: 15 minutes.

Mr. Reiff: When you were in route to the meeting, did you under – did you – did you have any conception of why you were going to this meeting? What the purpose of it was?

Mr. Palomo: To collect money from a job that I had done.

Mr. Reiff: Okay. And when you say a job, what job are you talking about?

Mr. Palomo: We – we build some, uh, steps or staircase for a client in the client's house. Of Mr. Patino's client.

Mr. Reiff: And how long did that job last?

Mr. Palomo: Three months.

Mr. Reiff: How many people worked at that job?

Mr. Palomo: Mr. Patino and myself.

Mr. Reiff: So, when you were going to meet Mr. Patino, for what -- for what purpose related to the job was it?

Mr. Palomo: He had collected the money from the job that I had finished.

Mr. Reiff: When you say the job that you had finished, what do you mean by that?

Mr. Palomo: That I had completed my part of that job.

Mr. Reiff: And when you did -- you met Mr., uh, Patino-Rios that evening at the McDonald's?

Mr. Palomo: Yes.

Mr. Reiff: When you arrived, was he there already or did you get there first?

Mr. Palomo: He was already there.

Mr. Reiff: Where was he when you arrived?

Mr. Palomo: In his vehicle.

Mr. Reiff: Was he in the McDonald's parking lot?

Mr. Palomo: Yes.

Mr. Reiff: And was his car parked or was it running?

Mr. Palomo: It was both.

Mr. Reiff: And did you -- did you park also in the McDonald's parking lot?

Mr. Palomo: Yes.

Mr. Reiff: And how far away from Mr. Rios did you park?

-
- Mr. Palomo: It was three spaces in between.
- Mr. Reiff: What happened after you arrived? And did you say you parked?
- Mr. Palomo: Yes.
- Mr. Reiff: What happened – what happened after you arrived where you parked? What happened next?
- Mr. Palomo: I got out of my car and I walked towards his vehicle.
- Mr. Reiff: And at any point in time did Mr. Rios – Mr. Patino-Rios ever emerge from his vehicle?
- Mr. Palomo: Yes. When I got to his car he was already standing outside.
- Mr. Reiff: And did he walk towards you or you walked toward him? Or did you both walk towards each other?
- Mr. Palomo: I walked towards him. Towards his vehicle.
- Mr. Reiff: Was there anybody else present in the immediate area where you and, uh, Mr. Patino-Rios were standing?
- Mr. Palomo: No.
- Mr. Reiff: Okay. And once you got up close to Mr. Patino-Rios what happened next?
- Mr. Palomo: I asked him what had happened. How come he had collected the money without letting me know?
- Mr. Reiff: How did you know he collected – did – did you know whether or not he collected the money at that point in time?
- Mr. Palomo: Yes.
- Mr. Reiff: When was – okay. So, this was December 2000 – uh. December 3, 2019. When was the job completed?
- Mr. Palomo: November 15.
- Mr. Reiff: And did you ever have any discussions with Mr. Patino-Rios about
-

the completion of the job and the payment before December 3, 2019 and after November 15, 2019?

Mr. Palomo: I – I had only asked him why he had not called me to let me know he had already collected the money.

Mr. Reiff: So, you talked to him?

Mr. Palomo: Yes. Around the 1 or 2 day of December.

Mr. Reiff: Did you – during that time period, November 15, 2019 and December 3, 2019, did you attempt to contact him at all to collect your money?

Mr. Palomo: Yes, but he – he wouldn't answer the phone.

Mr. Reiff: When you met Mr. Patino-Rios that night when you walked up to him what happened next?

Mr. Palomo: The – the person – I'm sorry. Your Honor, I've got to ask more specifics.

Judge Hoeffgen: Yes.

Mr. Palomo: When I got there, he told me that everything was ready. That he had gone over the numbers and the figures. And – and I told him that was not accurate because I had other out-of-pocket expenses.

Mr. Reiff: And what happened next?

Mr. Palomo: I went back to my car to get the receipts.

Mr. Reiff: And did you get the receipts?

Mr. Palomo: Yes.

Mr. Reiff: What did you do with them?

Mr. Palomo: I went back to John Patino's car. I gave the receipts to him.

Mr. Reiff: And then?

Mr. Palomo: And then Mr. Martinez was standing next to me. Was standing right next to me.

Mr. Reiff: Are you talking about Edgar Martinez?

Mr. Goswami: Objection.

Mr. Palomo: Yes.

Judge Hoeffgen: I'll allow it. Overruled.

Mr. Reiff: Okay. When you came back Mr. Edgar Martinez was standing next to you. Was Mr. Patino-Rios there too?

Mr. Goswami: Who is Edgar Martinez, Judge?

Judge Hoeffgen: He said Martinez. Mar – I need clarification.

Mr. Goswami: Yes, it's Medina.

Mr. Fonseca: Medina. Oh.

Mr. Reiff: When you – when you – when you talk about Mr. – when you referred previously to Mr. Martinez were you referring to Mr. Medina?

Mr. Palomo: Yes.

Mr. Reiff: So, the person when you came back and gave the receipts to Mr. Patino-Rios, the person that was standing next to you was Mr. Medina?

Mr. Palomo: He – he wasn't there at that very moment. He got there like 10 seconds later.

Mr. Reiff: Okay. And when he arrived what happened next?

Mr. Palomo: I was surprised, and I asked Patino who that person was.

Mr. Reiff: And did you find out who he was?

Mr. Palomo: John Patino told me that was the person who had helped finish the job.

Mr. Reiff: And after you found out who the person was, what happened next?

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- Mr. Goswami: He's a security officer –
- Mr. Palomo: After – after he got there, uh, I told him I had nothing to do with that person.
- Mr. Reiff: And then what happened?
- Mr. Palomo: He told me that he –
- Mr. Goswami: I'm going to object to hearsay, Your Honor. There's been a lot of hearsay over the last – I'm going to object to hearsay now.
- Judge Hoeffgen: All right. Sustained.
- Mr. Reiff: Well, my question would have – my question was and then what happened?
- Judge Hoeffgen: Yeah.
- Mr. Reiff: Then he was about to say –
- Judge Hoeffgen: So, then that – what he – right. So, that's what his answers need to be directed to is what happened.
- Mr. Reiff: I didn't hear his answer. Did he –
- Judge Hoeffgen: I think he was making statement about whoever was saying something there at the scene.
- Mr. Reiff: Okay. So, there was a point in time the three of you were standing together. Uh. Mr., uh, Patino – Patino-Rios, Mr. Medina, and yourself. Correct?
- Mr. Goswami: Objection, leading, Your Honor.
- Judge Hoeffgen: Sustained.
- Mr. Reiff: It's already been corrected.
- Judge Hoeffgen: I'm gonna I'm gonna overrule the objection. I'm going to allow the question. It's a pretty innocent question, so. Go ahead.
- Mr. Palomo: What was it? Yes, the three of us were there.
-

Mr. Reiff: Okay. What if anything happened that you recall other than you talking to each other?

Mr. Palomo: The person came and told me –

Mr. Reiff: Objection, hearsay, Your Honor.

Mr. Palomo: Sustained.

Mr. Palomo: He put his hand on my shoulder. Like trying to say like, "Well let's ..."

Mr. Goswami: Objection hearsay, Your Honor.

Judge Hoeffgen: Yeah. So, I'll sustain any statements where he's attempting to enter into the record alleging made by Mr. Medina. So, he testified Mr. Medina put his hand on my shoulder.

Mr. Reiff: Yes. Your testimony – testimony that it was Mr. Medina that put his hand on your shoulder?

Mr. Palomo: Yes.

Mr. Reiff: Where was Mr. Medina standing in relation to you? Was he to your right or to your left?

Mr. Palomo: My right.

Mr. Reiff: And he – Mr. Medina put your – his hand on which shoulder?

Mr. Palomo: On my right shoulder.

Mr. Reiff: And after he out his hand on your shoulder, did you – I don't want to know what you were saying. Was there any more conversation after that?

Mr. Palomo: I told him –

Mr. Goswami: Hearsay. He said I told him.

Judge Hoeffgen: Okay. Right. More questions?

Mr. Reiff: Is it – I'm sorry. Did you rule on the objection, Your Honor?

Judge Hoeffgen: Um. [Sighs] Yeah. I'll sustain. I mean if you could get him to stop repeating what was said per say. But whatever actions were taken if any.

Mr. Reiff: Mr. Fonseca is it fair to say that at the time that there was a dispute between yourself and, um, Mr. Patino-Rios as to the – the purpose of the meeting? Paying you?

Mr. Palomo: No.

Mr. Reiff: So, you were in agreement about the payment?

Mr. Palomo: We wanted to go over the receipts first.

Mr. Reiff: Okay. And how come you didn't go over the receipts?

Mr. Palomo: Because the other person had grabbed me by my shoulder.

Mr. Reiff: Prior to that, were you arguing at all with –

Mr. Goswami: Objection. Leading, Your Honor.

Mr. Reiff: Was there any argument occurring between yourself and Mr. Um. Mr. Patino-Rios going on?

Mr. Palomo: No.

Mr. Reiff: And after he – Mr., uh, Medina put his hand on your shoulder did you resist in any way?

Mr. Goswami: Objection. Leading Your Honor.

Judge Hoeffgen: Um. Yeah. I'm going to sustain that. So, I know you've asked before at least once or twice, Mr. Reiff. What happened next?

Mr. Reiff: After Mr. – after Mr. Medina – yeah. Mr. Medina put his hand on you shoulder, what happened next?

Mr. Palomo: I – I tried to move back – move away from Mr. Medina.

Mr. Reiff: And what happened?

Mr. Palomo: He – he wouldn't let me go. He grabbed me even harder.

Mr. Reiff: And then how did you react after he grabbed you harder?

Mr. Palomo: I moved my shoulders trying to get loose.

Mr. Reiff: And then what happened?

Mr. Palomo: Mr. Patino was walking towards me trying to grab me also.

Mr. Reiff: And did he grab you?

Mr. Palomo: No, I was trying to get away from both of them.

Mr. Reiff: And were you able to get away?

Mr. Palomo: Yes.

Mr. Reiff: And once you got away what did you do?

Mr. Palomo: I ran to my car.

Mr. Reiff: And did anybody stop you from getting to your car?

Mr. Goswami: Objection. Leading, Your Honor.

Judge Hoeffgen: Sustained.

Mr. Reiff: On your way to your car what happened?

Mr. Palomo: I – I made it to my car. And when I was trying to close the door, the person – Mr. Medina was pulling me trying to pull me out of the car.

Mr. Reiff: And was he successful in getting you pulled out of the car?

Mr. Palomo: No.

Mr. Reiff: Were you able to close the door?

Mr. Goswami: Objection. Leading.

Judge Hoeffgen: I'll allow it.

Mr. Palomo: Yes.

Mr. Reiff: Did you close the door?

Mr. Palomo: Yes.

Mr. Reiff: Now during this time at any point in time did you have a weapon on your person?

Mr. Palomo: No.

Mr. Reiff: Do you own brass knuckles or were you ever in possession in your lifetime of brass knuckles?

Mr. Palomo: No.

Mr. Reiff: Are you right handed or left handed, sir?

Mr. Palomo: Left handed.

Mr. Reiff: When you got into your car and closed the door, what happened after that?

Mr. Palomo: That – that – that other person was standing next to me over here, so I made the turn towards my right.

Mr. Reiff: Which other person?

Mr. Palomo: Mr. Medina.

Mr. Reiff: You say you turned to your right. Do you mean you started your car and drove away and turned to your right? Is that what you're saying?

Mr. Palomo: I was going to, but Mr. Patino got in front of me.

Mr. Reiff: And then – okay. Did it stop – what was the effect of Mr. Patino getting in front of you?

Mr. Palomo: I had two people in front of me. So, I had to – I had to go in reverse to save myself.

Mr. Reiff: And after you went into reverse then what happened?

Mr. Palomo: I got on Losee – Losee – Losee Street to go home. To go back to my house.

Mr. Reiff: How old are you, Mr. Fonseca?

Mr. Fonseca: 58.

Mr. Reiff: And during or about December of 2019, how tall were you?

Mr. Fonseca: 5'3". 5 –

Mr. Reiff: How much do you weigh, sir?

Mr. Palomo: 160.

Mr. Reiff: Court's indulgence, Your Honor.

Judge Hoeffgen: Sure.

Mr. Reiff: Nothing further, Judge.

Judge Hoeffgen: All right. Any cross-examination, Mr. Goswami?

Mr. Goswami: Thank you, Your Honor. Sir, you testified in Court today that when you arrived at the scene there was no dispute as to what was owed to you. Correct?

Mr. Palomo: No.

Mr. Goswami: Okay. And it was, uh – it was a peaceful conversation that you were having with Mr. Patino's. Correct? Yes or no. Yes or no.

Mr. Palomo: I wanted to collect my money.

Mr. Goswami: You wanted to collect your money. Correct?

Mr. Palomo: Yes.

Mr. Goswami: You thought you were owed a certain amount?

Mr. Palomo: Yes.

Mr. Goswami: But you were not upset about the fact that in your mind Mr. Patino-Rios was not giving you the amount that you were owed?

Mr. Palomo: We had not agreed on an amount yet.

- Mr. Goswami: But yes or no. You were not upset about the money that he was claiming that he owed you?
- Mr. Palomo: I don't understand the question.
- Mr. Goswami: Were you upset with Mr. Patino on the day of December '19 about what he said he owed you?
- Mr. Palomo: No, I was just waiting for him to pay me my money.
- Mr. Goswami: Okay. Do you see this detective sitting in the back of the courtroom that testified earlier?
- Mr. Palomo: Yes.
- Mr. Goswami: Isn't it true that the detective called you to find out your side of the story and you told the detective that "John owed him money and was not willing to pay his fair share." And that you told the detective you got upset. Isn't that true? Yes or no? Yes or no?
- Mr. Palomo: Yes.
- Mr. Goswami: Okay. So, when you just testified before this honorable Court that you weren't upset, you in fact told the detective that you were upset. Correct? Yes or no. Yes or no, sir. Did you –
- Judge Hoeffgen: Hold on. Let him answer. Go ahead.
- Mr. Palomo: After what they did to me of course I was upset.
- Mr. Goswami: After they didn't pay you the money that you thought you were owed?
- Mr. Palomo: He never pay. I never got anything.
- Mr. Goswami: Okay. Did you tell the detective that you got upset about the money that you were not paid?
- Mr. Palomo: I got a call from a private phone number. I didn't know who he was.
- Mr. Goswami: Do you remember speaking to a detective after this incident?
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- Mr. Palomo: I don't speak English that well and I was very nervous.
- Mr. Goswami: The question is do you remember speaking to a detective after this incident? Yes or no? It's a very simple question.
- Mr. Reiff: Objection. I have no – no idea why Mr. Goswami is being combative. He asked a question. He's answering them. And before he can get the chance to answer Mr. Goswami is wringing him saying it's a very simple answer. He's answering the question.
- Mr. Goswami: He's not. He's being nonresponsive. It's a very simple question. Do you recall speaking to the detective afterwards?
- Judge Hoeffgen: Okay. Well, I think the question was asked earlier and I believe he said yes.
- Mr. Goswami: That's correct. He did, Judge. He admitted it.
- Judge Hoeffgen: Okay. So, why are we asking again why – if he remembers speaking to a detective?
- Mr. Goswami: Okay. Fair enough, Judge. I'll proceed. Isn't it true that you told the detective that John owed you money and was not willing to pay and you got upset. Yes or no?
- Mr. Palomo: Yes.
- Mr. Goswami: Okay. And you also told the detective that you were not going to talk to him without consulting a lawyer. You told him to never call you again. And you hung up the phone on him. Correct?
- Mr. Palomo: I did not understand that well what the other person was saying. Calls kept coming in from a private phone number I did not recognize.
- Mr. Goswami: Did you ever tell the detective on the phone that Mr. Medina and John Patino-Rios attacked you in a McDonald's public parking lot? Did you tell the detective that? Yes or no?
- Mr. Reiff: Your Honor, I object to this line of question. He's violating my –
- Judge Hoeffgen: Hold on. What's the objection based on?
- Mr. Reiff: Violating my con – my client's constitutional rights.
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- Judge Hoeffgen: Of what?
- Mr. Reiff: Right to remain silent.
- Mr. Goswami: There is no privilege that attaches –
- Judge Hoeffgen: No, no. Hold on. Hold on. Yeah. I don't think it attaches because he gave testimony about something that happened that evening. So, what the City is attempting to do on cross-examination is to elicit testimony that whether or not he provided that information to, uh, the detective that called him.
- Mr. Goswami: Well, he's using my client's answer saying my client is indicated. He – he said it in his opening statement. He said it at least three times since that time. Made references to my client invoking his right to speak to an attorney without any further questioning. And he's using that against him, Judge.
- Judge Hoeffgen: Okay. Well, with res – okay. I understand. Okay. So, what I'm trying to figure out is – is what is the basis for – are you saying he's invoking his 5th Amendment right now not to answer the question?
- Mr. Reiff: No.
- Judge Hoeffgen: Then he should be able to answer the question. Now if his answer – if the answer is based on him exercising his right to remain silent at the time of the phone call, the Court certainly would take that into consideration.
- But I think the City has a right to illicit testimony from Mr. Fonseca the fact whether or not he provided information to the officer about the incident, alleged incidents, or about anything that happened that evening. So, the question was – what was the question if you can repeat it?
- Mr. Goswami: Thank you, Your Honor. I asked the defendant did you tell the detective that Mr. Fonseca and Mr. Med – Medina attacked him at the scene?
- Judge Hoeffgen: Okay.
- Mr. Reiff: Judge. Just for the record, Mr. Goswami has on multiple occasions

asked my client -- reading from the report. "He told me that he was not going to talk to me without consulting with a lawyer." And that's a violation of my client's right to invoke his right to no further questions without talking to an attorney. And he's using that against him.

Judge Hoeffgen: Well, he can -- he can provide -- he can -- he can make the fact known that your client exercised his right to counsel on the record. Okay. But it's up to the Trier of Fact to determine whether that is even given any you know -- you know any weight at all.

Mr. Reiff: I appreciate the Court's --

Judge Hoeffgen: No, no. What I mean is if I'm very clear -- it's very clear to me everyone has a right to counsel. He can talk all night and say, "Did you exercise your right to the 5th Amendment? Did you exercise your right to counsel?" And if the defendant says yes or the witness says yes, that's on the record.

Mr. Reiff: I agree.

Mr. Palomo: Okay.

Mr. Reiff: I'm just stating that he's doing it in an improper manner, Judge.

Judge Hoeffgen: Okay. Great. Okay. So, but I want to question answered. Do you recall the question, uh, Mr. Fonseca?

Mr. Palomo: No.

Judge Hoeffgen: Okay.

Mr. Goswami: I'll ask it again, Judge. Thank you.

Judge Hoeffgen: Okay.

Mr. Goswami: Sir did you tell the detective -- Detective Forsberg on the phone that Mr. Medina and Mr. Patino-Rios attacked you at the McDonald's in a public place? Did you tell the detective that? Yes or no?

Mr. Palomo: Yes.

Mr. Goswami: You told the detective that?

Mr. Palomo: Yes.

Mr. Goswami: So, the detective was being untruthful on the stand when he testified that you specifically did not say anything to him about that?

Mr. Palomo: No, he did not tell the truth.

Mr. Goswami: Okay. So, just so I get it clear. The detective is lying, Mr. Medina is lying, and Mr. Fonseca is lying?

Mr. Reiff: Asked and answered. He's -- that's the question he --

Mr. Goswami: I'm just asking if those are the three parties that are --

Judge Hoeffgen: Yeah. I'm going to overrule the objection because the question goes to -- it's a summarization of what his testimony has been thus far.

Mr. Goswami: Thank you, Your Honor. Thank you. Your -- may I proceed, Your Honor?

Judge Hoeffgen: Yes.

Mr. Goswami: Your -- your testimony is that the detective lied, Mr. Jose Medina lied, and Mr. Patino-Rios lied today. Correct?

Mr. Reiff: Objection. Mischaracterizes my client's testimony. He never said anybody lied.

Mr. Goswami: Well, the inference Judge is that one to two parties is going to be telling the truth.

Judge Hoeffgen: Okay. All right. You know what? I am gonna, uh -- this is what I'm gonna do is with respect to -- because the question was never asked in direct specifically, uh, questions about what was, uh, alleged or testified to by the two prior witnesses. Hopefully I can make myself clear is no questions were asked of Mr. Fonseca. You heard testimony that you attacked a -- attacked --

Mr. Goswami: I understand judicially a foundation.

Judge Hoeffgen: Yes, that's what I'm saying.

Mr. Goswami: I understand. You're – you're right. It's okay. I'm sorry. I'll do that.

Judge Hoeffgen: Yeah. So, I'm not gonna allow those questions with respect. Yeah. I'm gonna sustain the objection and the characterization that he is stating that Mr. Medina lied, and that Mr. Patino-Rios lied.

Mr. Goswami: I'll lay the foundation. Is that fair, Judge?

Judge Hoeffgen: Sure.

Mr. Goswami: Quickly. You heard the testimony of Mr., uh, Patino-Rios. Correct?

Mr. Palomo: Yes.

Mr. Goswami: He was untruthful today. Correct?

Mr. Palomo: He did not.

Mr. Goswami: Okay. He was – you're saying he was not truthful today. Correct?

Mr. Palomo: No.

Mr. Goswami: He was not – he was truthful?

Mr. Palomo: No.

Mr. Goswami: Okay. So, then you heard the testimony of – testimony of Mr. Medino – Medina. Correct?

Mr. Palomo: Yes.

Mr. Goswami: And he was not telling the truth. Correct?

Mr. Palomo: No.

Mr. Goswami: Okay. And then you heard the testimony of Detective Forsberg and he was lying. You already testified to that. Correct? He was untruthful.

Mr. Palomo: The – the detective testified what – what they told him.

Mr. Goswami: No, I'm asking what you talked to the detective about. You told the

– you never told the detective when you had the chance that you were the victim of this crime.

Mr. Palomo: I was attacked.

Mr. Goswami: Did you tell him that? Okay. I think the Court has gotten the point of that. And finally, when you were at the scene and you felt like you were attacked, did you call 911?

Mr. Palomo: No.

Mr. Goswami: Okay. You never called the police. Yes or no?

Mr. Palomo: I went home.

Mr. Goswami: Okay. You never called the police?

Mr. Palomo: I was very confused.

Mr. Goswami: And you were confused about the fact that you were a victim of a crime?

Mr. Palomo: Yes.

Mr. Goswami: But you were – you were battered. Correct?

Mr. Palomo: I was attacked.

Mr. Goswami: Yeah. So, you were the victim of a crime.

Mr. Reiff: Argumentative, Judge. Objection.

Mr. Goswami: No, I'm just asking him.

Judge Hoeffgen: Yeah. I'm going to sustain that. It's actually he's answered the question.

Mr. Goswami: No further questions, Your Honor.

Mr. Palomo: Any redirect, Mr. Reiff?

Mr. Reiff: Thank you. Briefly, Your Honor. At the point in time – you recall speaking to somebody from a private number that night. Correct?

Mr. Palomo: Yes.

Mr. Reiff: And today you believe it was the detective that testified. Is that correct?

Mr. Palomo: I don't know.

Mr. Reiff: Okay. So, the person that you spoke with at that point in time. Were you upset about the whole thing that just had occurred to you?

Mr. Goswami: Objection. Leading, Your Honor.

Judge Hoeffgen: I'm going to allow it. Overrule.

Mr. Palomo: I was upset and confused.

Mr. Reiff: Tell – tell the Judge what you were upset about.

Mr. Palomo: Because I went to collect money for a job I had performed, and I found – and I was – and I found I was – I met up with that aggression.

Mr. Reiff: Did you sustain any type of injury from that aggression?

Mr. Palomo: I have, uh, a scratch on my right side here.

Mr. Reiff: You say right side where specifically what are you talking about? Point to the area.

Mr. Fonseca: Right here.

Mr. Goswami: Judge, I'm going to object. First of all, this goes beyond the scope of direct examination. He never even testified about any injury. Now all of a sudden, he's talking about an injury. This goes completely beyond the scope of direct examination.

Mr. Reiff: Judge –

Mr. Goswami: No, and I'm gonna ask that – that be stricken.

Judge Hoeffgen: Yeah. I'm going to sustain that. That was not brought up in direct examination.

- Mr. Reiff: My client has testified that based – based – do you want to interpose your objection before I make a statement?
- Mr. Goswami: I haven't even said anything.
- Judge Hoeffgen: Go ahead. I'm not – I'm not paying attention to his head gestures, Mr. Reiff.
- Mr. Reiff: Thank you, Judge. Yeah. On cross-examination the whole point of the cross-examination or generally speaking was to show that my client was upset. I am now just trying to show to the Court what it was he was upset about.
- Judge Hoeffgen: Well, no. What you established in your first question – or your second question about the private phone call and the reasons why he was upset and confused. Specifically, he testified that it was he went to the location to get paid for a job that he had completed and that, uh, he was attacked. I believe that – that was his testimony.
- Now, if you're going to get into particulars about any injuries that he may have incurred that evening, certainly that would have been appropriate during direct examination. But it – it is outside the scope of the direct examination. So, I will not allow that line of questioning.
- Mr. Goswami: Thank you, Your Honor.
- Judge Hoeffgen: Yep.
- Mr. Reiff: I have nothing further.
- Judge Hoeffgen: Okay. All right. So, Mr. Fonseca, thank you for your testimony. If you'll take a seat with your attorney at the defense table. **[Clears throat]** All right. Okay. Uh. Mr. Reiff, uh, anything further from the defense at this point in time?
- Mr. Reiff: Judge, the defense rests.
- Judge Hoeffgen: Okay. So, are we prepared to, um – for closing arguments? Uh. Before you proceed, I will note that the City's exhibits in 4 and 5 have only been marked, um –
- Mr. Goswami: I'll mark the rest of them, Judge.
-

- Judge Hoeffgen: But – but they have not been, um, moved for introduction or publication. Just so you're aware. Okay?
- Mr. Goswami: Okay.
- Judge Hoeffgen: Yeah. So, I don't know if you want to take them back or if you just want to leave them there. It's up to you.
- Mr. Goswami: May I approach and grab it, sir?
- Judge Hoeffgen: Yes.
- Mr. Goswami: Thank you.
- Judge Hoeffgen: Yes. All right. So, okay.
- Mr. Goswami: Thank you, Your Honor. The City has proved this case beyond a reasonable doubt, Your Honor, on one count of simple battery. And this is not a complicated case. Uh. What we submit to the Court is that we have a victim, we have a suspect, we have motive, and we have a clear concise picture of what actually happened that day.
- I would propose to the Court that the only way that the City has not proved this case beyond a reasonable doubt is if the defendant is the single, sole person in this entire trial who has told the truth. And every single other person you heard from today testified lied to you. That is the only way the defendant's story makes any sense.
- Here is what we have proven. John Patino has known the defendant for the past four years. We've proven that Edgar Medina has also known the defendant for the past several years. In fact, all three of them worked together in the same, uh, industrial complex. Whatever it was. They all testified to that. John Patino and Edgar Medina both testified that they knew the defendant's demeanor.
- Mr. Reiff: Objection. That mischaracterizes testimony. There is no testimony from my client that he ever worked with these individuals.
- Mr. Goswami: John Patino testified that they worked at the same place. Edgar Medina testified they worked at the same place. They both testified to that. It's – it's on the record.
- Judge Hoeffgen: Okay. But I'll note – it is noted that your client never gave

testimony as to any type of working relationship with Mr. Medina.

Mr. Reiff: Thank you, Judge.

Judge Hoeffgen: I think his testimony is that was I think the first time he might have seen him that evening. Okay. Go ahead.

Mr. Goswami: They both testified they knew the defendant's demeanor. They knew him to be short of temper, short of fuse. They knew him to be an angry person. That John Patino testified and the defendant, uh, also testified that they had contacted each other by telephone several times before this subject incident about the money.

John Patino testified, "Yeah, he would call me occasionally and I could hear him before he would hang up the phone saying mean, angry things." He would testify, "I called several times asking, 'Where is my money? Where is my money?'" So, there was a pattern in history of exposure to his temper. They met at McDonald's. Why McDonald's?

John Patino chose McDonald's as a subject location. There is no dispute that there was a job done and there was a dispute about money. Okay. There is no dispute that the defendant thought he should get more money than he got. There is no dispute that John Patino thought he would be paying the defendant less money than he was expecting to get.

Knowing that was the – the – the boiling pot that was about to happen, John Patino chose a public place. McDonald's. The Golden Arches. Home of Ronald McDonald and the Happy Meal. He expected there would be people there. He expected it was to be a public forum where they could figure out whatever it is they needed to figure out and they could put this matter to rest.

Defendant wants you to think the purpose of this was a goon squad meeting where John Patino was going to get together his little goon squad under the pretense of, "I'm going to pay you and then we're just going to beat the hell out of you." Why wouldn't he do that at his garage? Why wouldn't he do that in a place that's not so public?

Not a place where it's advertised millions and millions served. Why out in a parking lot of a popular restaurant where even in the photographs you see there's cars all over the place. Why would they do that? John didn't show up to punch the defendant. John

showed up to pay the defendant. He just didn't want to pay him as much as he wanted. Now what did we hear during his testimony?

He did all the work. He worked on this project for months and months and months. He's the one that had all the experience. He's the one that should have got paid. He's the one that should be handling the money. Why does this guy get everything? Why is this guy controlling everything. This guy doesn't work on the project. This guy collects the money and I've got to call this guy for weeks and weeks and weeks to get paid?

And I gotta call this guy and fight with this guy about what is owed to me? Why did John Patino take Edgar Medina? Because John and Edgar knew his personality. John and Edgar knew the defendants' demeanor. John and Edgar knew how this was going to go. They knew it wasn't going to go good.

So, Edgar is in the bathroom. John pulls in – or defendant pulls in. John is already there. He pulls into the adjacent parking spot – or I'm sorry. There's one parking spot between them. And so, there is this small parking spot area where they are engaged in a discussion. It's clear the defendant didn't like what he heard about the money for the job. John brought records.

John was prepared to show him, "I'm not going to be giving you as much money as you want and I'm going to show you why that is. I brought statements. I brought information. I wrote out numbers. I'm going to give you the breakdown." That's not what you do if you show up to eat somebody up. You don't say, "Hey, let's go over the numbers and the figures and let's crunch this stuff out and let's hash this out. And by the way, now I'm going to beat the hell out of you and not pay you."

The defendant got heated and angry and he says, "Okay. I thought – I thought I was showing up to get whatever money I was gonna get. But you didn't bring me any money? All right. I got you." And he goes over to his car and he reaches in the vehicle and he comes back out with his hands in his pockets and then he comes back and confronts John. And that's when Edgar comes out of the bathroom.

Not surprised the defendant is pretty surprised to see him come out. Edgar comes out, sees the defendant angry, upset. Sees that they're arguing. Sees that something might escalate. So, he gets in the middle. And it is at that point that they both testified that he

pulled out his weapon. He pulled out this – this metal stick, which was testified by John that he recognized it when he saw it.

It was something during their friendship that he saw in his garage, in his warehouse, or factory, or whatever you want to call it, where he made it. He fabricated it out of a bicycle, uh – a bicycle kickstand. Had a rope tied to it and came out this way and was sharpened at the end so that he could wrap his hands in it and have a good grip of it or swing it around. They both testified that that's what he did. He started swinging this metal stick around – metal – metal, um, baton around. And he intentionally struck John Patino in the face with it.

At the same time, he also tried to strike Edgar with it. Edgar backed up. Backed up. Avoided getting struck and then went in between them and tried to break it up at the same time John Patino was engaged in a fight at that point with the defendant. They end up close the defendant – they end up close to John Patino's vehicle. At that point the defendant after having struck John Patino in the face with a metal baton, after having pulled out brass knuckles and punched John Patino in the chest with it, gets in his car.

Instead of backing out of McDonald's in the way that we showed you in the photographs he decided to turn around and take one more shot at John Patino who still hasn't paid him yet for the months and months of work. And – and steered his vehicle towards John Patino. John Patino tries to get out of the way, and he was nicked.

At that point the defendant realizing in his fit of rage with the motive to do so, having attacked John Patino three different ways, he gets the hell out of there. John Patino the victim stays at the scene and calls the police like victims do. "911 I was just attacked. I was just hit in the face with a metal club. I need the police here right away." These injuries didn't come from anywhere – from nowhere, Judge. These injuries came from someplace.

There is a cut on the bridge of the nose. There's a bruise to the chest. And I won't make a big deal about the little nick on the knee or the little nick on the – on the shin. If you believe what the defendant testified to today, he was baited to show up at McDonald's to be beaten up and he escaped by the skin of his teeth. He never testifies that he fought back. He never testified that he threw any punches. He never testified that he pulled any

weapons out or used his fists and fought in any way.

"I was standing there having a civilized discussion about – about – about this, uh – this job. And I was totally happy and content that I wasn't getting as much as he said that I was supposed to be getting. And then all of a sudden Edgar Medina, a security guard for two established casinos in the area, came out and just attacked me. Just – just started attacking me. And then when he started doing that, John Patino started attacking me. I got into my car, barely in the nick of time to get out of there, and I got out of there."

Well, then where did the bruising come from on John Patino? Where did the – where did the cut on his nose come from? Where did the bruise on his knee come from? There is no evidence to suggest Edgar Medina did that to John. There is no evidence that John did that to himself. In fact, the op – John Patino and Edgar Medina both testified as we've alleged, he was struck in the face with a metal baton that he brought. That he made.

That he used and then fled the scene. Detective Forsberg came to the scene and conducted his investigation. Tried to interview everybody including the defendant to get the defendant's side of the story. John Patino and Edgar Medina testified consistently about what happened. They testified about the motive. They testified about the job. The dispute about the money. They testified about the baton.

They both even testified the matter in which he was swinging it around. Completely consistent. Almost identical scenarios. Struck – struck him in the – in the – in the nose. On – Detective Forsberg testified that injury was fresh. It was consistent with the mechanism of injury that was test – that was, uh, described by both of the people involved. Both Edgar Medina and John Patino both saw brass knuckles.

Now the defendant had an opportunity to speak with Detective Forsberg. Detective Forsberg had not made any determinations of – of, uh, PC to arrest at that point. He was fact gathering, which good police officers do. There was no testimony in the record to suggest that there was anything short or – or inappropriate or – or improperly performed by Detective Forsberg. He came to the scene. He interviewed the people involved. He investigated. He looked at the injuries. He took pictures.

And then before making any determinations, he tried to speak with the defendant who admitted he was present, who admitted there was a dispute, who admitted he was angry. And at that point if you are the victim if you are in the parking lot beat up by – by these two big, huge guys and barely got away. And now you're on the phone with the police that's when you say, "I'm the victim. I was beat up. These guys baited me over here and attacked me. Please help. I'll come back. You're the police."

He didn't say any of that. "You can talk to my lawyer." Click. The next day he didn't call the police. The next day he didn't call the police. All the way up until right now he didn't call the police. At no point ever despite being beat up by these two goons in a public parking lot of McDonald's has he ever called the police and reported that he's the victim of a crime. Who was the victim, Judge?

The who – the guy who knew he was going to deliver bad – bad news to a – to a coworker on a job whose been trying to collect that money for the past month after the job was done who brought paperwork to justify and show you why I'm not going to be giving you what you think you're gonna be getting who knew the defendants anger and – and, uh, short temper and short fuse who picked a public place to do it and who was – who was struck in the face with a metal baton?

Or the guy who was chasing down his money who thought he was entitled to way more than he was supposed to get who finally when he showed up at that place he was supposed to – to be to get what he was supposed to get wasn't getting what he was supposed to get? Who is the victim in that case? What was the motive? You've heard it all. You've heard it during this whole trial. Three months of work when it was only supposed to be three weeks.

He's got all the experience. He did all the heavy lifting. He did all the work. Then he had to wait. He had to call and call and call. He had an expectation. He was upset and in that anger he did what he did. He hit John Patino in the face with a metal baton. Edgar Medina saw it. Tried to break it up. And that's why he left the scene. And that's why he didn't cooperate with police and that's why he's guilty of one count of battery, Your Honor. Thank you.

Judge Hoeffgen: Okay. All right. Mr. Reiff. Closing arguments?

Mr. Reiff:

Thank you, Judge Hoeffgen. No, interestingly enough I agree with a lot of what Mr., uh, Goswami just said. Although quite a bit of what he said is farfetched when put in the context of the testimony. Referred to Mr. Patino-Rios and Mr. Medina as two goons. I would agree. He referred them as they two big, huge guys. I would agree. But I would not agree that, as Mr. Goswami said, the evidence is that they beat him up.

That was never the testimony. They roughed him up. The strong armed him. They went there for a purpose. Mr. – Mr. Medina was there for a purpose. There was no beating up anybody. They roughed him up. Two people – three people get into a little mingling like that. Pushing and shoving. "Get your hands off me." Easily can get scratched. Mr. Goswami also tried to implicate and condemn my client on the theory, using Mr. Goswami's words, my client had to wait one month later, and he did all the work.

He's trying to show the Court – Mr. Goswami is trying to argue the Court that my client had all these reasons to be irate. He's right. He's right. Who wouldn't be? Who wouldn't be? He was cheated. And there's a motive for Mr. Patino-Rios to get up on the stand and lie. And when I came here, and I told the Court opening statement two victims in this case.

The City of North Los Vegas and my client. My client did a lot of work over the course of three months. He did it dutifully. He did it with an expectation. A reasonable expectation. He came to the meeting in an attempt to, "Let's look at the numbers. You got your numbers. I got mine. I got these receipts out-of-pocket expenses."

But the message was clear. There was not going to be any negotiating. "I haven't paid you for a month. You're going to take what I want to give you. If you don't like it too bad." And, oh, by the way, my other goon is here. And by the way let's – let's talk about Mr. – what Mr. Medina had to say about all of this.

He tells the Court, "I'm a security officer. I've been doing for any number of years. And I came there because my client told me he was in fear of Mr. Fonseca. That he's got a short temper. And you wanna – you wanna know what else happened, Judge? Mr. Fonseca, he had these brass knuckles on his hand. On his right hand."

Mr. Fonseca is left handed. And everybody knows – not everybody

– know and accepted what brass knuckles are. Logically you put your fingers through those. At the base of them three cylinders. There's a plate. It goes in the palm of your hand. That's what brass knuckles are. Mr. Medina says that my client had them in his right hand simultaneous with the time that he was swinging the club.

And oh, by the way, he punched Mr. Patino-Rios with that same hand. Officer Forsberg didn't believe that. Officer Forsberg said, "You know there was a scratch on the nose, and I accepted that a club was used. No brass knuckles. No motor vehicle." The Court knows that a motor vehicle is a deadly weapon if it's used against another person. Officer Forsberg didn't accept that. It didn't happen. Mr. Medina took it a step further.

I – you know what I'm doing is just appealing to the reasonable value of the Court. Try to accept what Mr. Medina is saying occurred. I'll get to Mr. Patino-Rios. But Mr. – in addition to what I've already said Mr. Medina said, Mr. Medina said, "You know when Mr. Fonseca was simultaneously with brass knuckles in his right hand and swinging this club at the person that I came to protect and I'm a security guard, I stepped back. I stepped back."

Reasonable mind of the Court would suggest that security people trained in security do otherwise. Not to believe simply – it's so farfetched. Mr. Patino-Rios laid the foundation for falsehoods early on in my cross-examination. "Mr. Patino-Rios, what is going on with this money? What – what – what's going on? You – you said it was your friend. That you got paid. How much?" "I got paid. Everybody got paid." "Who is everybody, how much, and by who?" "They got paid."

There was a – a number of questions along those lines. Mr. Patino-Rios is being as slippery as possible. Cute you might want to say. Wrong place to do it. In a courtroom being asked questions whether on direct or cross. Particularly on cross. He doesn't want to tell the Court what's really going on. And how is this all brought up? Why was this man of diminutive stature going to McDonald's to get his money? Because he worked for a long time.

And why is there a confrontation? Mr. Patino-Rios brought it on. He didn't pay him. He didn't acknowledge what he did. He let time go by. Didn't take my client's calls. And when he finally does show up, "Let's go to McDonald's." "All right. Wait, McDonald's?" We saw a few cars in that little frame. We can imagine there may be

others. We don't know. I would also imagine that if you have some wild actor running around with a club and brass knuckles swinging at people there may be other witnesses. That never happened.

When I say that never happened, I meant there are no other witnesses. Because he didn't do that. Moreover, I question my client's sanity if he's going to go to McDonald's after all this time with a club and brass knuckles to try to collect his money. He might want to do it somewhere else if he's going to do it. I'd suggest to the Court it's got nothing to do with his sanity. His sanity is arriving without any weapons in an attempt to collect his money.

Being confronted by two individuals who were sending a clear message. Mr. Patino-Rios, this – this – this charade of, "Oh, he's got a short temper." I'd have a short temper too if I worked for a month and people keep telling me they're – to ignore me. Maybe not so much as an attorney. That doesn't go too far.

Judge Hoeffgen: [laughs]

Mr. Reiff: But if I was in that position or anybody was in that position, I wouldn't be too happy. And it is going to expression a considerable amount of displeasure. Finally, you saw my client try to answer the questions as directly as possible. And he did so. Mr. Goswami tried to make a big deal out of the call that was made by Detective Forsberg to my client. My client is telling the truth about what happened before.

Mr. Goswami: Judge, I'm going to object to that. That's commenting on the credibility of a witness. He can't argue that his client is telling the truth. That's for the Fact Finder, Judge.

Mr. Patino-Rios: Absolutely.

Judge Hoeffgen: Yeah. So --

Mr. Goswami: I object to that.

Judge Hoeffgen: I will disregard that statement. Okay. Go ahead.

Mr. Reiff: Which statement?

Mr. Goswami: That you --

Judge Hoeffgen: You were characterizing your – your client's testimony. The truthfulness of his testimony.

Mr. Reiff: Well, I think I said if he is being truthful. But anyway. I will erase it. So, my client is on the stand describing an event that occurred as before you, the Court. He goes home and what does he say? One of the things he said is, "I'm confused. I didn't like the way I was treated." "Did you call the police?" "No." "You were the victim?"

Yeah, he's the victim. He's the victim of having worked for a long amount of time and getting nothing but this treatment that he described in reference – I'm sorry. As – as, uh – for his work. The City's description of him telling the – the police that he was upset with what happened. Of course, he's upset. Was he upset at the time there? Forget about Mr. Fonseca.

An individual in his shoes goes to that meeting having worked for three months. Having got paid a small amount of money. Being owed some considerable amount of money. It's not in their best interest to go in there both guns drawn. You gotta collect that money. You gotta try to reason with the individual that's got it. That's what he did. He tried to explain to the Court when I got there, he had his numbers.

He said, "This is –" Mr. Patino had his numbers. "This is the way it's going to be." "But no. I went back to my car. I should look. I want to show you these." Mr. Medina steps in. So, another thing that, uh, Mr. Goswami said is that if you believe my client then everybody else is a liar. I'm not trying to prove in favor of the Court by saying you know the cop didn't lie – officer and detective didn't lie. Try to make something out of that, that does not exist.

He called my client and gave him a couple short answers. Said, "I don't want to talk to you anymore." And that was it. That doesn't make the detective a liar. So, we had two other witnesses. So, yes, he's right. If you rely on my client everybody is a liar. Aside from the detective. Who is everybody? John Patino-Rios and Edgar Medina. Would – what is Mr. Medina gonna say? Is – they – they – they planned to meet ahead of time for the purpose of what?

Mr. Patino-Rios paying my client some amount of money that he knew my client would object to. So, come along, sir. And the result was what my client described not this folly, this fairytale of club,

brass knuckles swinging. All the while Mr. Medina does nothing but steps back. One last point, Judge. Mr. Rios – Patino-Rios early on in his testimony – I believe it was on the record – said, "You know I think it was – I think it was something I saw at his shop."

Well, then within – within half a minute he was certain. Why? Because he convinced himself that's a good way to put it. Yeah. "I think it was – I think it was the weapon that I saw – something I saw in his shop." And then he elaborated, "Yeah. I saw it in his shop." And then he started talking about the kickstand and all this other bologna. So, motive? Did they have motive to lie? Mr. Medina has a motive.

He's his friend. He came there to watch his back. He's a security guard. That's what they do. He would have taken it a step further if what they're alleging occurred in regard to whom. You know, I don't know where he came up with this idea that my client got beat up. But that he – Mr. Medina would have taken it a step further. And I've already said this. It's going to be redundant. About what would have happened.

But my point is Mr. Patino-Rios has a motive to call the police. He's got a witness that's going to back him up. "We'll say he had brass knuckles and he had this other – he had this other weapon." The police weren't too happy with that description. Nonetheless, they – they charged my client with, uh, battery because of the scratch on his nose. One last point, Judge. Thank you. My client gets in his car and walks away.

Reasonable minds will tell you under those circumstances what's going on. Whether it was a beaten up that never occurred or if was as my client described, he's going to be intimidated. And he's going to get in his car and leave. And if along the way he strikes somebody. In this case, Mr. Patino-Rios, with his vehicle a police officer is going to know about it. And we're not going to be in this admissible Court.

We're going to be under – my client is going to be in the – facing much greater consequences. The fact that, uh, that story didn't go anywhere. It didn't work but they told – you know it didn't work because it made no sense. But because they already told the police that, they got to stick with it. They – that's how it works. They know it's in the report. The Court understands this. They know what they told the police. They better stick with that story.

So, look at the totality of the circumstances. It's plain. There is doubt way beyond reason as to what occurred that night. I – I'd say there's reasonable doubt might exist as to anything other than what my client says and describes. That's more practical reality in this event. Not this screaming and shouting about – about things that never did happen to try to make it look like it was bad.

But to look at it from a realistic perspective. And see how an individual was acknowledged – cheated out of his money. And how he was dealt with. And I'd ask the Court to take that all into consideration and find my client not guilty. Thank you.

Judge Hoeffgen:

All right. Okay. I'll say – I'll – just at this time I know we've been here for quite a while. I'm thankful for everybody's patience, uh, this afternoon and evening regarding the case. I do appreciate the efforts put in by the respective attorneys in presenting their cases to the Court, uh, tonight. Or in this case I heard the testimony of, uh, four witnesses. Uh. First witness was Mr. Patino. Second witness was Mr. Medina.

And then Detective Forsberg gave testimony in the case. And finally, the Court had the opportunity to hear the testimony of Mr. Fonseca. I will state just kind of out there there's a lot of things going on. There's a lot of, uh, expectations, I guess, for a little bit of mindreading by the attorneys certainly as to what people were thinking. What their motivations were. Uh. But the Court does have to take into consideration motivation in this case. No question about it. Uh.

I believe that the evidence has shown that there was a dispute between Mr. Fonseca and Mr. Patino regarding, uh, a job that was performed. Uh. The Court is not – I mean the Court finally learned that it was involved a stairwell or stairs that were built in a home. Uh. That for Mr. – one of Mr. Patino's clients. Uh. That monies were paid for the job. And that, uh, there was a dispute between Mr. Fonseca and Mr. Patino regarding his compensation regarding his payment for his services that were rendered. Uh.

Mr., uh – Mr. Patino testified that he set up this meeting with Mr. Fonseca by way of phone. He called him and set up this meeting for the date of June, uh – December 3 in the evening time. And that the meeting was going to take place at the, um, southeast corner of Losee and Cheyenne in the City of North Los Vegas. That's been

established by the evidence. That – that as some point in that evening, uh, he met – he arrived there at the parking lot. Uh.

And that at some – Mr. Patino's testimony is that Mr. Medina was there at the time. Mr. Medina went into the bathroom to use the bathroom. While he was in the bathroom is when Mr. Fonseca showed up. And it's that point when an exchange happened. It was described by Mr. Patino that is was heated. That Mr. Fonseca was very upset because, uh, Mr. Patino attempted to show documents that he brought with him.

Numbers, figures about the book – the job. What was paid. What was spend. And that you know his estimation of what he was going to be paid. It was never established by testimony what that number was either by the, uh – the plaintiff, by Mr. Patino or the City. Nor was it established by Mr. Fonseca. "Okay. This is what I was supposed to be paid. This is what he offered me, and I was not happy with that."

So, the Court is not – the Court was never enlightened about what exactly – what the dispute was. But the general sense is that there dispute was he was supposed to be paid and that there was a dispute about the payment. Okay. Mr. Patino described the exchange that this was something that was -- got very heated. And at some point, when Mr. Medina came out that, uh, Mr. Fonseca went into his car and then he had – he brought out this weapon as described as a baton, club, stick, metal piece.

Whatever it was. Mr. Patino described it maybe as something like a kickstand. Okay. That the edge was sharpened. That he had created a contraption where it was in his hand. Uh Mr. Patino described that he was waiving it around and at some point, he struck – Mr. Fonseca struck him on the bridge of his nose. Uh. And then he went on to give testimony about other weapons.

But I am going to note, uh, for the record that he's actually being charged by the city prosecutor with striking him on the nose with an unknown object causing visible injury. Right? Uh. And that's what I want to discuss is – is the – is the battery on his nose. But I'll get to it. And then, um, when Mr. Patino was done testifying Mr. Medina was called to the stand. Uh. And they both testified that they spoke with two different officers.

I believe that, uh, Mr. Patino spoke with the detective and Mr.

Medina spoke with his partner. And, uh – and that they were separated when they gave their statements. Mr. Medina's statement was very consistent with what – what Mr. Patino testified to. About he went to the bathroom. When he came out Mr. Fonseca was there, but he wasn't there when he – when he first got there.

Uh. And at that point when as things got heated and, uh – and then he described Mr. Fonseca taking out this object and was swinging it around that he gave practically the same description. That at some point he struck Mr. Patino in the bridge of his nose causing an injury. And then he went on to testify about what happened subsequently to that regarding the brass knuckles and the vehicle and things like that.

Then office – then the Detective Forsberg got up and gave testimony and testified that they separated the witnesses so that way they can get something – so that there's no influence and they could get each respective witness' testimony or statement in hopes that they you know could see whether it was consistent or inconsistent. And the detective testified that he spoke with Mr. Patino and it was very consistent with what Mr. Patino testified regarding the device that he got out.

That they were there to talk about the job. That there was a dispute over money. That he got the weapon out and was swinging it around and hit him in the nose. And then off – and then obviously the detective testified what was said to him by Mr. Patino regarding the brass knuckles and the vehicle and what not. So, and then the detective did state that, uh, the office – his partner did get the statement from Mr. Medina.

And upon his further review of those statements of him taking pictures of the injuries, of the statements, the injuries, the totality that he had determined that a battery had occurred. He also testified that he was given, uh, Mr. Fonseca's cell phone number by Mr. Patino. That he called Mr. Fonseca's phone number. That he briefly spoke with Mr. Fonseca to try and get his side of what had occurred.

That, um, Mr. Fonseca had stated that there was an argument. That he was owed money for the job and that he was not being paid for the job. Um. But that Mr. Fonseca did not provide any other information regarding whether there was a fight. Uh. And that at – when – when the detective stated that the moment that he started to

ask him questions about whether he had, uh, attacked or hit Mr. Patino with any weapon at that moment. Uh.

He stated that Mr. Fonseca stated, "I'm not going to answer any more questions without – you know without speaking to my lawyer first. Which obviously is his right to do. And that he terminated the phone call. Uh. But it's clear from the detective's testimony that, uh, Mr. Fonseca didn't take the time or utilize the opportunity to – to provide him information, uh, in particular about him being a victim of a crime. That Mr. Medina had put his hand on his shoulder.

That he had grabbed him basically when he tried to break free from him. That when he tried to get into his car and shut the door that Mr. Medina was standing there preventing him from closing the door. And that he was roughed up or attacked by Mr. Medina. That Mr. Patino also was trying to get at him. Uh. It's clear that the detective stated that no information regarding that was provided to hi during the phone call. All right.

And then, uh – so. And then Mr. Fonseca testified that he was calm. That the conversation was peaceful. That there was no dispute about his payments. What the issue was regarding receipts for his out-of-pocket expenses in completing the job. That when he went to get to his car, he got the receipts out. Came back. Gave the receipts to Mr. Patino. And at that moment Mr. Medina put his hands on him. Put his hands on his right shoulder. And that you know that's when things started to go awry.

That he tried to break free from Mr. Medina's, uh, grasp of his shoulder. That you know he – he grabbed – he grabbed him harder. That he was able to break free and he ran to his car. And then he basically was able to – to get away from them and shut the door. Okay. So, that's – that's the testimony. And then I got to go to, "Okay. What makes sense here?" Okay. Mr. Patino testified that he called his friend Mr. Medina to be there with him because he knew that things could maybe get heated. Uh.

That maybe that Mr. Fonseca – that he knew the information he was going to provide Mr. Fonseca was not going to be happy about this information. And he wanted somebody there to be basically as a witness. And maybe to deescalate the situation. Whatever it was. But if I accept, the defense argument is that they planned all of this before anything happened that day.

That they had planned, for whatever reason, to set up this meeting at McDonald's, 6:30 whatever time in the evening in a public place. They set up this meeting for the purposes of basically I guess intimidating Mr. Fonseca to I guess either force him to take the payment that he was going to get or maybe not to even get him paid. And that when they – you know and if I accept this story, it's that they put their hands on him, he fled away in his car, they called the police.

Okay. And when the police came, they had their stories lined up. They had their stories set up so that when they spoke to two different officers their stories were going to be consistent. Somehow Mr. Patino had an injury on his nose. I guess maybe he did it himself? I don't know. But the injury was going to be consistent with Mr. Patino's story. That is was going to be consistent with Mr. Medina's story that he gave to the separate officer. Right?

So, they had planned all along. They planned all of this. Right? And Mr. Fonseca testified under oath that he told Detective, "I was attacked." That's what his testimony was. "I was attacked." He told the officer – the testimony he gave the Court today he told the officer, "Mr. Medina put his hands on me. They – they tried to attack me. They tried to prevent me from getting in my car."

He stated under oath he told the detective that. That's the story I'm supposed to believe. Right? Or I can believe the story that the City has presented. You have the – Mr. Patino who is the victim in the case. Then you have, yes, it's his friend. Right? Whose testimony was consistent with Mr. Patino. And I'm supposed to believe that Mr. Medina is ready and willing to perjure himself today? What is his modification? You know what's – what's the basis for that?

But those state – those state – those statements are consistent. The officer – the detective testified based on the statements of the statements of the two witnesses. Based on the pic – the injuries I witnessed. In particular, the injury on the nose. And my conversation with Mr. Fonseca. Those three things.

All those things together he determined based on probable cause that Mr. Fonseca injured Mr. Patino on his nose with an object that's still not really know what that object is. So, based on all the totality of the circumstances, the City has met its burden and I'll be

making a finding of guilty. Um. I have an idea of what the sentence will be. I don't know if you guys want to be heard on sentencing.

Mr. Goswami: Uh. I'll be --

Judge Hoeffgen: Mr. Goswami.

Mr. Goswami: Thank you, Your Honor. I'll be extremely brief with it. Um. Your Honor, this was an attack that occurred in a public place. In a place that the victim chose in order to avoid a confrontation. And unfortunately, the defendant created this, and he struck somebody with a metal object, Judge. I mean based on that kind of behavior.

That intentional conduct, Your Honor, I would submit to the Court that he should serve at least some jail time. I -- I -- as a lesson that you do not handle these -- these types of disputes in a public place the way he handled them, Judge. If he felt he wasn't paid what he should have been paid, he could have sued in small claims Court. He could have pursued some kind of civil litigation.

Instead, he took out an object. A metal object. In a public place and struck him in the -- in the face, Judge. And as a result of that, Your Honor, we've been here for -- all these people had to be here today and disrupt their lives to have to testify as to what this man did to them, Judge. Um. I would just implore the Court, Your Honor, in any circumstance driving on a suspended license a person pays a fine of 1,000 plus. What does somebody deserve, Your Honor, for striking somebody intentionally with a metal object?

I would submit to the Court, Your Honor, that he should spend at least five days in jail and learn that this is not the way that you handle a dispute in our society. You have an issue with the way somebody did something, you take it up in small claims Court. We live in a civil society, Judge. Not a lawless society where you get to take these matters into your own hands. Thank you, Your Honor.

Judge Hoeffgen: All right. Mr. Reiff?

Mr. Reiff: Thank you very much, Judge.

Judge Hoeffgen: And just let -- let the Court know if your client wishes to give a statement to the Court or not, please.

- Mr. Reiff: Thank you, Your Honor. Your Honor, I explained to – through the – with the assistance of the Court appointed interpreter in Spanish, uh, to my client Mr. Fonseca of his right to make a statement to the Court. And he has declined to do so, Judge.
- Judge Hoeffgen: Okay.
- Mr. Reiff: And I'll be very brief. Irrespective of, you know, the finding of the Court, this was all instigated by the – the facts that leading up to this event was brought on by Mr. Patino-Rios withholding the payment over a significant amount of time. So, we have that circumstance. And we have a situation here the State is not correct when they say that Mr. Patino-Rios was struck in the face with a metal object.
- Judge Hoeffgen: No, I'll take – I'll take judicial notice. It was his nose.
- Mr. Reiff: Right. And –
- Mr. Goswami: That's what I meant, Judge. I apologize.
- Judge Hoeffgen: Okay.
- Mr. Reiff: He didn't graze his nose with anything.
- Judge Hoeffgen: [sighs]
- Mr. Reiff: Graze because there was a – picture let's say a scratch like type injury. It certainly wasn't substantial bodily injury. And I'll submit it on that, Judge. The only thing that I would do is ask the Court to stay in position of the execution of the sentence for any amount of time whether it's a week or two, for my client to file an appeal.
- Judge Hoeffgen: Okay. All right. So, um – all right. In any of that, uh – so, this is what the Court's ruling is going to be. Um. I am going to sentence him to 90 days of jail. That will be suspended for one year. I'm going to pose a fine of \$1,000 plus assessments of \$140. Uh. And I'm going to order that he attend and pay for a level 2 anger management.
- All right? Okay. Um. With respects to – in the stay of an execution that required, uh, cash bail to stay in execution of a Judgement is a cash bail of \$1,140. If posts an appeal bond, obviously, the Judgement and the sentence will be imposed.

Mr. Reiff: What was the last thing the Court said?

Judge Hoeffgen: The – if – if – if it's going to be – if there's going to be an appeal bond filed, then that does not stay the execution of the Judgement and the sentence.

Mr. Reiff: He'll have to post 1,140. Is that correct?

Judge Hoeffgen: Yeah. I – I – yeah. 1,140 cash bail. So.

Mr. Reiff: Very well.

Judge Hoeffgen: In any of that, um, I'm going to require that he check in with Court programs within, uh, I'll say two weeks to get signed up for the anger management classes. Uh. I'll schedule him on payments at \$100 a month. Give him 30 days to start those payments. Okay?

Mr. Reiff: Thank you very much, Your Honor.

Judge Hoeffgen: Thank you.

Mr. Goswami: Thank you.

Judge Hoeffgen: Now there is a picture of the parking lot. I'm not sure where the – but I don't know if that needs to stay in the file since it was admitted into evidence. I don't have it. I don't know if it's – is it on the machine?

Mr. Goswami: You know what? It might be on the MO, Your Honor.

Judge Hoeffgen: Yeah. [Shuffles papers]

Mr. Reiff: May – may I approach the defendant?

Judge Hoeffgen: Yes.

Mr. Reiff: Guillermo, is he okay?

Mr. Palomo: Yes.

Mr. Goswami: What exhibit? Is that 6?

Judge Hoeffgen: Okay. Yeah. Okay. All right. Well, thank you so much, Whitney.

Judge Hoeffgen: Whitney –

Mr. Goswami: Thanks for

[End of Audio]

Duration: 183 minutes

MUNICIPAL COURT
NORTH LAS VEGAS, NEVADA

FILED
JAN 09 2020

CITY OF NORTH LAS VEGAS, NEVADA,

Plaintiff,

vs.

NERY GUSTAVO FONSECA,

Defendant.

CASE NO. : CR000143-20

COMPLAINT

BATTERY

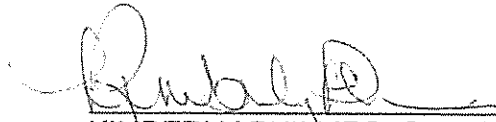
NRS 200.481.2A

NLVCC 2.150


KIMBERLY PHILLIPS, Deputy City Attorney, on this January 7, 2020, in the City of North Las Vegas, County of Clark, State of Nevada, makes the following declarations subject to the penalty for perjury and says

that within her knowledge, information and belief, on 12/03/2019 or thereabout, and before the filing of this complaint and within the City of North Las Vegas, County of Clark, State of Nevada, at approximately 6:45 p.m., a misdemeanor was committed by such defendant who did willfully and unlawfully, commit an act of force or violence upon the person of another, to-wit: JOHN PATINO-RIOS, by striking him on the nose with an unknown object causing visible injury which occurred at or near LOSEE RD/CHEYENNE AVE,

all of which is contrary to the form, force and effect of NRS 200.481.2A in such case made and provided against the North Las Vegas City Charter 2.150 and against the peace and dignity of the people of the City of North Las Vegas. Said complainant makes this declaration subject to the penalty according to law.


KIMBERLY PHILLIPS, Complainant
Deputy City Attorney

CA006703-20 SH
1912030024081


135
Reiff

MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS
2332 LAS VEGAS BLVD, NORTH SUITE 100
NORTH LAS VEGAS, NV 89030
IN THE COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS

PLAINTIFF

- vs -

FONSECA, NERY GUSTAVO

DEFENDANT

SUMMONS

CASE NO: CR000143-20

TO: FONSECA, NERY GUSTAVO
635 TERRACE POINT ST
NORTH LAS VEGAS, NV 89032

YOU ARE HEREBY SUMMONED to appear in the Municipal Court of the City of North Las Vegas on 02/20/2020 at 8:00 am to answer the following charge(s) brought against you by the City of North Las Vegas. If you fail to appear as ordered, a warrant for your arrest will be issued.

BATTERY



Judge Sean Hoeffgen

North Las Vegas Municipal Court

Dated: January 9, 2020

CERTIFICATE OF MAILING

I hereby certify that on this 1-9-2020 I placed a true and correct copy of this
(Date)
summons in the United States Mail, postage prepaid, addressed to:

NERY GUSTAVO FONSECA
635 TERRACE POINT ST
NORTH LAS VEGAS, NV 89032

By: 

Furthermore, a copy of this summons has been forwarded to the North Las Vegas City Attorney.



City of North Las Vegas Police Department

1

Case No: 1912030024081
Report No: 1912030024081-001
Report Date: 12/3/2019 6:47:29 PM

Page 1 of 4

Administrative

Subject	BATT		
Case Report Status	Date Entered	12/3/2019 10:49:53 PM	
Occurred On	Entered By	NL2143 - Forsberg, Shane	
(and) Occurred Between	Date Reported	12/3/2019 6:47:29 PM	
Location Address	Date Verified (Legacy Cases)		
Location Name	Verified By (Legacy Cases)	Reporting Officer	
Jurisdiction	Date Approved (Legacy Cases)	Forsberg, Shane	
Grid (Beat)	Approved By (Legacy Cases)	Assisted By	
Sector	Clearance Basis	AGUILAR, DENISE	
Connecting Cases	Date of Clearance		
Report Type	Disposition	Active	
Crime Report			

Offense Detail Battery, E/VOP - 200.481.2A

Offense Description	Battery, E/VOP - 200.481.2A	Location	Parking Lot/Garage
Charge Type	M	Hate/Bias	None (No Bias)
Crime Against	Person	Domestic Violence	
UCR Hierarchy	04	Fraud Related	N - No
Using		Cargo Theft	
Tools Used		Gang	N - No
Criminal Activity		Entry Method	
Weapons	Blunt Object (Club, Hammer, etc.)		

Offenders

Suspect Name: Fonseca, Nery Gustavo



Name	Fonseca, Nery Gustavo	DOB	3/10/1963	Place of Birth	
CS No	1682924	Age	56	SSN	593-52-7018
Resident	Resident	Sex	Male	DLN	2600573297
Habitual Offender		Race	White	DLN State	Nevada
Domestic Violence	N - No	Ethnicity	Hispanic or Latino	Employer/School	
		Height	5' 6"	Employer Address	
		Weight	170	Employer CSZ	
		Build	Small	Occupation/Grade	
				Suspect MO	
				Other MO	

Addresses

Address Type	Address	CSZ	County	Country
H - Home	635 Terrace Point St	NLV, NV 89032	Clark	USA

Phones

Phone Type	Phone Number
------------	--------------

JUDGMENT AND SENTENCING ORDER

CITY OF NORTH LAS VEGAS,
VS.

CASE NUMBER: CR000143-20

NERY FONSECA

CITATION NUMBER: CA006703-20

Defendant

The Court has entered a judgment and imposes the following sentence:

CHARGE	PLEA	JUDGMENT				FINE	JAIL DAYS/ CTS	SUSPENDED SENTENCE
		NOT GLTY	GLTY	DISM	ADJ STAY			
BATTERY			X			1000		90

- | | |
|---|---|
| <input type="checkbox"/> Traffic Safety School – 5 Hour / 8 Hour | <input type="checkbox"/> Community Service _____ Hours |
| <input type="checkbox"/> DUI School | <input type="checkbox"/> Victim Impact Panel |
| <input type="checkbox"/> Alcohol/Narcotics Monitoring Program _____ | <input type="checkbox"/> Abstain From Alcohol/Drugs for _____ |
| <input type="checkbox"/> Alcoholic/Narcotics Anonymous for _____ | <input type="checkbox"/> Drug/Alcohol Evaluation |
| <input checked="" type="checkbox"/> Probation/ Stay Out of Trouble for <u>1 year</u> | <input type="checkbox"/> In House Arrest _____ Days |
| <input type="checkbox"/> Domestic Violence Counseling – 6 Months / 1-Year | <input type="checkbox"/> Petit Larceny School |
| <input checked="" type="checkbox"/> Anger Management Program – Level 1 / <u>Level 2</u> | <input type="checkbox"/> Forfeit Paraphernalia |
| <input type="checkbox"/> Other _____ | <input type="checkbox"/> Forfeit Weapon |
| <input type="checkbox"/> Substance Abuse Counseling for _____ | <input type="checkbox"/> Group or <input type="checkbox"/> Individual |
| <input type="checkbox"/> Ignition Interlock Device must be installed on any vehicle driven for a period of _____ days. | |
| <input type="checkbox"/> If proof shown within _____ days that insurance/registration/driver's license was valid on violation date dismiss charge. | |
| <input type="checkbox"/> If proof shown within _____ days that insurance/registration/driver's license was obtained after violation date, reduce fine to \$ _____ | |
| <input type="checkbox"/> Warrant Fee: _____ | <input type="checkbox"/> Restitution Fee: _____ |
| <input type="checkbox"/> Chemical Fee: \$60 | <input type="checkbox"/> Attorney Fee: _____ |
| <input type="checkbox"/> Domestic Violence Fee: \$35 | <input type="checkbox"/> Witness Fee: _____ |
| | <input type="checkbox"/> Community Service Fee: \$55 |
| | <input type="checkbox"/> Stay Away From: _____ |

Balance Due for Fines and Fees: \$ _____ plus a \$40 Payment Plan Fee = Total Balance Due: \$ _____

A payment of \$ 100 is due on 5/17/21, and on the _____ day of every month following until paid in full. If the payment due date falls on a day the Court is closed, the payment is due on the next business day.

Date

Judge

FAILURE TO COMPLY WITH THE THIS ORDER WILL RESULT IN THE ISSUANCE OF A BENCH WARRANT FOR THE ARREST OF THE ABOVE-NAMED DEFENDANT

Payments may be made at the Court from 7:00 am to 5:00 pm Monday through Thursday or online at www.cityofnorthlasvegas.com. Mailed payments must be received by the court by the due date.

1 NOASC
2 JOSEPH P. REIFF
3 Nevada Bar No. 6469
4 3001 E. Charleston Blvd., Suite A
5 Las Vegas, Nevada 89101
6 (702) 388-7000
7 Lvtkt3887000@gmail.com
8 Attorney for Defendant

9
10 **IN THE MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS**
11 **COUNTY OF CLARK, STATE OF NEVADA**

12 THE CITY OF NORTH LAS VEGAS,
13 Plaintiff,

Case No.: CR000143-20

14 vs.


Dept. No.: 2

15 NERY GUSTAVO FONSECA,
16 Defendant.

17 **NOTICE OF APPEAL**

18 PLEASE TAKE NOTICE that, NERY GUSTAVO FONSECA, the Defendant in the
19 above entitled action, by and thorough his counsel of record, Joseph P. Reiff, Esq., hereby
20 appeals to the Eighth Judicial District Court, Clark County, Nevada from the Judgment and
21 Sentencing Order issued by the North Las Vegas Municipal Court Judge Scan Hoeffgen and
22 entered on the 13th day of April, 2021, a copy of which is attached hereto.

23 Dated this 21 day of April, 2021.

24 
25 JOSEPH P. REIFF, ESQ.
26 Nevada Bar No. 6469
27 3001 E. Charleston Blvd., Suite A
28 Las Vegas, Nevada 89101
(702) 388-7000
Lvtkt3887000@gmail.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I did serve a true and correct copy of the foregoing Notice of Appeal
on the City of North Las Vegas via at:

Deep Goswami, Esq.
James Smedley, Esq.
cacriminal@cityofnorthlasvegas.com

Dated this 21 day of April, 2021.



Joseph P. Reiff, Esq.

IN THE MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS
IN THE COUNTY OF CLARK, STATE OF NEVADA

CITY OF NORTH LAS VEGAS,)	
)	
Plaintiff,)	Municipal Court Case Number: CR143-20
)	
vs.)	
)	
FONSECA, NERY GUSTAVO,)	
)	
Defendant.)	
_____)	

TRANSMITTAL OF NOTICE OF APPEAL AND RECORD ON APPEAL

TO: CLERK OF THE EIGHT JUDICIAL DISTRICT COURT, CLARK COUNTY, STATE OF NEVADA.

A Notice of Appeal has been filed in the above-referenced Municipal Court case.

I hereby certify that:

- All papers relating to the case, a certified docket, and a transcript of the trial are hereby transmitted to Clark County District Court via email to:
clerkmastercalendar@clarkcountycourts.us.
- The Notice of Appeal was filed with North Las Vegas Municipal Court within the statutory timeframe; however, due to a delay in preparation of the verbatim transcript of the trial in this case, the Transmittal of Notice of Appeal and Record of Appeal was delayed;
- A copy of all papers relating to the case, a docket, and a transcript of the trial are hereby sent to the parties as follows:

Via US Mail
Joseph R. Reiff, Esq.
3001 E. Charleston Blvd., Ste A
Las Vegas, NV 89104

Via Justice Facility Drop Box
City of North Las Vegas
c/o City Prosecutor's Office

5-27-21
Date

Cindy S. Marshall
Cindy S. Marshall
Court Administrator

MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS
2332 LAS VEGAS BLVD. NORTH SUITE 100
NORTH LAS VEGAS, NV 89030
IN THE COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS

PLAINTIFF

- vs -

FONSECA, NERY GUSTAVO

DEFENDANT


SUMMONS

CASE NO: CR000143-20

TO: FONSECA, NERY GUSTAVO
635 TERRACE POINT ST
NORTH LAS VEGAS, NV 89032

YOU ARE HEREBY SUMMONED to appear in the Municipal Court of the City of North Las Vegas on 02/20/2020 at 8:00 am to answer the following charge(s) brought against you by the City of North Las Vegas. If you fail to appear as ordered, a warrant for your arrest will be issued.

BATTERY



Judge Sean Hoeffgen

North Las Vegas Municipal Court

Dated: January 9, 2020

CERTIFICATE OF MAILING

I hereby certify that on this 1-9-2020 I placed a true and correct copy of this
(Date)
summons in the United States Mail, postage prepaid, addressed to:

NERY GUSTAVO FONSECA
635 TERRACE POINT ST
NORTH LAS VEGAS, NV 89032

By: 

Furthermore, a copy of this summons has been forwarded to the North Las Vegas City Attorney.

MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS
2332 LAS VEGAS BLVD. NORTH SUITE 100
NORTH LAS VEGAS, NV 89030
IN THE COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS

PLAINTIFF

CASE NO: CR000143-20

SUMMONS

- vs -

FONSECA, NERY GUSTAVO

DEFENDANT

TO: FONSECA, NERY GUSTAVO
635 TERRACE POINT ST
NORTH LAS VEGAS, NV 89032

YOU ARE HEREBY SUMMONED to appear in the Municipal Court of the City of North Las Vegas on 02/10/2021 at 1:30 pm to answer the following charge(s) brought against you by the City of North Las Vegas. If you fail to appear as ordered, a warrant for your arrest will be issued.

BATTERY



Judge Sean Hoeffgen

North Las Vegas Municipal Court

Dated: December 1, 2020

CERTIFICATE OF MAILING

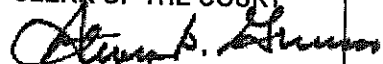
I hereby certify that on this DECEMBER 1, 2020
(Date)
summons in the United States Mail, postage prepaid, addressed to:

I placed a true and correct copy of this

NERY GUSTAVO FONSECA
635 TERRACE POINT ST
NORTH LAS VEGAS, NV 89032

By: 

Furthermore, a copy of this summons has been forwarded to the North Las Vegas City Attorney.



1 **CSERV**
2 **JOSEPH P. REIFF, ESQ.**
3 Nevada Bar No. 6469
4 The Law Offices of Joseph P. Reiff
5 3001 E. Charleston Blvd., Suite A
6 Las Vegas, Nevada 89104
7 (702) 388-7000
8 Attorney for the Appellant/Defendant

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IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

NERY GUSTAVO FONSECA,
Appellant/Defendant

-vs.-

THE CITY OF NORTH LAS VEGAS,
Appellee/Plaintiff.

Case No.: C-21-356402-A
Dept. No.: 19

NLVMC Case No.: CR000143-20

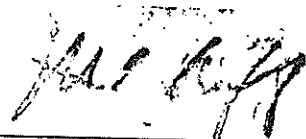
Hearing Date: August 26, 2021
Hearing Time: 9:00 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I did serve a true and correct copy of the Joint Appendix on the Appellees/Plaintiffs via electronic mail to:

Micaela R. Moore, Esq.
City of North Las Vegas
City Attorney
moorem@cityofnorthlasvegas.com
CACriminal@cityofnorthlasvegas.com

Dated this 1st day of July, 2021.



Joseph P. Reiff, Esq.
Nevada Bar No. 6469
The Law Offices of Joseph P. Reiff
3001 E. Charleston Blvd., Suite A
Las Vegas, Nevada 89104
(702) 388-7000
Attorney for Appellant/Petitioner

1 **BREF**

2 MICHAELA C. RUSTIA MOORE
3 NORTH LAS VEGAS CITY ATTORNEY
4 Nevada Bar No. 9676
5 AMANDA R. MATEER
6 Deputy City Attorney
7 Nevada Bar No. 14238
8 2332 Las Vegas Boulevard North
9 North Las Vegas, Nevada 89030
10 (702) 633-2100 Ext. 2539
11 Attorneys for the City of North Las Vegas

12 **EIGHTH JUDICIAL DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 In the Matter of the Application of:
15 **NERY GUSTAVO FONSECA,**
16 Petitioner,

Case No.: C-21-356402-A
Dept. No.: 19

NLV Muni Case No.: CR143-20

Hearing Date: August 26, 2021
Hearing Time: 9:00am

17 For Petition For Post-Conviction Relief.

18 **RESPONDENT'S OPENING BRIEF**

19 COMES NOW, the City of North Las Vegas, by Micaela C. Rustia Moore, North Las
20 Vegas City Attorney, through Deep Goswami, Chief Deputy City Attorney, and hereby
21 submits the attached Points and Authorities in Opposition to Defendant's Petition For Post-
22 Conviction Relief.

23 This opposition is made and based upon all the papers and pleadings on file herein,
24 the attached points and authorities in support hereof, and oral argument at the time of
25 hearing, if deemed necessary by this Honorable Court.

26 DATED this 28th day of July, 2021.

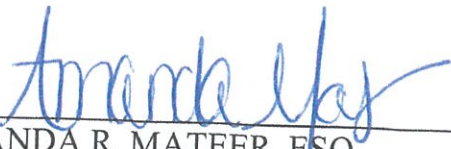
27 BY: 
28 AMANDA R. MATEER, ESQ.
DEPUTY CITY ATTORNEY

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B. Did Mr. Fonseca Invoke His Fifth Amendment Right To Remain Silent, And If So, Did The City Impermissibly Use His Silence Against Him At Trial, Leading To Error That Was Not Harmless?	13-20
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1 **TABLE OF AUTHORITIES**

2 **PAGE NO.**

3 **Statutes**

4 NRS 200.4814

5
6 **Case Authority**

7 *Grunewald v. United States*, 353 U.S. 391 (1957).....18

8 *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).....19

9 *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).....17-19

10 *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).....17, 18

11 *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6 (1954).....11

12 *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).....15

13 *Quinn v. United States*, 349 U.S. 155, 75 S. Ct. 668, 99 L. Ed. 964 (1955).....15

14 *Raffel v. United States*, 271 U.S. 494 (1926).....17, 18

15 *Salinas v. Texas*, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013).....14-16, 19

16 *United States v. Monia*, 317 U.S. 424, 63 S. Ct. 409, 87 L. Ed. 376 (1943).....15

17
18
19 **Respondent's Exhibits**

20
21 Please see Joint Appendix.

1 **ISSUES PRESENTED**

- 2
- 3 A. Did the City Violate Mr. Fonseca's Sixth Amendment Right to Counsel When
- 4 Referencing His Conversation With The Investigating Detective, Leading To
- 5 Error That Was Not Harmless?
- 6 B. Did Mr. Fonseca Invoke His Fifth Amendment Right To Remain Silent, And If
- 7 So, Did The City Impermissibly Use His Silence Against Him At Trial, Leading
- 8 To Error That Was Not Harmless?
- 9

10 **POINTS AND AUTHORITIES**

11 **I. STATEMENT OF CASE**

12

13 On or about January 7, 2020, Nery Gustavo Fonseca, Petitioner-Defendant

14 (hereinafter "Petitioner and/or Mr. Fonseca") was charged by way of misdemeanor

15 complaint with a single offense; Battery. This offense was alleged to have occurred on

16 December 3, 2019, and was charged under NRS 200.481. Detective Shane Forsberg with the

17 North Las Vegas Police Department investigated the alleged battery committed by the

18 Petitioner, and submitted charges to the North Las Vegas City Attorney's Office for

19 prosecution. On April 13, 2021, Petitioner was represented by his attorney Joseph Reiff at

20 trial in the North Las Vegas Municipal Court in front of the Honorable Judge Sean Hoeffgen.

21 Petitioner was found guilty of the offense at bench trial and was sentenced to pay a fine of

22 \$1000 plus court fees and assessments for a total of \$1140, to complete an Anger

23 Management Level Two counseling course, and to 90 days jail suspended during the

24 pendency of the case. On July 1, 2021, Petitioner filed the instant Appellate Brief. The City

25

26

27

28

1 responds as follows and respectfully requests that this Court order Petitioner's request for
2 appellate relief be DENIED.

3 4 II. LEGAL ARGUMENT

5 Respondent contends that neither Mr. Fonseca's Fifth nor Sixth Amendment Rights
6 were violated at the time of trial. As such, there were no harmful errors that led to Judge
7 Hoeffgen's finding of guilt at the time of trial.
8

9 **A. Did the City Violate Mr. Fonseca's Sixth Amendment Right to Counsel When** 10 **Referencing His Conversation With The Investigating Detective, Leading To** 11 **Error That Was Not Harmless?** 12

13 In Appellant's opening brief, there are four occasions during the trial in which the
14 Appellant alludes to a violation of Mr. Fonseca's Constitutional rights in relation to the Sixth
15 Amendment. While Respondent will address these alleged violations, the City believes one
16 section does not merit response and should be completely disregarded. In Appellant's
17 Opening Brief, he argues that the "City's improprieties started from the start with their first
18 violation of Mr. Fonseca's rights being made during their Opening Statement" and then
19 refers to portions of testimony on pages 2-3 of the Transcript located in the Joint Appendix.
20 Conveniently, Appellant does not include the full portion of the transcript related to that
21 interaction, and ends it at the words "Your Honor," then declares that defense counsel
22 objected, the city retracted that statement, and that the Court acknowledged and removed
23 said statement. It is of extreme importance to include the entire exchange in this portion of
24 the Opening Statement, as defense counsel did not actually object until *later*, and to
25 something actually different than he implies in his opening brief. Specifically:
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1 Mr. Goswami: Then Detective tried to reach out to the Defendant. Got him on the
2 phone. The defendant said, "I refuse to talk to you without a lawyer. Don't call me again."
3 And hung up the phone. And that's why we're here today, your Honor. I believe that the
4 defense is going to try to present you an argument that, uh, because the victim in this case
5 may not have been -

6 Mr. Reiff: Objection, Your Honor. The - what I am going to present is not what the
7 evidence is going to be presented - the State is arguing - I'm sorry. The State's - the City's
8 opening statement -

9 Mr. Goswami: I'll retract, your Honor. Move on.

10 Judge Hoeffgen: Okay. Removed.

11 *See Transcript (Joint Appendix) Pages 2-3.*

12 It is clear that Mr. Reiff did not make any sort of objection as to the comments made
13 regarding "talking to you without a lawyer" - in fact, the objection is not made until after
14 that portion of the opening statement has been completed, and the prosecution (Mr.
15 Goswami) begins talking about what he believes the defense is going to argue in the case. At
16 that point in time, Mr. Reiff objects. Appellant's opening brief misrepresents the nature of
17 the objection; at no point does Mr. Reiff object to the comments regarding speaking with a
18 lawyer. In turn, Appellant's opening brief discussing this particular alleged "impropriety"
19 should be completely disregarded as an inaccurate representation of what occurred at trial.

20 Petitioner also mentions three other instances where Mr. Fonseca's Sixth Amendment
21 rights were allegedly violated because the City "used evidence of Mr. Fonseca's invocation
22 of his right to retain counsel as evidence of his consciousness of guilt in their case-in-chief."
23 *See Petitioner's Opening Brief at 6.* The alleged first incident occurs when Mr. Goswami is
24 conducting direct examination of Detective Forsberg. Again, the Petitioner carves out
25 portions of the testimony without including the full exchange, which paints a much fuller
26 and actually accurate picture. *See Petitioner's Opening Brief at 7* (Petitioner shares the first
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1 portion of the exchange and then writes, "The colloquy concluded as" while skipping several
2 portions of the testimony). The full testimony was as follows:

3 Mr. Forsberg: He told me he had went to meet with the, uh, victim to exchange some
4 money that was owed to him. The money that he was offered was not the amount he was
5 expecting. And he became upset. An argument ensued and then he said he didn't want to talk
6 to me without a lawyer and not to contact him again.

6 Mr. Goswami: And did he hang up on you?

7 Mr. Forsberg: He did.

7 Mr. Goswami: Okay. Um. At the point that the – when you were talking to the
8 defendant, I want to ask you a very important question, Detective. Did the defendant ever tell
9 you, "I was the one that was battered"?

9 Mr. Forsberg: No.

10 Mr. Goswami: Did the Defendant ever tell you, "I was the one that was attacked"?

11 Mr. Forsberg: No.

11 Mr. Goswami: Did the defendant ever tell you that, "I have injuries, and I need to
12 come and show you these injuries or can you come and take photos of them"?

12 Mr. Forsberg: No. He told me specifically not to contact him.

13 Mr. Goswami: After you interviewed the victim and Officer Aguilar, the witness did
14 you make a determination as to whether a battery occurred?

14 Mr. Forsberg: I did.

15 Mr. Goswami: And who did you determine to be the batterer?

16 Mr. Forsberg: Uh. Mr. Fonseca

16 Mr. Goswami: And why did you determine him to be the batterer?

17 Mr. Forsberg: The injury present on the victim was consistent with his story and the
18 witness' story. And obviously I didn't get any rebuttal from Mr. Fonseca or any explanation.
19 And the witness present – having an eyewitness present, um, contributes to that as well.

19 See Transcript (Joint Appendix) Pages 63-64.

20 Appellant vaguely says the issue with the exchange is that "City questioned Forsberg
21 about Mr. Fonseca's invocation of his right to retain counsel." See Petitioner's Opening
22 Brief at 7. Again, this is a misrepresentation of what the exchange on direct examination was
23 about – the prosecutors asked the Detective for information on what was told to them by
24 Petitioner prior to him saying he wanted to speak with counsel and hanging up the phone
25 call. It is clear from the testimony these questions came before, since Detective Forsberg
26 testified he had learned several things about the incident from the Petitioner – that there was
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1 an incident about money, that Petitioner was angry, and so on - and clearly testified the
2 phone call ended immediately after Mr. Fonseca indicated he wanted to speak with counsel.
3 Additionally, Detective Forsberg is extremely clear – he did not believe Petitioner invoking
4 his right to speak with a lawyer was evidence of his consciousness of guilt, but instead
5 testified *directly* as to what made him determine there was probable cause that Petitioner had
6 committed the crime of battery: the injury present on the victim consistent with his story, the
7 witness, and the fact that Mr. Fonseca did not give him any rebuttal information or
8 explanation. *See* Transcript (Joint Appendix) Page 64. The fact he wanted to speak with a
9 lawyer is not mentioned in the summation of Detective Forsberg’s probable cause review;
10 and at no point does the prosecution mention Mr. Fonseca wanting to speak with a lawyer as
11 evidence of anything during this exchange (in fact, it is not mentioned by the prosecution at
12 all). Additionally, of note, there were no noted objections by defense counsel at any point
13 during the above exchange. In conclusion, no misconduct occurred during the direct
14 examination of Detective Forsberg.
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16 Defense counsel then alludes to the next incident, which purportedly occurred during
17 the cross-examination of Mr. Fonseca (which Respondent will note was not during his case-
18 in-chief, as stated by Petitioner). At the point of his testimony, Petitioner had waived his
19 Fifth Amendment right against self-incrimination and elected to testify on his own behalf.
20 On direct examination by his defense attorney, Petitioner testified that he was the victim
21 during the incident in question; he was “grabbed by his shoulder” and the other parties tried
22 to pull him out of his car. *See* Transcript (Joint Appendix) Pages 75-76. On cross-
23 examination, Mr. Goswami asked him details on if he had provided information to the
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1 Detective on being a victim of a crime prior to stating he wanted to speak with a lawyer and
2 hanging up the call. *See* Transcript (Joint Appendix) Page 80. As Petitioner states in his
3 opening brief, this matter was cleared up on the record at the time of trial – in Petitioner’s
4 own words, “the Court construed the line of questioning as eliciting evidence of whether or
5 not he provided information about the incident, thus overruling the objection. The Court
6 went on to state that the City could properly put on the record the fact that Mr. Fonseca
7 invoked his right to remain silent and to counsel.” *See* Appellant’s Opening Brief at 8.

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10 The City at no point argued that because Mr. Fonseca wanted a lawyer and
11 discontinued the telephone call, he was guilty of the offense of battery. The City had every
12 right once Petitioner elected to testify about the incidents related to that day to cross-examine
13 him on his testimony about being a victim and his credibility as to such; Judge Hoeffgen
14 properly notes that it is on the record that Mr. Fonseca stated he wanted to speak with a
15 lawyer and discontinued the call, and that “What I mean is if I’m very clear - it’s very clear
16 to me everyone has a right to counsel. He can talk all night and say, ‘Did you exercise your
17 right to the 5th amendment? Did you exercise your right to counsel?’ And if the defendant
18 says yes or the witness says yes, that’s on the record.” *See* Transcript (Joint Appendix) Page
19 82. It was clearly established on the record the purpose of the testimony was to show
20 credibility of what Petitioner testified to on direct-examination about being a victim, and as
21 to what occurred in his phone call with Detective Forsberg prior to hanging up the phone
22 call; not to show consciousness of guilt in any way because Petitioner stated he wanted to
23 speak with a lawyer and then discontinued the call.
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1 Finally, Petitioner references alleged “indiscretions” in Respondent’s closing
2 argument remarks. Again, Petitioner alludes to a portion of the testimony, leaving key parts
3 of it out and skipping portions with merely a “...”. Additionally, it is important to note that
4 no portion of the City’s closing argument was objected to by defense counsel at the time of
5 trial. In full, Mr. Goswami stated, while referencing Detective Forsberg:

7 Mr. Goswami: And then before making any determination, he tried to speak with the
8 defendant who admitted he was present, who admitted there was a dispute, who admitted he
9 was angry. And at that point if you are the victim if you are in the parking lot beat up by – by
10 these two big, huge guys and barely got away. And now you’re on the phone with the police
11 that’s when you say, “I’m the victim. I was beat up. These guys baited me over here and
12 attacked me. Please help. I’ll come back. You’re the police. He didn’t say any of that. “You
13 can talk to my lawyer.” Click. The next day he didn’t call police. The next day he didn’t call
14 the police. All the way up until right now he didn’t call the police. At no point ever des[it
15 being beat up by these two goons in public parking lot of McDonald’s has he ever called the
16 police and reported that he was the victim of a crime. Who was the victim, Judge?”

14 See Transcript (Joint Appendix) Page 93.

15 The City agrees with Petitioner’s references to numerous cases that state that the mere
16 act of hiring an attorney is not probative in the least of the guilt or innocence of defendants.

18 See Appellant’s Opening Brief at 9. However, those cases are not relevant to the present case
19 because there are no references made in this trial that the “mere act of hiring an attorney” –
20 or in this case, wanting to speak with one – was indicative at all of guilt or innocence.

21 Petitioner also cites to *Macon* (a case outside this jurisdiction) and states the references made
22 by the City are “nearly identical” to ones that were deemed unconstitutional in that case. See
23 Appellant’s Opening Brief at 9. This is completely untrue; Petitioner tries to make this
24 argument by taking snippets of testimony and not including them in their full context. As the
25 City has outlined above, in full context, it is clear that the prosecution never violated
26 Petitioner’s right to counsel – what the prosecution did is illicit factual testimony from both
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1 Detective Forsberg and the Petitioner himself after waiving his Fifth Amendment right about
2 the contents of the phone call prior to it being disconnected. Petitioner attempts to paint a
3 picture of “indiscretions” that simply do not exist when shown in the light of the entirety of
4 the testimony regarding Mr. Fonseca’s testimony that he was the victim and not the
5 perpetrator.
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7 Furthermore, the City would like to briefly address Petitioner’s allegations that this
8 conduct was not harmless error at the time of Judge Hoeffgen’s ruling. “Harmless error” is a
9 well-established standard, and is appropriate here, as outlined by Petitioner. “In reviewing a
10 judgment of a trial court...a Court of Appeals may not set aside the judgment below unless it
11 is clearly erroneous...A finding is clearly erroneous when although there is evidence to
12 support it, the reviewing court on the entire evidence is left with the definite and firm
13 conviction that a mistake has been committed. *McAllister v. United States*, 348 U.S. 19, 19,
14 75 S. Ct. 6, 7 (1954). Petitioner states that the above “errors” were not harmless; while
15 Respondent contends that in their full context, none of the above were errors, the City
16 believes even if they were deemed errors that they were in fact harmless as evidenced in
17 Judge Hoeffgen’s ruling.
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21 Petitioner refers to Judge Hoeffgen’s ruling in part, and states that “Judge Hoeffgen,
22 ignoring Constitutional mandates not to do so, went on to state that Mr. Fonseca’s testimony
23 was not credible because he had an opportunity to tell the police he was a victim, but instead
24 invoked his right to counsel. Judge Hoeffgen determined that Mr. Fonseca was not credible
25 because his actions, in invoking his right to counsel, were not consistent with his claim to be
26 innocent.” *See* Appellant’s Opening Brief at 10-11. He also quotes a portion of Judge
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1 Hoeffgen's closing remarks, again framing a small piece of testimony to fit Petitioner's
2 narrative while not including it in its entirety, which shows that there actually was no error.

3 Fully, the particular portion of the ruling referenced by Petitioner goes as follows:
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5 Judge Hoeffgen: And upon his [Detective Forsberg] further review of those
6 statements, of him taking pictures of the injuries, of the statements, of the injuries, the
7 totality that he had determined that a battery had occurred. He also testified that he was
8 given, uh, Mr. Fonseca's cell phone number by Mr. Patino. That he called Mr. Fonseca's
9 phone number. That he briefly spoke with Mr. Fonseca to try and get his side of what had
10 occurred. That, um, Mr. Fonseca stated there was an argument. That he was owed money
11 from the job and that he was not being paid for the job. But that Mr. Fonseca did not provide
12 any other information regarding whether there was a fight. Uh. And that at – when – when
13 the detective stated that the moment he started to ask him questions about whether he had,
14 uh, attacked or hit Mr. Patino with any weapon at that moment. He stated that Mr. Fonseca
15 stated, "I'm not going to answer any more questions without – you know without speaking to
16 my lawyer first. Which obviously is his right to do. And that he terminated the phone call.
17 But it's clear from the detective's testimony that, uh, Mr. Fonseca didn't take the time or
18 utilize the opportunity to – provide him information, in particular about him being a victim
19 of a crime.

20 See Transcript (Joint Appendix) at Pages 101-102.

21 Judge Hoeffgen specifically states Mr. Fonseca had the *right* to discontinue the
22 telephone call and choose to speak with a lawyer. In no way does Judge Hoeffgen use that
23 decision against him – instead, Judge Hoeffgen frames the conversation that Detective
24 Forsberg and Petitioner had prior to the phone call being hung up, and whether it was
25 consistent with the testimony Petitioner elected to give at trial. Judge Hoeffgen used that
26 testimony to help determine the credibility of the Petitioner – he did not, at any point, use the
27 fact that Petitioner discontinued the phone call to suggest that was a reasoning in the "totality
28 of the circumstances" behind him finding Petitioner guilty. See Transcript (Joint Appendix)
Pages 102-103.

1 In whole, when looked at in their complete context, references to Mr. Fonseca
2 choosing to speak with a lawyer were not made in any way to show his consciousness of
3 guilt. They were not a violation of his Sixth Amendment rights – instead, they reflected facts
4 related to his phone call with Detective Forsberg and his own statements made at the time of
5 trial when he elected to testify on his own behalf. As a result, Petitioner’s Sixth Amendment
6 arguments fail, no constitutional rights were violated, and any appellate relief on those
7 grounds should be denied.
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11 **B. Mr. Fonseca Never Invoked His Fifth Amendment Right Against Self-**
12 **Incrimination, And His Conversation With Detective Forsberg Was Permissibly**
13 **Used At Trial**
14

15 Petitioner argues in main part that the City violated Petitioner’s Fifth Amendment
16 right to remain silent after Petitioner had affirmatively asserted his right to remain silent
17 when he was questioned by Detective Forsberg. *See* Petitioner’s Opening Brief at 12-13.
18 Petitioner then follows down a long “chain” of reasoning - that after this affirmative
19 assertion was made, the City impermissibly used his silence as evidence of guilt at trial, and
20 then Petitioner assures that said violations were not harmless error because of statements
21 made by Judge Hoeffgen at the time of his finding of guilt. *See* Petitioner’s Opening Brief at
22 14-15. Respondent disagrees with several of Petitioner’s assertions related to the Fifth
23 Amendment in the case at hand. Additionally, in order to get down his “chain” of reasoning
24 to show that there was harmful error, the City contends that Petitioner must prove first and
25 foremost that Mr. Fonseca did affirmatively assert his right to remain silent at the time he
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1 spoke with Detective Forsberg. The City contends the “chain” ends immediately at the
2 inception, because Mr. Fonseca did not affirmatively assert his right to remain silent.

3 Petitioner claims that Mr. Fonseca affirmatively asserted his Fifth Amendment right
4 to the privilege against self-incrimination because he told the investigating detective that he
5 didn’t want to speak with him anymore without a lawyer, to not contact him again, and then
6 hung up the call. *See* Petitioner’s Opening Brief at 12-13. While Petitioner glosses over
7 *Salinas vs. Texas* in his opening brief, it is the critical case at bar in this argument. *See*
8 Petitioner’s Opening Brief at 12. Nevada has not ruled specifically on any limitations post-
9 *Salinas*; Petitioner wants to speculate about who and what Nevada *would* do, saying it is
10 likely they would side with other unnamed Federal Circuits and State Supreme Courts. *See*
11 Petitioner’s Opening Brief at 12. Absent any clear movement by the Nevada Supreme Court
12 or legislature, this speculation is completely unwarranted, and thus *Salinas* as it stands is the
13 controlling authority with there being no post-*Salinas* changes in Nevada.
14

15 In the 2013 *Salinas* ruling, the Supreme Court held that “Without being placed in
16 custody or receiving *Miranda* warnings, petitioner voluntarily answered the questions of a
17 police officer who was investigating a murder. But petitioner balked when the officer asked
18 whether a ballistics test would show that the shell casings found at the crime scene would
19 match petitioner’s shotgun. Petitioner was subsequently charged with murder, and at
20 trial prosecutors argued that his reaction to the officer’s question suggested that he was
21 guilty. Petitioner claims that this argument violated the Fifth Amendment, which guarantees
22 that ‘[n]o person . . . shall be compelled in any criminal case to be a witness against himself.’
23 Petitioner’s Fifth Amendment claim fails because he did not expressly invoke the privilege
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1 against self-incrimination in response to the officer's question. It has long been settled that
2 the privilege 'generally is not self-executing' and that a witness who desires its protection
3 'must claim it.' *Minnesota v. Murphy*, 465 U.S. 420, 425, 427, 104 S. Ct. 1136, 79 L. Ed. 2d
4 409 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S. Ct. 409, 87 L. Ed. 376
5 (1943)). Although 'no ritualistic formula is necessary in order to invoke the
6 privilege,' *Quinn v. United States*, 349 U.S. 155, 164, 75 S. Ct. 668, 99 L. Ed. 964 (1955), a
7 witness does not do so by simply standing mute. Because petitioner was required to assert
8 the privilege in order to benefit from it, the judgment of the Texas Court of Criminal
9 Appeals rejecting petitioner's Fifth Amendment claim is affirmed." *Salinas v. Texas*, 570
10 U.S. 178, 181, 133 S. Ct. 2174, 2177-2178, 186 L. Ed. 2d 376, 382 (2013).

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13 Additionally, the *Salinas* Court looked to the explicit issue of whether the petitioner
14 was deprived of the ability to voluntarily invoke the Fifth Amendment at any point. The
15 Supreme Court determined he was not, and specifically that there was "...no allegation that
16 petitioner's failure to assert the privilege was involuntary, and it would have been a simple
17 matter for him to say that he was not answering the officer's question on Fifth
18 Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial
19 silence did not violate the Fifth Amendment." *Id.* at 186.

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22 *Salinas* shares nearly identical similarities with Petitioner's case and the facts
23 underlying it. Petitioner was not in custody at the time he spoke with Detective Forsberg;
24 therefore, he had not been read *Miranda* warnings. The conversation was over the phone and
25 at no point was there any belief by Petitioner he was in custody or required to answer
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1 questions; Detective Forsberg hoped to get Petitioner's version of events to complete his
2 investigation. Detective Forsberg testified to the details of the phone call at the time of trial:

3 Mr. Forsberg: He told me he had went to meet with the, uh, victim to exchange some
4 money that was owed to him. The money that he was offered was not the amount he was
5 expecting. And he became upset. An argument ensued and then he said he didn't want to talk
6 to me without a lawyer and not to contact him again.

6 Mr. Goswami: And did he hang up on you?

7 Mr. Forsberg: He did.

7 Mr. Goswami: Okay. Um. At the point that the – when you were talking to the
8 defendant, I want to ask you a very important question, Detective. Did the defendant ever tell
9 you, "I was the one that was battered"?

9 Mr. Forsberg: No.

10 Mr. Goswami: Did the Defendant ever tell you, "I was the one that was attacked"?

11 Mr. Forsberg: No.

11 Mr. Goswami: Did the defendant ever tell you that, "I have injuries, and I need to
12 come and show you these injuries or can you come and take photos of them"?

12 Mr. Forsberg: No. He told me specifically not to contact him.

13 See Transcript (Joint Appendix) Page 63.

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15 At no point in time did Mr. Fonseca affirmatively assert his Fifth Amendment Right
16 and, as analyzed in *Salinas*, it would have been easy for him to say that he was not
17 answering Officer's questions on Fifth Amendment grounds. As such, Respondent contends
18 that Petitioner never invoked his Fifth Amendment right to silence at the time he was
19 interviewed by Detective Fonseca, and that Petitioner's "chain" of reasoning that said rights
20 were violated can and should end at its inception.

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22 Should this Honorable Court find there is an issue as to Petitioner invoking his Fifth
23 Amendment right, then the "chain" ends at the next logical step, as Mr. Fonseca opted to
24 waive his Fifth Amendment Right against self-incrimination at trial when he opted to take
25 the stand after he was appropriately told that him remaining silent could not and would not
26 be used against him. See Transcript (Joint Appendix) Page 67. The United States Supreme
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1 Court has held that "Common law traditionally has allowed witnesses to be impeached by
2 their previous failure to state a fact in circumstances in which that fact naturally would have
3 been asserted. Each jurisdiction may formulate its own rules of evidence to determine when
4 prior silence is so inconsistent with present statements that impeachment by reference to
5 such silence is probative." *Fletcher v. Weir*, 455 U.S. 603, 606, 102 S. Ct. 1309, 1311, 71 L.
6 Ed. 2d 490, 493-494 (1982). In the present case, Petitioner asserted throughout his direct
7 testimony that he was the victim and that he was battered by the other party and not vice
8 versa. *See* Transcript (Joint Appendix) Pages 74-85. As clear from the direct testimony by
9 Detective Forsberg cited previously, he was never told by Petitioner prior to hanging up the
10 call that he was a victim in any way shape or form.

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13 Case law in the United States shows absolute precedent that Mr. Fonseca's "silence"
14 (him saying absolutely nothing about how he was a victim at the time of the investigation) is
15 admissible at trial. The United States Supreme Court held in *Jenkins* that, "The prosecutor
16 attempted to impeach the petitioner's credibility by suggesting that the petitioner would have
17 spoken out if he had killed in self-defense. The petitioner contends that the prosecutor's
18 actions violated the Fifth Amendment...In this case, of course, the petitioner did not remain
19 silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in
20 his own defense. This Court's decision in *Raffel v. United States*, 271 U.S. 494 (1926),
21 recognized that the Fifth Amendment is not violated when a defendant who testifies in his
22 own defense is impeached with his prior silence...The Court held that inquiry into prior
23 silence was proper because "[the] immunity from giving testimony is one which the
24 defendant may waive by offering himself as a witness. . . When he takes the stand in his own
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1 behalf, he does so as any other witness, and within the limits of the appropriate rules he may
2 be cross-examined. . . .” *Id.*, at 496-497. *Jenkins v. Anderson*, 447 U.S. 231, 235-236, 100 S.
3 Ct. 2124, 2127-2128, 65 L. Ed. 2d 86, 92-93 (1980).

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5 In this case, Petitioner opted to take the stand and testify. As a result, he was subject
6 to cross-examination by Respondent regarding him hanging up on Detective Forsberg and
7 his silence regarding being a victim of an attack by the other party involved in this case.
8 The *Raffel* Court concluded that the defendant was “subject to cross examination impeaching
9 his credibility just like any other witness.” *Grunewald v. United States*, 353 U.S. 391, 420
10 (1957). There were no violations of Petitioner’s Fifth Amendment right, and there were no
11 impermissible uses of his silence to show consciousness of guilt, as argued by Petitioner.
12 Therefore, Petitioner’s argument that his silence was impermissibly used by the prosecutor at
13 the time of trial fails.
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16 Although Respondent contends that the “chain” of reasoning ended at both inception
17 and at the heart of Petitioner’s argument, Respondent would like to address if this Honorable
18 Court were to make it all the way to the final step of Petitioner’s “chain” of reasoning – that
19 this was not harmless error. Again, the United States Supreme Court has made it abundantly
20 clear in *Fletcher v. Weir* the extent to which post-arrest silence can be relied on by a Judge:
21 “In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we
22 do not believe that it violates due process of law for a State to permit cross-examination as to
23 post-arrest silence when a defendant chooses to take the stand. A State is entitled, in such
24 situations, to leave to the judge and jury under its own rules of evidence the resolution of the
25 extent to which post-arrest silence may be deemed to impeach a criminal defendant’s own
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1 testimony. *Fletcher v. Weir* at 607 (1982). Additionally, *Salinas* added to *Fletcher*:
2 "...The Fifth Amendment guarantees that no one may be 'compelled in any criminal case to
3 be a witness against himself'; it does not establish an unqualified 'right to remain silent.' A
4 witness' constitutional right to refuse to answer questions depends on his reasons for doing
5 so, and courts need to know those reasons to evaluate the merits of a Fifth
6 Amendment claim." See *Hoffman*, 341 U.S., at 486-487, 71 S. Ct. 814, 95 L. Ed. 1118.
7 *Salinas v. Texas*, at 189 (2013).
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10 Petitioner argues that in his ruling, Judge Hoeffgen "relied upon the City's evidence
11 that Mr. Fonseca's invocation of his right to retain or remain silent, and his actual silence,
12 was not consistent with his claim to innocence." See Appellant's Opening Brief at 14-15.
13 Petitioner states this point several times as being the most "pertinent;" however, of real
14 importance is Judge Hoeffgen's reliance on the "totality of the circumstances" in making his
15 ruling of guilt: The testimony of the victim, of the witness, the noticeable documented
16 injury, and the testimony of Detective Forsberg that detailed his conversation with Petitioner
17 and was noticeably silent as to Petitioner being attacked or a victim himself in any way
18 shape or form. See Transcript (Joint Appendix) Page 103. Judge Hoeffgen appropriately
19 made a determination as to the credibility of Mr. Fonseca after he opted to testify in the trial;
20 his testimony was such that he was the victim, and that was not at all consistent with his
21 silence at the time of the investigation regarding being a victim. Thus, Judge Hoeffgen
22 weighed the credibility of Petitioner's testimony, which included his silence as to being a
23 victim, as one factor in his final ruling; it was one of many factors in a "totality of
24 circumstances." Specifically, Judge Hoeffgen noted that he did not find Mr. Fonseca's
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1 testimony at the time of trial very credible; and his silence about being a victim at the time of
2 the investigation was properly used to impeach Petitioner's own testimony at the time of
3 trial.
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5 In summation, Petitioner never directly and affirmatively invoked his Fifth
6 Amendment right to remain silent at the time of the investigation; Respondent used
7 Petitioner's silence properly at trial when Petitioner opted to waive his Fifth Amendment and
8 testify; and finally, there was no error made by Judge Hoeffgen at the time of his ruling. As a
9 result, Petitioner's Fifth Amendment arguments fail, no constitutional rights were violated,
10 and any appellate relief on those grounds should be denied.
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13 III. CONCLUSION

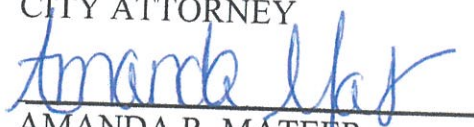
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15 Petitioner argues that both his Fifth and Sixth amendment rights were violated at the
16 time of trial, and that these alleged violations were relied on by Judge Hoeffgen in his ruling
17 of guilt. At no point during the trial does the fact that Petitioner wanted to speak to a lawyer
18 become a basis whatsoever for his conviction. In fact, at no point is the Petitioner's decision
19 to speak with and hire counsel an issue that is used in the Respondent's case in chief. More
20 accurately, the Petitioner did not invoke his Fifth Amendment right at the time of the
21 questioning, stayed silent as to potentially being a victim, and then chose to testify on his
22 own behalf at trial that he was the victim. Respondent appropriately addressed his silence
23 during cross-examination. Additionally, Judge Hoeffgen made his ruling based on a totality
24 of circumstances – including witness testimony, evidence of injury, and the Detective's
25 investigation. Mr. Fonseca's silence was used to impeach his credibility when he testified he
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1 was a victim; this was only one of several factors that led to his finding of guilt. Nothing
2 improper was relied on because there were no constitutional violations, and as a result, there
3 was no harmful error at the time of the finding of guilt. Based on the foregoing, the City of
4 North Las Vegas respectfully requests that Petitioner's request for appellate relief be denied.
5

6 DATED this 28th day of July, 2021.
7

8 Respectfully submitted,
9 MICAELA C. RUSTIA MOORE
10 CITY ATTORNEY

11 BY:

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13 AMANDA R. MATEER
14 Deputy City Attorney
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Employee of the City of North Las Vegas

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

NERY GUSTAVO FONSECA,
Appellant/Defendant

-vs-

THE CITY OF NORTH LAS VEGAS,
Appellee/Plaintiff.

Case No.: C-21-356402-A
Dept. No.: 19

NLVMC Case No.: CR000143-20

Hearing Date: August 26, 2021
Hearing Time: 9:00 a.m.

AN APPEAL IN THE EIGHTH JUDICIAL DISTRICT COURT IN AND FOR CLARK
COUNTY, NEVADA OF A JUDGMENT IN MUNICIPAL COURT FOR THE CITY OF
NORTH LAS VEGAS, NEVADA

APPELLANT'S REPLY BRIEF

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Appellant/Defendant)
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)
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Appellee/Plaintiff.)
_____)

Case No.: C-21-356402-A

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. There are no such persons and/or entities that are required to be disclosed that are associated with the Appellant's counsel. The undersigned, Joseph P. Reiff, Esq., is and was the sole counsel of record in the above-entitled action in both the North Las Vegas Municipal Court and Eighth Judicial District Court, and will be the only counsel appearing on appeal.

Dated this 16th day of August, 2021.

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C. THE CITY'S MISCONDUCT WAS NOT HARMLESS ERROR...

NATURE OF REPLY

In the City'sⁱ Opening Briefⁱⁱ, they make two major arguments. First, in regard to Mr. Fonseca's claim that the City violated his right to counsel, the City argues that Mr. Fonseca has misstated and/or misrepresented the trial transcripts and the legal consequences concerning those interpretations. Second, in regard to Mr. Fonseca's claim that the City violated his right to remain silent, the City argues that Mr. Fonseca never properly invoked his right to remain silent, and even if he did his invocation was only used to properly impeach his claim of innocence. Mr. Fonseca now replies to these arguments.

LEGAL ARGUMENT

I. MR. FONSECA'S APPEAL SHOULD BE GRANTED ON THE GROUNDS THAT HIS NEVADA CONSTITUTIONAL CLAIMS WENT UNOPPOSED.

A. STANDARD FOR GRANTING UNOPPOSED CLAIMS.

Failure of the opposing party to serve and file written opposition to an argument or issue may be construed as an admission that the argument or issue is meritorious and a consent to granting the same. *Belcher v. State*, 464 P.3d 1013, 1023 (Nev. 2020) (holding that where the State failed to make an argument in their answering brief, the Court was justified as treating the omission as waiver of the issue and/or confession that the issue raised on appeal was meritorious) citing NRAP 31(d)(2),

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- i. The City of North Las Vegas refers to its Brief as "Respondent's Opening Brief," however, Respondent's Brief should be entitled as "Respondent's Answering Brief." See NRAP 28(b); see also note ⁱⁱ below. For the sake of clarity, the Appellant will refer to the Respondents' Brief as their "Answering Brief." In the Appellant's Opening Brief, Appellant refers to himself as Mr. Fonseca and the Appellee, as the "City." For the purposes of clarity, the Appellant will reuse the same names in this Reply Brief in referencing.
 - ii. Within the caption of its Answering Brief, Respondent-Appellee City of North Las Vegas incorrectly designates Mr. Fonseca's Appeal as a "Petition For Post-Conviction Relief." The Appellant's action is a direct appeal from the conviction of a misdemeanor charge in the North Las Vegas Municipal Court filed pursuant to NRS 5.073, NRS 189.010 and NRS 177.015; see also NRAP 3B. Mr. Fonseca makes note of this because a Petition For Post-Conviction Relief is controlled by NRS Chapter 34 and restricts issues to those of ineffective assistance of counsel and other issues not allowed on direct appeal. If this was a Petition For Post-Conviction Relief, Mr. Fonseca would be barred from raising the issues he raised in his Opening Brief. Therefore, Mr. Fonseca requests the Court to construe the City's "Opening Brief" as "Respondent's Answering Brief" in response to Mr. Fonseca's filing a direct appeal to his conviction.

and *Polk v. State*, 126 Nev. 180, 184-86, 233 P.3d 357, 359-61 (2010); *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005).

B. APPLYING THE STANDARD TO THE CASE AT BAR.

In the case at bar, Mr. Fonseca raised four constitutional claims in his Opening Brief. He raised a claim for violation of the right to counsel and the right to remain silent. For each of these two claims, he raised a United States Constitution claim and a Nevada Constitution claim, totaling four claims. See App. Opening Brief. In the City's Answering Brief, they fail to even mention Mr. Fonseca's Nevada Constitutional claims, cite a Nevada case, or discuss the Nevada Constitution. The City had ample opportunity to oppose Mr. Fonseca's Nevada Constitutional claims, but failed to do so. Therefore, the Court should hold that the City has waived its right to oppose Mr. Fonseca's Nevada Constitutional claims and construe the City's failure to oppose these claims as an admission of error by the North Las Vegas Municipal Court and grant Mr. Fonseca's appeal on these claims. NRAP 31(d)(2); *Belcher*, 464 P.3d at 1023; *Polk*, 126 Nev. at 184-86, 233 P.3d at 359-61; *Gonzalez-Flores*, 418 F.3d at 1100.

II. THE CITY DID VIOLATE MR. FONSECA'S CONSTITUTIONAL RIGHT TO COUNSEL.

In the City's Opening Brief, they do not argue about which cases control Mr. Fonseca's Sixth Amendment claim or that his interpretation of the controlling law is incorrect. Rather, the City's arguments center around the facts. The City's arguments can be narrowed down to six major objections. These include: 1) the Appellant purposely omitted relevant portions of the trial transcripts; 2) Defense Counsel did not make a proper objection; 3) the City only used evidence of Appellant's invocation of his right to counsel for impeachment purposes; 4) Detective Forsberg did not consider Mr. Fonseca's invocation of his right to counsel in determining whether there was probable cause; 5) Mr. Fonseca waived

his right to self-incrimination by taking the witness stand; and 6) even if there was error on the part of the City, Mr. Fonseca's appeal should be denied because there was no harm to Mr. Fonseca. Mr. Fonseca Replies to each of the City's objections.

A. MR. FONSECA WAS REQUIRED TO OMIT IRRELEVANT PORTIONS OF THE RECORD IN HIS BRIEF.

The City makes much ado about Mr. Fonseca leaving out portions of the trial record in his Legal Argument of his Opening Brief. Rsp. Ans., at 5-13. However, the Nevada Rules of Appellate Procedure, Rule 28 (j) and Rule 30 (b) require briefs to omit "all matters not essential to the decision of issues presented by the appeal." See also NRAP 3B (NRAP controls appeals from the municipal courts to the District Courts). The portions of the record that Mr. Fonseca left out of his argument are not relevant to the decision in this case. Mr. Fonseca's omissions were in accordance to the Rules, and not for some nefarious reason as argued by the City. Therefore, the City's objection is without merit and Court should decide the appeal based upon the portions of the record cited by Mr. Fonseca. *Id.*

B. DEFENSE COUNSEL'S OBJECTIONS WERE PROPER, HOWEVER, EVEN IF THEY WEREN'T THIS COURT SHOULD REVIEW THE APPEAL UNDER THE PLAIN ERROR STANDARD OF REVIEW.

The City spends four to five pages arguing that the Court should dismiss Mr. Fonseca's Appeal because Defense Counsel failed to properly objection to the City's misconduct. The City argues, without citing any controlling authority, that the Court does not have jurisdiction to the hear the Appeal because Defense Counsel failed to properly object. The City's argument is without merit.

First, as argued in the Opening Brief, Defense Counsel properly objected each time the City violated Mr. Fonseca's Constitutional rights. See *Johnson v.*

Egtedar, 112 Nev. 428, 435, 915 P.2d 271, 275 (Nev. 1996) (explaining the standard for making objections); *Village Development Co. v. Filice*, 90 Nev. 305, 526 P.2d 83 (1974) (same); *Otterbeck v. Lamb*, 85 Nev. 456, 456 P.2d 855 (1969) (same); *Downing v. Marlia*, 82 Nev. 294, 417 P.2d 150 (1966) (same); *Tidwell v. Clarke*, 84 Nev. 655, 447 P.2d 493 (1968) (same); see also *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690 n. 1, 669 P.2d 709, 710 (1983) (same).

Secondly, even if Defense Counsel did not properly object, *in arguendo*, this does not end the inquiry. Plain errors or defects affecting substantial rights that were not properly objected to in the trial court, may still be noticed and decided on appeal. NRS 178.602; and see *Pellegrini v. State*, 34 P.3d 519, 534, 117 Nev. 860 (Nev. 2001) (“On direct appeal of any judgment of conviction, this court has discretion to review instances of plain error despite the failure to preserve an issue at trial or the failure to raise the issue on appeal.”); *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, (Nev. 1991) (“As a general rule, failure to object below bars appellate review; but, we may address plain error or issues of constitutional dimension sua sponte.”); and see *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986); *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

In the case at bar, the City’s misconduct is plain error and/or a constitutional error that effects the substantial right of Mr. Fonseca. *Valdez v. State*, 196 P.3d 465, 477, 124 Nev. 97 (Nev. 2008) (“Misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error.”); *Chapman v. California*, 386 U.S. 18, 21, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (same). Therefore, if this Court determines that Defense Counsel did not properly object to the City’s misconduct during trial, it should review the issue under the plain error standard. *Valdez*, at 477 (“When an error has not been preserved, this court employs plain-error review. Under that standard, an

error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing "actual prejudice or a miscarriage of justice.").

Even under the plain error standard, this Court should reverse Mr. Fonseca's conviction. As argued in Mr. Fonseca's Opening Brief, Mr. Fonseca was prejudiced by the City's misconduct because the Judge considered the misconduct, and evidence produced there from, in rendering his decision. Op. Brief, at 10-11. This is the kind of prejudice that the Nevada Supreme Court has held effects a substantial Constitutional right of a defendant. *Valdez*, 196 P.3d 477-78.

C. THE CITY DID NOT ONLY USE THE EVIDENCE OF FONSECA'S INVOCATION OF HIS RIGHT TO COUNSEL FOR IMPEACHMENT PURPOSES.

The City next argues that it did not violate the Constitutional rights of Mr. Fonseca because all it did was use the evidence of Mr. Fonseca's invocation of his right to counsel to impeach his testimony that he was innocent. They argue that they did not use the fact of Mr. Fonseca's invocation of his right to counsel as evidence of his guilt. This argument is without merit.

As argued in Mr. Fonseca's Opening Brief, the facts in the case at bar are on point with the facts in *United States ex rel. Macon v. Yeager*, 476 F.2d 613, 615 (3rd Cir. 1973) cert. denied 424 U.S.855 (1974). Just like in *Macon*, supra., the City elicited evidence that Mr. Fonseca invoked his right to counsel during their case in chief, then used that evidence in their opening and closing arguments. Just like in *Macon*, the City details Mr. Fonseca's actions in invoking his right to counsel, then states, "He didn't do any of that [talk to police] you talk to my lawyer, click. . . Who is the victim, Judge?" J.A., at 92-93. In *Macon*, supra., the prosecutor outlined the defendant's actions, and states "He gets up in the morning and lo and behold, what does he do? he calls his lawyer. These are the acts of innocence?" *Macon*, at 614. Like the City, the prosecutor in *Macon* also argued

that they were simply using the evidence of invocation to impeach. *Id.* The Third Circuit Court of Appeals held that these types of statements in a closing argument violated the rights of the defendant. *Id.* The two statements are identical in form, ie., a statement of what innocent people don't do, "call their lawyer." Just like the Third Circuit, this Court should also hold that these types of statements violate Mr. Fonseca's right to counsel and grant his appeal.

D. DETECTIVE FORSBERG DID CONSIDER EVIDENCE OF MR. FONSECA'S INVOCATION OF HIS RIGHT TO COUNSEL IN DETERMINING THAT THERE WAS PROBABLE CAUSE FOR ARREST.

The City next argues that Detective Forsberg did not consider evidence that Mr. Fonseca invoked his right to counsel in determining that there was probable cause to arrest Mr. Fonseca. Rsp. Brief, at 8-9. They argue that Detective Forsberg was "extremely clear – he did not believe Petitioner [Mr. Fonseca] invoking his right to speak with a lawyer was evidence of his consciousness of guilt..." *Id.* The City cites to page 64 of the Joint Appendix to support this argument. The City's argument is without merit.

The City's citation to Detective Forsberg's testimony is far from being "*extremely clear*" that he did "*not believe Petitioner invoking his right to speak with a lawyer was evidence of his consciousness of guilt.*" *Id.* Rather, his testimony makes clear that he absolutely considered Mr. Fonseca's invocation of his right to counsel as evidence that he was guilty of the battery. As argued in Mr. Fonseca's Opening Brief, the City asked the Detective, "why did you determine him [Mr. Fonseca] to be the batterer?" Op. Brief, at 7-8. In response, the Detective does not say at anytime that Mr. Fonseca's invocation of his right to counsel was **NOT** a factor in determining that there was probable cause, as argued by the City. *Id.* Rather, the Detective clearly and unequivocally states that the reasons he determined that there was probable cause was because, 1) the injury on the victim

was consistent with his story and the witness' story; and 2) "*obviously I didn't get any rebuttal from Mr. Fonseca or any explanation.*" J.A., at 64. The reason the Detective didn't get a rebuttal or explanation from Mr. Fonseca was because, as the Detective testified, Mr. Fonseca invoked his right to counsel. *Id.*, at 63. Mr. Fonseca told Detective Forsberg that "he didn't want to talk to me [Forsberg] without a lawyer and to not contact him again." *Id.* Clearly, the Detective believed that Mr. Fonseca's not wanting to give a statement outside the presence of his attorney was evidence of Mr. Fonseca's consciousness of guilt. *Dettloff v. Nevada*, 120 Nev. Adv. Op. 67, 6 n.24 (Nev. 9/16/2004); *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983) cert. denied 469 U.S. 920 (1984); *Macon*, at 614.

E. MR. FONSECA DID NOT WAIVE HIS RIGHT AGAINST SELF-INCRIMINATION IN REGARDS TO HIS RIGHT TO RETAIN COUNSEL.

The City next argues that they were within their right to elicit testimony from Mr. Fonseca about his invocation of his right to counsel because he waived his right against self-incrimination when he testified on his own behalf. Rsp. Brief, at 8-9. They argue that they only elicited testimony from Mr. Fonseca about his pre-invocation statements with Detective Forsberg, and therefore did not violate his rights. *Id.* This argument too, is without merit.

First, Mr. Fonseca did not waive his right against self-incrimination as to the use of this type of evidence simply because he testified in court. Rather, a defendant only waives his right to the introduction of this type of evidence when he testifies on direct examination regarding his invocation of his right to counsel. *Dettloff*, at 6 n.24. In the case at bar, Mr. Fonseca never testified about his invocation of his right to counsel on direct examination, and the defense never commented on it in it's case in chief. J.A., at 67-83. Therefore, the City's elicitation of testimony regarding Mr. Fonseca's invocation of his right to counsel for the purpose of showing evidence of consciousness of guilt was a violation of

Mr. Fonseca's Constitutional rights. *Dettloff*, at 6 n.24; *Bruno*, at 1195; *Macon*, at 614.

Second, far from eliciting only evidence of Mr. Fonseca's pre-invocation statements to Detective Forsberg, the City specifically questioned Mr. Fonseca about his invocation of his right to counsel when Mr. Fonseca never gave any testimony during direct examination about his invocation. J.A., at 80. The City's specific question was:

Mr. Goswami: Okay. And you also told the detective that you were not going to talk to him without consulting a lawyer. You told him to never call you again. And you hung up the phone on him. Correct?

J.A., at 80.

This was not a question regarding Mr. Fonseca's pre-invocation statements to Detective Forsberg. Rather, it was a direct question about Mr. Fonseca invoking his right to counsel, attempting to show that Mr. Fonseca had a consciousness of guilt because he did not want to speak with the Detective outside of the presence of his counsel. This is the kind of questioning that the Courts have held violate a defendant's right to counsel. *Dettloff*, at 6 n.24; *Bruno*, at 1195; *Macon*, at 614.

F. MR. FONSECA WAS HARMED BY THE CITY'S MISCONDUCT.

The City next argues that even if they did violate Mr. Fonseca's right to counsel, it was harmless error. They argue that the Judge did not consider evidence of Mr. Fonseca's invocation to his right to counsel as evidence of his guilt. Rsp. Brief, at 10-13. Rather, they argue that the Judge only considered Mr. Fonseca's invocation of his right to counsel as evidence of Mr. Fonseca's credibility. *Id.* This argument is without merit.

First, the City's citation and statement of the law as to the "harmless error" standard is not correct. The City states that the standard for "harmless error" is a finding of "clearly erroneous" which is when a reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been made. *Id.*, at 11. This is an incorrect statement of the law on “harmless error.”

The “harmless error” standard was correctly stated in Mr. Fonseca’s Opening Brief. Op. Brief, at 10. An error of constitutional dimension is not harmless if “there is a reasonable possibility that it might have contributed to the conviction.” *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The State must “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman*, 386 U.S. at 24, and see *Dettloff*, at 6 n.24; *Macon*, at 616-17.

Next, the City argues that in looking to the totality of the record, Judge Hoeffgen only considered Mr. Fonseca’s pre-invocation statements to Detective Forsberg as evidence of Mr. Fonseca’s credibility. Rsp. Brief, at 12. As argued in Mr. Fonseca’s Opening Brief, the record clearly shows that the Judge considered Mr. Fonseca’s actions in invoking his right to counsel as evidence of his consciousness of guilt. See Op. Brief, at 10-11. In reviewing the evidence he considered in determining that Mr. Fonseca was guilty, the Judge stated in pertinent part,

“When the detective stated that the moment that he started to ask him about whether he had, uh, attacked or hit Mr. Patino with any weapon at that moment. Uh. He stated that Mr. Fonseca stated, ‘I’m not going to answer any more questions without – you know without speaking to my lawyer first.’”

J.A., at 101-102. Far from this being a reference about Mr. Fonseca’s credibility, these types of statements actually reveal that the Judge was considering Mr. Fonseca’s invocation of his right to counsel as evidence of his guilt. *Dettloff*, at 6 n.24; *Bruno*, at 1195; *Macon*, at 614.

III. CITY DID VIOLATE MR. FONSECA’S RIGHT TO REMAIN SILENT.

The City next argues that they did not violate Mr. Fonseca's right to remain silent because, 1) Mr. Fonseca did not affirmatively assert his right to remain silent; 2) the City did not use Mr. Fonseca's invocation as evidence of his guilt; and 3) any error was harmless. These arguments are without merit for the following reasons.

A. MR. FONSECA AFFIRMATIVELY INVOKED HIS RIGHT TO COUNSEL.

The City first argues that Mr. Fonseca did not affirmatively invoke his right to remain silent because he never specifically stated he was invoking his Fifth Amendment right to counsel. This argument is without merit.

More than half a century ago, the United States Supreme Court explained that "no ritualistic formula is necessary in order to invoke the privilege to remain silent." *Quinn v. United States*, 349 U.S. 155, 164, 75 S.Ct. 668, 99 L.Ed. 964 (1955); *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 2186 (2013). Thus, a prosecutor may not comment on a defendant's failure to testify at trial—even if neither the defendant nor anyone else ever mentions a Fifth Amendment right not to do so. Circumstances, not a defendant's statement, tie the defendant's silence to the right. Similarly, a prosecutor may not comment on the fact that a defendant in custody, after receiving Miranda warnings, "stood mute"—regardless of whether he "claimed his privilege" in so many words. *Miranda*, supra, at 468, n. 37, 86 S.Ct. 1602. Again, it is not any explicit statement but, instead, the defendant's deeds (silence) and circumstances (receipt of the warnings) that tie together silence and constitutional right. Most lower courts have so construed the law, even where the defendant, having received Miranda warnings, answers some questions while remaining silent as to others. See, e.g., *Hurd v. Terhune*, 619 F.3d 1080, 1087 (C.A.9 2010); *United States v. May*, 52 F.3d 885, 890 (C.A.10 1995); *United States v. Scott*, 47 F.3d 904, 907 (C.A.7 1995); *United States v. Canterbury*, 985 F.2d

483, 486 (C.A.10 1993); *Grieco v. Hall*, 641 F.2d 1029, 1034 (C.A.1 1981); *United States v. Ghiz*, 491 F.2d 599, 600 (C.A.4 1974).

In the case at bar, the City argues that Mr. Fonseca did not affirmatively assert his right because he failed to state that he was invoking his right to remain silent guaranteed by the Fifth Amendment. Rsp. Brief, at 19-20. The United States Supreme Court has clearly held that one does not have to specifically mention the right to remain silent nor the Fifth Amendment to invoke his right to remain silent.” *Quinn*, 349 U.S. at 164; *Salinas*, 133 S.Ct. at 2186. In the case at bar, Mr. Fonseca clearly invoked his right to remain silent when he told Detective Forsberg that he did not want to speak with the Detective outside the presence of his attorney and not to call him any further. J.A. at 63, 80. The Federal Courts have held under these circumstances, a person affirmatively invokes his right to remain silent. *Miranda*, at 468, n. 37, 86 S.Ct. 1602; *Hurd*, 619 F.3d at 1087; *May*, 52 F.3d at 890; *Scott*, 47 F.3d at 907; *Canterbury*, 985 F.2d at 486; *Grieco*, 641 F.2d at 1034; *Ghiz*, 491 F.2d at 600.

B. THE CITY DID USE MR. FONSECA’S INVOCATION OF HIS RIGHT AS EVIDENCE OF HIS GUILT.

The City next argues that it only used evidence of Mr. Fonseca’s invocation of his right to remain silent for impeachment purposes. The record belies this argument. Mr. Fonseca reasserts his argument in his Opening Brief, and as argued above, that the City elicited evidence, and improperly used in its case in chief, Mr. Fonseca’s invocation of his right to remain silent as evidence of his guilt. Op. Brief, at 11-13.

C. THE CITY’S MISCONDUCT WAS NOT HARMLESS ERROR.

Finally, the City argues that any error of conduct by the City was harmless error because Mr. Fonseca took the stand and because the Judge did not consider Mr. Fonseca’s invocation of his right to remain silent as evidence of his guilt. Mr.

Fonseca reasserts his arguments in his Opening Brief and as argued above that the Judge did consider Mr. Fonseca's invocation of his right to remain silent as evidence of his guilt. Op Brief. at 14-15.

CONCLUSION

For the foregoing reasons, this Court should **GRANT** Mr. Fonseca's appeal, and issue an order **REVERSING** the North Las Vegas Municipal Court's Order finding Mr. Fonseca guilty of one count of misdemeanor battery and **REMAND** the case back to the lower Court with instructions to provide Mr. Fonseca with a new trial.

Dated this 16th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of (a)(4), the typeface requirements of (a)(5) and the type style requirements of (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft 365 Word in 14 point “Times New Roman.”

2. I further certify that this brief complies with the page- or type-volume limitations of (a)(7) because, excluding the parts of the brief exempted by (a)(7)(C), it does not exceed 30pages.

3. Finally, 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 (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 16th day of August, 2021.

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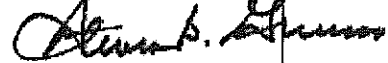
CERTIFICATE OF SERVICE

I hereby certify that I did serve a true and correct copy of the
Appellant/Defendant's Reply Brief on the Appellees/Plaintiffs via electronic mail
to:

Micaela R. Moore, Esq.
City of North Las Vegas
City Attorney

Dated this 16th day of August, 2021.

Joseph P. Reiff, Esq.



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 NERY GUSTAVO FONSECA,
8 Appellant,

9 vs.

10 NORTH LAS VEGAS CITY OF,
11 Respondent.
12

CASE NO.: C-21-356402-A
DEPT. XIX

13 BEFORE THE HONORABLE CRYSTAL ELLER, DISTRICT COURT JUDGE
14 THURSDAY, AUGUST 26, 2021

15 **RECORDER'S ROUGH DRAFT TRANSCRIPT OF HEARING:**
16 **APPEAL FROM LOWER COURT**

17
18 APPEARANCES:

19 For the Appellant: JOSEPH P. REIFF, ESQ.,

20
21
22 For the Respondent: AMANDA R. MATEER, ESQ.,
23 (via BlueJeans)

24
25 RECORDED BY: BRITTANY AMOROSO, COURT RECORDER

1 Las Vegas, Nevada; Thursday, August 26, 2021

2

3 [Proceeding commenced at 9:17 a.m.]

4 THE COURT CLERK: C356402 Nery Gustavo Fonseca
5 versus North Las Vegas City.

6 THE COURT: Good morning. Appearances, please.

7 MS. MATEER: Good morning, Your Honor. Amanda Mateer
8 on behalf of the City of North Las Vegas.

9 THE COURT: How do you spell your last name?

10 MS. MATEER: It's M-A-T-E-E-R.

11 THE COURT: Like it sounds. Thank you.

12 MS. MATEER: Thank you, Your Honor.

13 THE COURT: All right, and who's here for Appellant?

14 THE COURT CLERK: I'm sorry, Your Honor. I -- the
15 attorney's in another courtroom, the paralegal's here.

16 THE COURT: Oh, okay. So, we're going to wait.

17 THE COURT CLERK: Yep.

18 [Matter trailed at 9:18 a.m.]

19 [Matter recalled at 9:26 a.m.]

20 THE COURT CLERK: Page 8, case C356402 Nery Gustavo
21 Fonseca versus North -- City of Las Vegas.

22 THE COURT: All right. So, I -- go on, appearances, please.

23 MR. REIFF: Good morning, Judge Eller, Joseph Reiff on
24 behalf of Nery Fonseca, the Appellant. He's present with me; we're in
25 the courtroom, Your Honor.

1 THE COURT: Okay, I see you. Thank you.

2 MS. MATEER: Morning, Your Honor. Amanda Mateer on
3 behalf of the City of North Las Vegas appearing virtually today.

4 THE COURT: Okay. All right, so I should have waited a
5 minute before I called your case. Bear with me. I have got this other
6 computer here that I have to get pulled up. So because I'm at home, I
7 don't have all the briefs and I like to have them in front of me before I
8 hear argument, although I have read them. So, just bear with me for a
9 minute here, my computer is like not -- I might have to shut it off. Yeah,
10 it's just disagreeing.

11 All right, sorry for the delay.

12 [Pause in proceedings]

13 THE COURT: All right, thank you everyone, again, for your
14 patience. Mr. Reiff?

15 MR. REIFF: Yes, Your Honor.

16 THE COURT: Okay, this is your client's appeal. Would you
17 like to go ahead and make your argument?

18 MR. REIFF: Can I -- okay. Yes, Your Honor, thank you.

19 Judge, if I refer to my client's Fifth Amendment right to remain
20 silent and not incriminate himself or his Sixth Amendment right to
21 counsel, I understand it's the -- by virtue of the Fourteenth Amendment
22 applies to the States.

23 Judge, when you look down, we cited quite a bit of case law in
24 support of our argument. And -- so set that aside and look down, these
25 trials, these cases, they don't happen in a vacuum. I know the Court

1 knows that. But look down, you can figure out why the City went out of
2 their way to interject into this case, in fact, it was the crux of their case,
3 that my client engaged in constitutionally protected conduct. Why would
4 they do that, Judge? It's improper, It's unlawful.

5 But the reason why they did it, Judge, the testimony, even in
6 the -- and we have it in our brief -- in the closing argument is one of the -
7 - another one of their series of infractions of those two rights about how
8 my client had the opportunity to tell the police officer that day, that night,
9 or the next day, hey, I got beat up by these two big guys, these big
10 goons. Those -- that's what the City Attorney argued.

11 He's telling you, they looked down and they knew -- who my
12 client testified that he's, I think, 5'5 or 5'6 -- that the confrontation
13 occurred, two big goons. They were in court against the little guy. So,
14 who's going to win, I mean, in terms of trial? It's their word against my
15 client's about a battery.

16 So, the City says, well, what we'll do is instead of looking
17 down at that statement, which is the focal point of this appeal, where my
18 client contacted by the detective, the detective asks him some
19 questions, he answers a couple of them and says, I don't want to talk
20 anymore. I want an attorney. He invokes both rights, expressly.

21 So, the City, going into the trial in preparation, they don't say
22 let's keep our hands off of that, let's not touch that. They go out of their
23 way in the trial to use that against my client. And they do it in their
24 opposition, time and time again.

25 I objected, Judge, more than once. And I specifically said the

1 second time to Judge Hoeffgen that when they are bringing up this issue
2 that my client -- it's not that he invoked his right. That's not how they
3 treated it. They kept arguing, opening argument, direct examination of
4 the detective, cross-examination of my client, and in closing,
5 notwithstanding my objection to where I specifically said they're doing it
6 for an improper purpose. They're engaged in violating his
7 constitutionally protected rights. They should not even be doing that.

8 When I talked to -- when we addressed this in the -- in our
9 brief, Judge, we talk about how his invocation was express, crystal clear.
10 We talk about how the City, time and again, said on cross-examination
11 of my client, on direct testimony -- direct examination of the detective,
12 did he ever tell you that -- did he ever call you back? Did he hang up the
13 phone on you?

14 These are all the questions he's asking the detective. What
15 happened after he said that? He hung up the phone, right? He never
16 told you about those guys over there. He never said they hit him over
17 the head.

18 And in the closing argument, the City's position is, you know,
19 he had every chance in the world to -- tell his side of the story, but he
20 didn't. They're going out of their way to violate his rights.

21 In the City's opposition, Judge, I can point, if the Court wants
22 me to, to at least three passages in their opposition where they say
23 Appellant's Opening Brief points to testimony that was elicited whereby
24 the Appellant is saying that his client -- the Appellant is saying that his
25 right to counsel was abrogated. That he didn't receive the benefit of

1 acknowledgement that this person has a right to an attorney, leave that
2 alone.

3 When they responded to that in their opposition, what did they
4 do? If you want me to read it, I'll read it. They keep on pointing to --
5 there's -- the direct examination of Detective Forsberg, they say there's
6 no implication of his right to counsel.

7 But what do they do? In each one of those passages, they
8 ignore what they set out to do from the onset in the end. And each one
9 of those passages, the point -- it's a long-winded point that I'm making is
10 it talks about how my client never, after he invoked his right to remain
11 silent, how he never took advantage of the fact that he could have just
12 said, this happened, and that happened, and I was the victim, and they
13 beat me up, and he hung up. You didn't hang up on him, he hung up on
14 you.

15 That's how they respond -- to our -- they're -- in their argument
16 against -- in their contention that they never violated my client's right to
17 counsel. They cite passages where they're violating his right to remain
18 silent. And why do they do it? Because when they set out, as I said in
19 the beginning, Judge, in this case, they looked down, instead of saying
20 let's not touch that, that's constitutionally protected conduct, we're going
21 to use it. And they continued to use it at trial, at all the stages, and in
22 their opposition.

23 They don't seem to care. It's as if they don't want to
24 acknowledge that a person has a right to remain silent. It's the most
25 fundamental bedrock principle that most people comprehend more --

1 above and beyond everything else, when they see this on TV or they
2 hear it, or they read it, and the City doesn't seem to think that is
3 something that they need to be concerned about, at no stage, at the trial
4 stage, and now in their opposition.

5 And there's passage after passage, and I -- quite frankly, Your
6 Honor, we cited the cases. We differentiated our cases from, you know,
7 anything that was possibly irreconcilable. We differentiated that. For
8 example, *Dettloff versus Nevada*, where the Nevada Supreme Court
9 talked about how a person -- I'm reading the passage. The Nevada
10 Supreme Court, we recognize Dettloff's right to hire counsel at any time
11 and that the State may not refer in its case in chief to retention of
12 counsel as in and of itself evidence of consciousness of guilt.

13 That concept is -- it's lost on the City of North Las Vegas. It
14 was then, hopefully it's no -- it no longer is, Judge. And you know, we --
15 we showed how *Dettloff*, the facts in that case were entirely different. It
16 involved an accident where a person had a duty after leaving the scene
17 and finding out what was the nature of the accident to communicate, to
18 report. You can remain silent, but you're going to be found guilty if you
19 don't report the fact that you were in an accident involving injury or
20 property damage.

21 Moreover, the defendants in that case, they offered the
22 testimony of their client that their client sought an attorney and that's
23 why he never reported it. It was the defense that brought up that issue.

24 We're -- my client had no duty to talk to anybody. He had a
25 right to remain silent. He hung up the phone, that was the end of the

1 story, until the City picked up and said, we're going to make this -- we're
2 going to use this against him.

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 MS. MATEER: Thank you, Judge. May I proceed at this
6 time?

7 THE COURT: Yes, Ms. Mateer.

8 MS. MATEER: Thank you, Your Honor.

9 First, Judge, what I really want to emphasize is that the City of
10 North Las Vegas holds that the Fifth and Sixth Amendment rights of an
11 individual who is being charged with a crime or is, prior to actually
12 entering the courtroom, a suspect in a crime, they hold -- we hold those
13 rights extremely dear, Judge. There's no question here that the City of
14 North Las Vegas believes both the Fifth Amendment right to remain
15 silent, and a Sixth Amendment right to counsel, are extremely critical
16 and fundamental rights that matter to defendants in the court process.

17 And I want to make that extremely clear because I feel that
18 Mr. Reiff has questioned, not just my integrity, but the integrity of Mr.
19 Goswami and Mr. Smedley, the two deputies who tried this case. And I
20 want to make that as clear as possible before I begin, Judge.

21 If I could start, Judge, with the Sixth Amendment claims --

22 THE COURT: Mm-hmm.

23 MS. MATEER: -- that involve the invocation of counsel, Mr.
24 Reiff talks a lot about that the City used the fact that Mr. Fonseca told
25 Detective Forsberg that he wanted to end the conversation because he

1 wanted to talk to a lawyer. Mr. Reiff's argument essentially today,
2 Judge, is that the City argued that Mr. Fonseca was guilty because he
3 said he wanted a lawyer. And that fundamentally, Judge, when you look
4 at the trial transcript, is absolutely what did not happen.

5 And if we start with the prosecution's case in chief, which is
6 the first segment of argument that Mr. Reiff refers to today in the
7 Appellant's brief, that goes directly to Detective Forsberg's testimony at
8 the time of trial. Detective Forsberg was the investigating officer of an
9 alleged battery that occurred in North Las Vegas. Mr. Forsberg talked to
10 several people, one being the alleged victim in the case, another being a
11 witness in the case, he took photographs, and then as part of his
12 investigation, he reached out to Mr. Fonseca telephonically.

13 At this point in time, it's very, very clear, Judge, Mr. Fonseca is
14 not in custody. He is not subject to Miranda warnings. He is not in any
15 kind of interrogative situation. He's not even a suspect at this point in
16 time, Judge.

17 Detective Forsberg is simply gathering evidence to conduct an
18 investigation to determine whether or not a crime occurred. When he
19 does that, he actually engages in a rather long conversation with Mr.
20 Fonseca before the word lawyer is ever stated. That conversation
21 included several important facts that the City references.

22 Number one, Mr. Fonseca indicates he was in fact at the
23 scene; he indicates, I was there, I know those two individuals. He
24 indicates to Detective Forsberg, I was upset, there was a dispute about
25 money, and I was unhappy. And he indicates that he was part of the --

1 incident that allegedly happened that day.

2 It's at the point in time when Detective Forsberg starts to ask
3 questions about an alleged battery, at that point in time, Mr. Fonseca
4 says, I will -- don't want to proceed forward with any questions. I would
5 like a lawyer. And he hangs up the phone call.

6 Now, Detective Forsberg is very clear. He did not pursue Mr.
7 Fonseca after that invocation of counsel, he didn't ask him any
8 additional questions, he didn't follow up with him further. The call simply
9 ended at that.

10 And then Detective Forsberg very clearly stated on his direct
11 examination that he found probable cause that a crime had occurred for
12 several reasons, one, being that there was a victim. There was
13 noticeable injury. There was a corroborating witness. And finally, that
14 he didn't hear any sort of information from Mr. Fonseca that none of this
15 was true.

16 And he didn't say, I didn't believe Mr. Fonseca, or I found
17 probable cause because Mr. Fonseca told me, I want to speak with a
18 lawyer, and only guilty people would tell me that. Detective Forsberg is
19 crystal clear, and that is not what he says at all. He says very clearly, I
20 found probable cause because I did an investigation, and as part of that
21 investigation, Mr. Fonseca admitted several key important information
22 details to me. And then the conversation ended. That was the end of
23 that.

24 So, Judge, I would say that there's absolutely no Sixth
25 Amendment violation on the City's -- case in chief when they provided

1 that information and they had Detective Forsberg talk about the details
2 of his investigation.

3 Now, where we cross over is we leave the City's case in chief,
4 and we go to when defense presented their case. And at that point in
5 time, Mr. Fonseca elected to waive his Fifth Amendment right to remain
6 silent and decided to testify, which is absolutely his right. Again, there is
7 no question throughout this trial that he had the right to either remain
8 silent at the time of trial, or go ahead and testify on his own behalf,
9 which he decided to do in this case.

10 Now, during that testimony, he is a witness, just like anybody
11 else. He is subject to cross-examination, and at that point in time, he
12 was cross-examined because he got up on the stand and for no less
13 than several minutes testified that he was the victim in this alleged
14 incident. He said, I was battered. It was me. They hurt me.

15 And when he says that, Judge, his credibility becomes an
16 issue. He's waived his Fifth Amendment right, and at this point in time,
17 the City has every right to question him about his credibility to the
18 statement that he is a victim. And that is exactly what the City did.

19 The City asked him several questions, did you tell officers at
20 any point in time that you were battered when you spoke with them?
21 Did you tell officers at any point down the line that you were battered?
22 Or is today the very first day that we are hearing that you are the victim
23 of a battery? And that goes entirely to his credibility as a witness in the
24 case and by trying to flip the case on its head saying that he is the
25 victim, not the perpetrator.

1 So, Judge, once he became a witness, those questions are
2 completely appropriate because they go to credibility. And Judge
3 Hoeffgen as the trier of fact, this being a bench trial, has a right to
4 determine the credibility of witnesses based on their testimony in a case.

5 Now, Mr. Reiff also mentions the City's closing statement.
6 And in the closing statement, the City reiterates, Judge, look at the
7 credibility of everybody who testified today. We have a victim who
8 testified, we have a witness who testified, we have a detective who
9 testified about his investigation, and then we have the alleged
10 Defendant, the Defendant in this case, who testified as well. And the
11 City emphasized, look at the credibility of the statements that came out
12 today.

13 Again, I think Mr. Reiff wants this Court to believe that the City
14 got up there and said, Mr. Fonseca is guilty of battery because number
15 one, he didn't tell detectives some extra information after he decided he
16 wanted a lawyer. At no point in time does the City believe, oh, Mr.
17 Fonseca was guilty because he wanted a lawyer or because he ended
18 the conversation. That is not at all what happened.

19 And Judge Hoeffgen is crystal clear in his ruling that he bases
20 his ruling off a totality of circumstances that have nothing to do with Mr.
21 Fonseca having a lawyer, which I think we all believe is 100 percent
22 fundamentally his right, and ending a conversation with police because
23 he decides it's in his best interest to talk to a lawyer at that point in time.
24 Absolutely, again, 100 percent fundamentally his right. I don't think
25 that's in dispute here.

1 What Judge Hoeffgen said was I have to take credibility of
2 witnesses into account and look at all the evidence as it's presented to
3 me as a trier of fact. And he didn't find that Mr. Fonseca had the same
4 credibility as a victim as the actual victim who took the stand in this case
5 and who had evidence of injury, a corroborating witness, and who told
6 police and documented those injuries for police. He simply didn't
7 believe that Mr. Fonseca's testimony that day that he was a victim made
8 sense.

9 So, when it comes to the Sixth Amendment, Judge, I think it's
10 very clear that while Detective Forsberg conducted his investigation, Mr.
11 Fonseca was not in interrogative custody, he was not Mirandized, this
12 was not a court proceeding where he certainly has a right to counsel,
13 this was simply an investigation like detectives do every single day on
14 battery, domestic battery, those types of cases. And there is no Sixth
15 Amendment violation.

16 If I could briefly touch on the Fifth Amendment as well, Judge,
17 because Mr. Reiff did mention the Fifth Amendment and invocation of
18 silence as well. If I could talk about that prior to the actual trial setting, at
19 the time of the investigation, I want it to be crystal clear that Mr. Fonseca
20 told detectives, I don't want to talk anymore without a lawyer and don't
21 contact me again, and he hung up the phone.

22 According to *Salinas versus Texas*, which I think is completely
23 the ruling authority here, there's nothing in Nevada's Legislature that's
24 changed that since that 2013 Supreme Court ruling, it's very clear that
25 Mr. Fonseca has to expressly invoke his Fifth Amendment right to

1 silence in order for it to take effect. But the City would contend that
2 again, Judge, he's not in any kind of actual custodial interrogation. This
3 is simply an investigation at this point in time. He hung up the call and
4 then Detective Forsberg left it alone. He didn't ask him any follow-up
5 questions after he said, I don't want to talk anymore. There was no
6 violation that occurred after that moment.

7 And Detective Forsberg is crystal clear, he didn't say he didn't
8 want to talk to me, that means he's guilty. He said, let me compile all
9 the information I gathered from my investigation and make an
10 assessment on if there was a crime that was committed, and if there
11 was, who was the perpetrator of that crime? And he outlines that
12 extremely clear, which is why the City has that entire section of
13 Detective Forsberg's testimony in their opposing brief. Because when
14 you look at it in its context, it shows exactly what happened at trial.

15 And then, Judge, I would contend the Fifth Amendment
16 argument fails at its inception for that reason because it was never
17 expressly invoked. But if we go down the path that it was at that time,
18 there was no violation that occurred as a result of it. And then when we
19 go to the actual trial setting and talk about the Fifth Amendment, Mr.
20 Fonseca waived his Fifth Amendment to remain silent at the time of trial.
21 He elected to testify, he got up on the stand, testified I didn't batter
22 anybody, I was the victim. And Judge Hoeffgen, at that time, has every
23 right to hear that testimony and to listen to the cross-examination of that
24 testimony, which he did.

25 And again, he made his ruling very clear. It wasn't that Mr.

1 Fonseca invoked a Fifth Amendment right or a Sixth Amendment right.
2 It was that Mr. Fonseca had an opportunity when he spoke with
3 Detective Forsberg, which he did at length, to tell him he was a victim,
4 and he never did so. And because today he's telling me he's the victim,
5 those two things don't add up. There's not credibility to that. Why
6 wouldn't he have told police that?

7 So, it goes to the credibility of Mr. Fonseca's testimony at the
8 time of trial. And Judge Hoeffgen is crystal clear in his ruling. It's about
9 a victim, a witness, Detective Forsberg's investigation, and it's not about
10 the fact that he wanted to talk to a lawyer or that he stopped talking to
11 detectives after already -- engaging in at least somewhat of a
12 conversation. It's not about that, Judge.

13 So, Mr. Reiff wants it to be about that and not about what
14 evidence was actually presented at trial. And what the trial transcript
15 actually says, which I think is abundantly clear that there was no
16 fundamental Fifth or Sixth Amendment right and the City, while it's
17 believed -- apparently that we don't believe in those two constitutional
18 amendments, we hold them very dear, Judge. And the reason that they
19 were meant -- those conversations were mentioned at trial was not to
20 say that Mr. Fonseca was guilty for those reasons but went entirely to
21 his credibility as a witness at the time of trial.

22 And I'll submit it at that, Judge.

23 THE COURT: Okay, I have a question for you. On the Fifth
24 Amendment, generally, as we all learned in law school, it's essentially
25 that no negative inference can be drawn from the fact that you choose to

1 remain silent, correct?

2 MR. REIFF: I agree with that, Your Honor.

3 MS. MATEER: Correct. Correct, Judge.

4 THE COURT: Thanks.

5 MR. REIFF: Oh, I would agree.

6 THE COURT: So, how is the fact that he chose to remain
7 silent, aka not speak to the police officer even though he was a victim --
8 that's his allegation is that he's the victim. And of course, it makes
9 sense. Well, if you're the victim, if you're the guy who got beat up, why
10 didn't you talk to the police? Okay. And it lends to credibility.

11 So, what I'm saying is how is the State's use of his --
12 assuming it is -- invocation of the Fifth Amendment to stay silent and no
13 longer speak to the officer and thus not tell him that he was the victim,
14 how is using that to discredit him and reduce his credibility, how is that
15 not a negative inference?

16 MS. MATEER: And Judge, I think it's actually -- it kind of goes
17 to when you look at the conversation that he had with Detective
18 Forsberg in its full context. So, Mr. Fonseca actually before saying
19 anything about not wanting to continue to talk to Detective Forsberg and
20 that he wanted a lawyer, he actually never invokes the Fifth Amendment
21 right at any point to remain silent. He simply says, I want a lawyer and
22 hangs up the phone call. He doesn't want to be contacted again.

23 So, Judge, I think that argument ends sort of on its face
24 because the invocation of the Fifth Amendment never happened at the
25 scene. And I think *Salinas* is very, very clear that that Fifth Amendment

1 has to be asserted by the individual at the time, and it has to be a clear
2 invocation of that Fifth Amendment right, which didn't happen here.

3 Mr. Fonseca never said --

4 THE COURT: Okay.

5 MS. MATEER: -- the words, I don't want to talk to you, I'm
6 invoking my Fifth Amendment right to remain silent. And the *Salinas*
7 Court looks at whether or not the individual in that capacity is in any way
8 deprived of the ability to voluntarily invoke their Fifth Amendment, and
9 Mr. Fonseca wasn't. He wasn't even in custody or Mirandized.

10 So because of that, Judge, he's just answering some
11 questions for the detective and then decides he doesn't want to anymore
12 and hangs up the call. There's no invocation of the Fifth Amendment at
13 that particular time, so I believe the argument sort of stops there for that
14 reason, Judge.

15 THE COURT: Okay, so and we all agree that the Fifth
16 Amendment right exists whether you're in custody or not. It's just that
17 you have to be Mirandized if you're in custody, correct?

18 MS. MATEER: Well, I think, Judge, what it is is if you're in
19 custody and you say to an officer, I don't want to answer any questions
20 anymore without a lawyer and it stops there, this was a situation where
21 he wasn't even a suspect yet, the detective was just sort of information
22 gathering. And certainly, he could have said, I invoke my Fifth
23 Amendment right to remain silent even in this stage of the process and I
24 want to talk to a lawyer, but he didn't do that, Judge. And so, that's why
25 the City would contend that the Fifth Amendment isn't in play in that

1 particular conversation.

2 And when the City references it at trial, it's after Mr. Fonseca
3 elects to testify, and they go into, well, you did give the detective some
4 information at the scene, and some of that information you gave never
5 included that you were the victim, right? So, that's clarifying for the
6 Court we've never heard he was a victim until today.

7 THE COURT: Okay, understood. But what I'm --

8 MS. MATEER: Thank you.

9 THE COURT: -- trying to say is the State is in agreement that
10 the Fifth Amendment right to remain silent exists at all times, not just
11 when you're in custody, right?

12 MS. MATEER: That's correct, Judge. Yes.

13 THE COURT: Okay, okay. All right, so --

14 MR. REIFF: Your Honor --

15 THE COURT: Go ahead, it's your turn.

16 MR. REIFF: Well, thank you, Judge.

17 THE COURT: Let's see, Mr. Reiff.

18 MR. REIFF: The City in their argument right now, Ms. --
19 Amanda, how do you pronounce your last name? I'm sorry.

20 MS. MATEER: It's Mateer.

21 MR. REIFF: Mateer.

22 MS. MATEER: Yes.

23 MR. REIFF: Ms. Mateer starts by saying that Mr. Reiff is --
24 attacking the integrity of the two City attorneys that were at the trial and
25 as well as her. This has nothing to do with personal integrity

1 [indiscernible], zero.

2 This has to -- I don't care who the three people are, the one
3 person is, that are involved, Judge. They could be the citizens of the
4 year, role model people, have all great qualities, which I happen to know
5 these three people and the -- they don't have all great qualities, but they
6 have a lot of great qualities. It's got nothing to do with it, Judge.

7 When you walk in a courtroom, we all have the same
8 standards that we have to follow. It's not about integrity. It's about
9 following the Constitution and following the law.

10 And Ms. Mateer's argument is totally upside down. With
11 regard -- they're trying to justify how they attacked my client's right to
12 remain silent. They're saying, all we did -- he got up on the stand, he
13 waived his right at that point. He didn't waive anything. He -- yes, he --
14 he's subject to cross-examination. And anytime a witness gets on the
15 stand, credibility is an issue. I agree with that.

16 What they are saying -- what Ms. Mateer just said is, look, he
17 hung up the phone. He had a chance to say, A, B, and C happened to
18 me. I got a lump on my head or I got a scratch on my neck. Because
19 when he took the stand, he took the stand and he said those guys beat
20 me up, it was the other way around. They say, okay, we're going -- he
21 said that.

22 Mr. Fonseca got up on the stand and he said, those two guys
23 beat me up. So, we're going to attack that statement. And how are we -
24 - on the grounds of credibility. Do you understand what they're saying?
25 It's totally open to attack.

1 If he would have told Detective Forsberg I really wasn't
2 injured, they never hit me, I really didn't get scuffed up, I wasn't the
3 victim, now you have a credibility issue. Now you can go back and say,
4 wait a minute, today you're on the stand saying you got beat up? That's
5 not credible. Why? Because you told Detective Forsberg you didn't get
6 beat up. He didn't -- he never said any of those things.

7 But that would have been a proper line of attacking his
8 credibility to say, if my client, which he did not -- my client said I didn't do
9 those things. He was credible. His statements on the stand were not
10 inconsistent with what he told detective. If they wanted to try to attack
11 his credibility based upon what he's saying today versus what he said to
12 Detective Forsberg, fine, do that. But don't come -- don't in court and on
13 this appeal try to tell a Judge or anybody else that's looking down at this
14 that when you don't tell somebody something and you engage in your
15 right to remain silent, that's -- now we can attack that. That's -- that
16 discredits what you're saying today.

17 Because if that was the law, then nobody could ever get up on
18 the stand once they invoke their right to remain silent. Because if you
19 said, look, I have a right to remain silent, you just told me that, whether -
20 - before or after Miranda. I am not going to say anything, just like my
21 client said. And I'll read it to you, Judge, what he said.

22 One moment, Your Honor.

23 [Colloquy between counsel]

24 MR. REIFF: And let's talk -- and I'm going to talk, Judge,
25 about what the -- Ms. Mateer is talking about how everything's so crystal

1 clear. I'll tell you what's crystal clear, their violations. I'll start reading
2 what -- this is the transcript, Judge.

3 Mr. Goswami, at trial, and then before making any
4 determination, he tried to speak with the Defendant who admitted he
5 was present, who admitted -- and this is the City. This is the City's
6 opposition -- who admitted there was a dispute, who admitted he was
7 angry. And at that point, if you were the victim, you were in the parking
8 lot beat up by these two big, huge guys and barely got away, and now
9 you're on the phone with the police, that's when you say, I'm the victim, I
10 was beat up.

11 There's an -- right away, they're saying, he should have
12 talked, he should not have remained silent. These guys -- and this is a
13 continuation of what the City attorney is saying at trial. These guys --
14 he's saying that my client should have told him, these guys baited me
15 over the -- they baited me over here and attacked me. Please help, I'll
16 come back.

17 Their logic is, hey, you better talk. You better throw that Fifth
18 Amendment right to remain silent out the window. Now is your time,
19 buddy. Because if you don't, we're going to use it against you.

20 And they go on to say -- this is the City attorney, please --
21 saying you should have told the police. You put -- come back, I'll come
22 back, I'll help you. I'll tell you everything -- he didn't say any of that.
23 Quote: you can talk to my lawyer, click.

24 The next day he didn't call the police, the next day he didn't
25 tell the police. All the way up until right now he didn't call the police.

1 They're faulting him for not talking. They're using it against him. And as
2 far as Detective Forsberg is concerned, how crystal clear he was, well
3 let's -- yeah, it is crystal clear. This is -- this is the transcript.

4 Mr. Goswami asked the detective, and why did you determine
5 Mr. Fonseca to be the batterer? Detective Forsberg: the injury present
6 on the victim was consistent with his story and the witness's story. And
7 obviously -- here's your crystal clear -- and obviously I didn't get any
8 rebuttal from Mr. Fonseca or any explanation.

9 They talked to Detective Forsberg ahead of time. The knew
10 he was going to say that. It's their duty to say, stay away from that.
11 Leave that alone. That's in -- you know, that's in the transcript.

12 Here's another example of how they go out of their way,
13 Judge. In the -- this is in the City's opposition. They're trying to defeat
14 our argument regarding my client's right to have an attorney. And so,
15 what do they use? They use the transcript of the direct examination of
16 the detective, again.

17 And they say -- this is the detective -- this is Detective
18 Forsberg speaking. He told me he went to meet with the victim. He's
19 referring to my client, Mr. Fonseca. Detective Forsberg is saying, Mr.
20 Fonseca went to meet with the victim to exchange some money that was
21 owed to him. And the money that he was offered was not the amount he
22 was expecting. He became upset. An argument ensued. And then he
23 said he didn't want to talk to me without a lawyer and not to contact him
24 again.

25 How more -- how much more clear is that than an invocation

1 of his rights? The City attorney --

2 THE COURT: Okay, let me stop you there because that's my
3 question. My question is, the City's argument is that he did not invoke
4 the Fifth Amendment. Arguably, he invoked the Sixth Amendment
5 because he literally mentioned the word lawyer. But the City's argument
6 is that, you know, and under *Salinas*, the Fifth Amendment must be
7 invoked. So, that's what I need you to focus on.

8 If he said that -- what you just quoted, how does that support
9 his invocation of the Fifth Amendment?

10 MR. REIFF: Well, I'm going to get his statement for you. This
11 is not a quotation of what my client is saying, Judge. This is --

12 THE COURT: Okay.

13 MR. REIFF: -- the City attorney talking -- direct examining --
14 okay. I placed in my brief, Judge -- and this is -- I'm looking at my
15 opening brief. Mr. Fonseca affirmatively asserted his Fifth Amendment
16 right to the privilege against self-incrimination. First, during his phone
17 conversation with Detective Forsberg, Mr. Forsberg [sic] told the
18 detective that he did not want to speak with the detective any further
19 without a lawyer, and quote: not to contact me again.

20 And they're right. The City's right. He didn't call him back.
21 Detective Forsberg recognized it that he invoked those rights. Secondly,
22 Mr. Forsberg [sic] invoked his right to remain silent the moment the
23 detective asked the question whether or not he had struck the
24 complainant with the weapon. That's when he responded, I don't want
25 to speak anymore. How much more clearer is it than that? I want an

1 attorney.

2 This is not us trying to dance around whether he invoked his
3 rights or not. He invoked his rights. English is his second language. I
4 don't know what the standard has to be. You know, you have to be a
5 lawyer to invoke your rights, I'm not sure.

6 THE COURT: Okay. I appreciate your argument. Is there
7 anything else you want to add? I am going to take this under
8 advisement, but I'll get an answer --

9 MS. MATEER: If I may, just very briefly, address --

10 THE COURT: Okay.

11 MS. MATEER: -- that. I think it's as clear as it is in *Salinas*,
12 Judge. And *Salinas* outlines it perfectly. The invocation of the Fifth
13 Amendment has to be clear unless there's a reason that the Defendant
14 cannot voluntarily invoke it. If there's some sort of prohibitive factor, and
15 in this case, there wasn't, Judge. It was crystal clear. He could have
16 said the words, and he didn't say them. So, I just wanted to address
17 that.

18 The other thing I wanted to address that Mr. Reiff was just
19 arguing, Judge, because I think it's important is about after Mr. Fonseca
20 elected to testify. The Supreme Court held in *Jenkins* that the
21 prosecutor in this -- in that particular case attempted to impeach the
22 petitioner's credibility by suggesting that the petitioner would have
23 spoken out if he'd killed in self-defense. Obviously, the facts in that case
24 were a lot more egregious. The petitioner contends that the
25 prosecutor's actions violated the Fifth Amendment, exactly what Mr.

1 Reiff is saying here.

2 In that case, of course, the petitioner did not remain silent
3 throughout the criminal proceedings. Instead, he voluntarily took the
4 witness stand in his own defense. And the Court's decision in *Raffle*
5 *versus United States*, which is still good law, recognized that the Fifth
6 Amendment is not violated when a Defendant who testifies in his own
7 defense is impeached with his prior silence. The Court held that inquiry
8 into prior silence was proper because the immunity from giving
9 testimony is one in which the Defendant may waive by offering himself
10 as a witness, like Mr. Fonseca did in this case, and when he takes the
11 stand on his own behalf, he does so as any other witness and within the
12 limits of the appropriate rules, he may be cross-examined.

13 So, at this point in time, case law is clear that there is no
14 violation of the Fifth Amendment when the City asks questions that go to
15 the credibility of the election to remain silent at the time if that's going to
16 impeach his testimony that day that he was the victim, Judge. And so,
17 for those reasons, I would submit no Fifth Amendment violation at the
18 time of trial, and that the Fifth Amendment was never invoked prior to
19 trial at the time of the investigation.

20 THE COURT: All right. Mr. Reiff, it's your appeal, so I'm
21 going to let you have the last word. Is there anything you wanted to
22 add?

23 MR. REIFF: Yes, very importantly. The record from below
24 reflects that my client was in court with an interpreter. What country are
25 you from?

1 THE DEFENDANT: Honduras.

2 MR. REIFF: He's Honduran. He doesn't speak fluent English.
3 He's barely communicable in English. The totality of the circumstances,
4 what did he tell the police officer? I think he did a very good job of
5 invoking his rights based upon his limited handle on the English
6 language, which he couldn't rely on it at trial. We -- as I've already
7 indicated, there was an interpreter present.

8 And once again, you attack credibility of a witness on the
9 stand by inconsistent statements, not by saying, well, you should have
10 not invoked your right to remain silent. You should have squawked and
11 got yourself off the hook when you had a chance to, and you didn't.

12 Thank you, Your Honor.

13 THE COURT: Thank you. All right, thank you both. Good
14 work on the briefs, good arguments. Like I mentioned, I'm going to take
15 it under advisement, but I'm going to get you an answer as soon as
16 possible.

17 MR. REIFF: Thank you, Judge.

18 THE COURT: All right, thank you, everyone.

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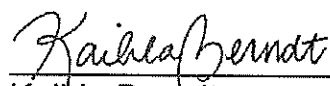
MS. MATEER: Thank you, Your Honor. Thank you, Your Honor. Have a great day.

THE COURT: You, too.

[Hearing concluded at 10:10 a.m.]

* * * * *

ATTEST: Pursuant to Rule 3C (d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.



Kaihla Berndt
Court Recorder/Transcriber

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Criminal Appeal**COURT MINUTES****September 28, 2021**

C-21-356402-A Nery Gustavo Fonseca, Appellant(s)
 vs
 North Las Vegas City Of, Respondent(s)

September 28, 2021 3:00 AM Minute Order

HEARD BY: Eller, Crystal**COURTROOM:** Chambers**COURT CLERK:** Valeria Guerra

JOURNAL ENTRIES

The Court DENIES Appellant s Appeal of the Judgment of the North Las Vegas Municipal Court, AFFIRMS the lower court s ruling, and REMANDS this matter. The Court notes that this matter is no longer before it, pursuant to the reassignments of Administrative Order (AO) 21-06. However, because this matter was heard on this Court s docket prior to the reassignment, the Court finds issuance of this Minute Order to be proper.

An appellate court, as this Court functions for the Justice and Municipal courts, reviews questions of law de novo. *S.O.C. v. Mirage Casino-Hotel*, 117 Nev. 403, 407 (2001) (citing *SIIS v. United Exposition Servs. Co.*, 109 Nev. 28, 30 (1993)); see also NRS 177.015; *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659 (2005) (district courts have final appellate jurisdiction in cases arising in Justice Courts and such other inferior tribunals as may be established by law). Conversely, factual determinations are entitled to deference and will be reviewed for clear error. *Rosky v. State*, 121 Nev. 184, 190 (2005).

In considering an appeal, deference will be given to a lower court s factual findings so long as they are supported by substantial evidence, which has been defined as evidence that a reasonable mind might accept as adequate to support a conclusion. *First Interstate Bank v. Jafbros Auto Body*, 106 Nev. 54, 56 (1990). Moreover, the Nevada Supreme Court has stated that when the sufficiency of evidence is challenged on a criminal appeal, [t]he relevant inquiry for this Court is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of a fact could have found essential elements of the crime beyond a reasonable doubt. *Koza v. State*, 100 Nev. 245, 250 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979)). Finally, where an error, defect, irregularity or variance does not affect substantial rights [it] shall be disregarded. NRS 178.598.

PRINT DATE: 09/28/2021

Page 1 of 4

Minutes Date: September 28, 2021

As a preliminary matter, the Court finds that Appellant misapplies *Dettloff v. State*, 120 Nev. 588 (2004). Although correctly and fully cited, Appellant argues that *Dettloff* prevents any reference, in Respondent's case-in-chief, to a defendant's retention of counsel as evidence of consciousness of guilt. However, Appellant misses a key qualifying clause: in and of itself. The full quote is: We recognize *Dettloff's* right to hire counsel at any time and that the State may not refer in its case-in-chief to retention of counsel as, in and of itself, as evidence of consciousness of guilt. *Id.* at 599 (emphasis added). In other words, Respondent cannot use retention of counsel, in its case-in-chief, as the sole evidence of consciousness of guilt. This alone undermines Appellant's appeal, as he consistently ignores all other reasons for the detective to establish Probable Cause and the lower court rendering a ruling of guilty, focusing only on instances where retention of counsel are mentioned or referenced. *Dettloff* does not prevent retention of counsel from being a factor in finding guilty; it just cannot be evidence in and of itself, or the sole piece of evidence.

Second, the Court finds that Appellant misrepresents the characterizations of Respondent and the lower Court's use and reference to Appellant's retention of counsel. Appellant cites four specific incidents where Respondent allegedly violates Appellant's constitutional rights: in its opening statements, direct examination, cross-examination, and closing arguments. Initially, the Court notes and agrees with Appellant's rebuttal that NRS 178.602 provides a court with authority, on appeal, to review plain errors and defects of substantial rights, even if not preserved by objection.

1. Opening Statements Joint Appendix (J.A.) pg. 2-3

Appellant argues that the passage, beginning at the bottom of page 2 down to the first third of page 3, illustrates Respondent's attempt to question about Appellant's invocation of his right to retain counsel. And that somehow, by simply questioning such invocation, Respondent is attempting to prove a consciousness of guilt. However, a full review of the referenced passage, including a couple of contextual paragraphs prior and after, show that Respondent was explaining the available evidence of the case (as a proper opening statement). To do so necessitates a review of the potential witnesses and what they might testify to. Further, it is noteworthy, that Appellant is still relying on *Dettloff* here, but that case only applied to improper references made during Respondent's case-in-chief; not its opening statements.

2. Respondent's Direct Examination of the detective J.A. pgs. 63-64

Appellant makes the same arguments here. However, the lower court did not go so far as to consider Appellant's pre-arrest silence as evidence of guilt by rather toward his credibility, not because he chose not to incriminate himself, but because his silence prevented him from assisting the police with their investigation by not revealing that Appellant was in fact the victim. Reading the surrounding statements, show that the detective is being questioned about his initial interview of Appellant, the two alleged aggressors, and what information was obtained. The detective was asked if there were other witnesses to the subject incident, were they interviewed, and was Appellant contacted/interviewed. There was really only one way that the detective could answer: yes, he

contacted Appellant, but did not get any information because he said he didn't want to talk to me without a lawyer... Respondent's purpose in the questioning was further illustrated by the specific follow-up questions: did Appellant state that he was battered, attacked, or injured? The goal was one of credibility. Appellant alleges he was a victim, but never made any indication of such to the responding officer. This is the only section of Appellant's four challenges that might have triggered Dettloff. However, the record is clear that Appellant's invocation of his right to retain counsel was nowhere on the radar; relegated to merely a single, tangential blurb of a multi-paragraph excerpt.

3. Respondent's Cross during Appellant's case-in-chief J.A. pgs. 80-83

Appellant objected to Respondent's questioning, and the lower court made an evidentiary ruling. Reviewing courts review a [] court's decision to admit or exclude evidence for abuse of discretion, and ... will not interfere with the [] court's exercise of its discretion absent a showing of palpable abuse. *M.C. Multi Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913 (2008). Here, the lower court made clearly explained findings to support its decision to overrule Appellant's objection. The lower court found that no constitutional privilege attached to references of Appellant's retention of counsel because Appellant provided prior testimony on the matter. Further, Respondent was entitled to illicit testimony on whether or not [Appellant] provided information to the officer about the incident, alleged incidents, or about anything that happened that evening. J.A. 81. Nothing in that explanation triggers a showing of palpable abuse. Thus, this Court cannot touch the lower court's allowance of Respondent's line of questioning.

4. Respondent's Closing Arguments J.A. pgs. 92-93

Although this is outside the purview of Dettloff, because it is in the closings and not Respondent's case-in-chief, this is perhaps Appellant's strongest example of a potential constitutional violation. Here, Respondent directly references and cites to Appellant's invocation of his right to retain counsel: You can talk to my lawyer. J.A. 93. However, while this may be the strongest example, it still fails. As stated, it is outside Respondent's case-in-chief. More importantly, the context of this statement is a summary of the totality of the evidence against Appellant and his claims of being the victim. Dettloff requires Appellant's invocation to be in and of itself evidence of consciousness of guilt. Here, Respondent is arguing that Appellant is guilty because of (1) inconsistencies and contradictions between other witnesses and Appellant; (2) the internal inconsistencies between all of the other witnesses, who were separated when giving their statements; (3) the injuries on the alleged aggressors; (3) Appellant's refusal to speak with the detective; and (4) Appellant's failure to make an indication that he was a victim in the subject altercation at the scene or anytime thereafter. Thus, even if, Respondent was using Appellant's invocation as evidence of a consciousness of guilt, it was clearly not the only evidence of guilt. Consequently, Dettloff is not and could not be triggered.

The Court finds that the third issue, regarding Appellant's 5th Amendment right to remain silent, can be summarily disposed of. It is fundamental criminal law that Miranda rights do not attach unless and until a defendant is in-custody/arrested and questioned on the subject matter of the crimes charged. Because Appellant's conversation with the detective was on the phone, while Appellant was

free to discontinue the questioning (which he ultimately did), there was no custodial interrogation to trigger his 5th Amendment rights. Further, any 5th Amendment privilege retained at trial was waived when Appellant took the stand to testify in his own defense. See *Raffel v. United States*, 271 U.S. 494, 496-97 (1926) (The immunity from giving testimony is one which the defendant may waive by offering himself as a witness ... [h]e may be examined for the purpose of impeaching his credibility). Thus, Appellant s 5th Amendment arguments, both federal and state, must fail.

Finally, the Court finds that because it was established that there was no violation of Appellant s 5th or 6th Amendment rights, through Dettloff or otherwise, there can be no error by the lower court in its consideration of the evidence to make it ruling. Therefore, the Court need not address Appellant s arguments in that regard.

The Court directs Respondent to prepare the Order; correcting for any scrivener error, and adding appropriate context and authorities. Further, Respondent shall submit the Order, pursuant to AO 21-04, to DC12Inbox@clarkcountycourts.us within fourteen (14) calendar days, allowing a minimum of twenty-four (24) hours for opposing counsel to review.

CLERK'S NOTE: This minute order was electronically served by Courtroom Clerk, Valeria Guerra, to all registered parties for Odyssey File & Serve and/or served via facsimile. vg/09/28/2021

1 **ORDR**
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11 Attorneys for Respondent,
12 City of North Las Vegas

8 **EIGHTH JUDICIAL DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 **NERY FONSECA,**

11
12 Appellant,

13 -vs-

14 **CITY OF NORTH LAS VEGAS,**

15
16 Respondent(s).

Case No.: C-21-356402-A

Hearing Date: 08/26/21

Dept. No.: 12

17 **ORDER DENYING APPEAL**

18 THIS MATTER, having come before the Honorable Court on the 26th day of August,
19 2021, upon Appellant's (Defendant in the underlying Matter) Appeal and Appellant Brief,
20 and upon Respondent's (Plaintiff in the underlying Matter) Response via Respondent's
21 Answering Brief, the Matter having been set for argument and appearance before this
22 Honorable Court on said date and time, the Court having reviewed all of the submissions by
23 the Parties, the Appellant's and Respondent's Briefings, any oral argument which was
24 adduced at the time of the hearing in this Matter, in consideration of all applicable Law and
25 Statute, and the Court having taken the Matter under advisement, rules as follows:
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ANALYSIS

1. APPELLANT MISAPPLIES THE HOLDING IN DETTLOFF v. STATE.

As a preliminary matter, the Court finds that Appellant misapplies *Dettloff v. State*, 120 Nev. 588 (2004). Although correctly and fully cited, Appellant argues that *Dettloff, supra.*, prevents any reference, in Respondent's case-in-chief, to a defendant's retention of counsel as evidence of consciousness of guilt. However, Appellant misses a key qualifying clause: in and of itself. The full quote is: "We recognize Dettloff's right to hire counsel at any time and that the State may not refer in its case-in-chief to retention of counsel as, *in and of itself*, as evidence of consciousness of guilt." *Id.*, at 599 (emphasis added). In other words, Respondent cannot use retention of counsel, in its case-in-chief, as the sole evidence of consciousness of guilt. This alone undermines Appellant's appeal, as he consistently ignores all other reasons for the detective to establish Probable Cause and the lower court rendering a ruling of guilty, focusing only on instances where retention of counsel are mentioned or referenced. *Dettloff* does not prevent retention of counsel from being a factor in finding guilt; it just cannot be evidence in and of itself, or the sole piece of evidence.

2. THE APPELLANT MISREPRESENTS THE RESPONDENT'S AND COURT'S USE OF APPELLANT'S RETENTION OF COUNSEL.

The Court finds that Appellant misrepresents the characterizations of Respondent and the lower Court's use and reference to Appellant's retention of counsel. Appellant cites four specific incidents where Respondent allegedly violates Appellant's Constitutional rights: in its opening statements, direct examination, cross-examination, and closing arguments. App. Br., at 6-10. Initially, the Court notes and agrees with Appellant's rebuttal that NRS 178.602

1 provides a court with authority, on appeal, to review plain errors and defects of substantial
2 rights, even if not preserved by objection. Id.

3 **a. The Respondent's Use at the Opening Statement.**

4 Appellant argues that the passage, beginning at the bottom of page 2 down to the first
5 third of page 3, illustrates Respondent's attempt to question about Appellant's invocation of
6 his right to retain counsel. And that somehow, by simply questioning such invocation,
7 Respondent is attempting to prove a consciousness of guilt. J.A., at 2-3. However, a full
8 review of the referenced passage, including a couple of contextual paragraphs prior and after,
9 show that Respondent was explaining the available evidence of the case (as a proper opening
10 statement). Id. To do so necessitates a review of the potential witnesses and what they
11 might testify to. Further, it is noteworthy, that Appellant is still relying on *Dettloff* here, but
12 that case only applied to improper references made during Respondent's case-in-chief, not its
13 opening statements.
14

15 **b. Respondent's Direct Examination of the Detective.**

16 Appellant makes the same arguments regarding the direct examination of the Detective.
17 J.A., at 63-64. However, the lower court did not go so far as to consider Appellant's pre-
18 arrest silence as evidence of guilt but, rather toward his credibility, not because he chose not
19 to incriminate himself, but because his silence prevented him from assisting the police with
20 their investigation by not revealing that Appellant was in fact the victim. Reading the
21 surrounding statements, show that the Detective is being questioned about his initial
22 interview of Appellant, the two alleged aggressors, and what information was obtained. The
23 detective was asked if there were other witnesses to the subject incident, were they
24 interviewed, and was Appellant contacted/interviewed. Id. There was really only one way
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1 that the detective could answer: yes, he contacted Appellant, but did not get any information
2 because he said he didn't want to talk to me without a lawyer... Id. Respondent's purpose in
3 the questioning was further illustrated by the specific follow-up questions: did Appellant
4 state that he was battered, attacked, or injured? The goal was one of credibility. Appellant
5 alleges he was a victim, but never made any indication of such to the responding officer.
6 This is the only section of Appellant's four challenges that might have triggered *Dettloff*.
7 However, the record is clear that Appellant's invocation of his right to retain counsel was
8 nowhere on the radar; relegated to merely a single, tangential blurb of a multi-paragraph
9 excerpt. Id.

12 **c. Respondent's Cross During Appellant's Case-in-Chief.**

13 The next incident that the Appellant cites is the Respondent's cross of the Appellant's
14 case-in-chief. J.A., at 80-83. Appellant objected to Respondent's questioning, and the lower
15 court made an evidentiary ruling. "Reviewing courts review a [] court's decision to admit or
16 exclude evidence for abuse of discretion, and ... will not interfere with the [] court's exercise
17 of its discretion absent a showing of palpable abuse." *M.C. Multi Family Dev. v. Crestdale*
18 *Assocs.*, 124 Nev. 901, 913 (2008). Here, the lower court clearly explained findings to
19 support its decision to overrule Appellant's objection. The lower court found that no
20 constitutional privilege attached to references of Appellant's retention of counsel because
21 Appellant provided prior testimony on the matter. Further, Respondent was entitled to illicit
22 testimony on whether or not [Appellant] provided information to the officer about the
23 incident, alleged incidents, or about anything that happened that evening. J.A., at 81.
24 Nothing in that explanation triggers a showing of palpable abuse. Thus, this Court cannot
25 touch the lower court's allowance of Respondent's line of questioning.

1 **d. Respondent's Closing Arguments.**

2 Finally, the Appellant cites the Respondent's use of Appellant's retention of counsel at
3 closing arguments. J.A., at 92-93. Although this is outside the purview of *Dettloff*, because
4 it is in the closings and not Respondent's case-in-chief, this is perhaps Appellant's strongest
5 example of a potential constitutional violation. Here, Respondent directly references and
6 cites to Appellant's invocation of his right to retain counsel: "You can talk to my lawyer."
7 J.A., at 93. However, while this may be the strongest example, it still fails. As stated, it is
8 outside Respondent's case-in-chief. More importantly, the context of this statement is a
9 summary of the totality of the evidence against Appellant and his claims of being the victim.
10 *Dettloff* requires Appellant's invocation to be, "in and of itself," evidence of consciousness
11 of guilt. *Dettloff*, 120 Nev. at 599. Here, Respondent is arguing that Appellant is guilty
12 because of, (1) inconsistencies and contradictions between other witnesses and Appellant;
13 (2) the internal consistencies between all of the other witnesses, who were separated when
14 giving their statements; (3) the injuries on the alleged aggressors; (3) Appellant's refusal to
15 speak with the detective; and (4) Appellant's failure to make an indication that he was a
16 victim in the subject altercation at the scene or anytime thereafter. Thus, even if,
17 Respondent was using Appellant's invocation as evidence of a consciousness of guilt, it was
18 clearly not the only evidence of guilt. Consequently, *Dettloff* is not and could not be
19 triggered. *Id.*

20
21 **3. THE APPELLANT'S MIRANDA RIGHTS DO NOT ATTACH PRE-ARREST.**

22 The Court finds that the third issue, regarding Appellant's 5th Amendment right to
23 remain silent, can be summarily disposed of. It is fundamental criminal law that Miranda
24 rights do not attach unless and until a defendant is in-custody/arrested and questioned on the
25
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27
28

1 subject matter of the crimes charged. Because Appellant's conversation with the Detective
2 was on the phone, while Appellant was free to discontinue the questioning (which he
3 ultimately did), there was no custodial interrogation to trigger his 5th Amendment rights.
4 Further, any 5th Amendment privilege retained at trial was waived when Appellant took the
5 stand to testify in his own defense. See *Raffel v. United States*, 271 U.S. 494, 496-97 (1926)
6 ("The immunity from giving testimony is one which the defendant may waive by offering
7 himself as a witness ... [h]e may be examined for the purpose of impeaching his
8 credibility"). Thus, Appellant's 5th Amendment arguments, both federal and state, must fail.
9

10
11 Finally, the Court finds that because it was established that there was no violation of
12 Appellant's 5th or 6th Amendment rights, through *Dettloff* or otherwise, there can be no
13 error by the lower court in its consideration of the evidence to make its ruling. Therefore,
14 the Court need not address Appellant's arguments in that regard.
15

16 CONCLUSION

17 The Court DENIES Appellant's Appeal of the Judgment of the North Las Vegas
18 Municipal Court, AFFIRMS the lower court's ruling, and REMANDS this matter. The Court
19 notes that this matter is no longer before Dept. 19, pursuant to the reassignments of
20 Administrative Order (AO) 21-06. However, because this matter was heard on this Court's
21 docket prior to the reassignment, the Court finds issuance of this Order to be proper.
22

23 **THEREFORE**, the Court having found good cause,
24

25 THE COURT ORDERS, ADJUDGES AND DECREES THAT Appellant's appeal is
26 DENIED, Appellant's conviction is AFFIRMED, and the matter REMANDED back to the
27 lower court.
28

1 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES THAT that
2 Appellant misapplies *Dettloff v. State*, 120 Nev. 588 (2004), missing a key qualifying clause:
3 “in and of itself.” The Court finds that Appellant misrepresents the characterizations of
4 Respondent and the lower Court’s use and reference to Appellant’s retention of counsel.
5

6 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES THAT
7 Appellant’s 5th Amendment arguments, both federal and state, must fail as a matter of law.

8 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that there was no
9 violation of Appellant’s 6th Amendment rights, through *Dettloff* or otherwise, as a matter of
10 law.
11

12 SO ORDERED this ____ day of _____, 2021 by:
13
14

15 _____
16 DISTRICT COURT JUDGE

17 JOINTLY SUBMITTED AND AGREED TO BY:
18

19 _____
20 AMANDA R. MATEER, ESQ.
21 BAR NUMBER 14238
22 Attorney for Respondent

23 _____
24 JOSEPH P. REIFF, ESQ.
25 BAR NUMBER 6469
26 Attorney for Appellant
27
28

1 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES THAT that
2 Appellant misapplies *Dettloff v. State*, 120 Nev. 588 (2004), missing a key qualifying clause:
3 "in and of itself." The Court finds that Appellant misrepresents the characterizations of
4 Respondent and the lower Court's use and reference to Appellant's retention of counsel.


5 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES THAT
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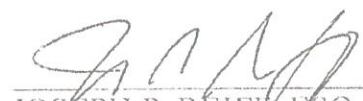
7 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that there was no
8 violation of Appellant's 6th Amendment rights, through *Dettloff* or otherwise, as a matter of
9 law.
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11

12 SO ORDERED this _____ day of _____, 2021 by:

13
14
15 DISTRICT COURT JUDGE

16
17 JOINTLY SUBMITTED AND AGREED TO BY:

18 
19 AMANDA R. MATEER, ESQ.
20 BAR NUMBER 14238
21 Attorney for Respondent

22
23 
24 JOSEPH P. REIFF, ESQ.
25 BAR NUMBER 6469
26 Attorney for Appellant
27
28

Alana S. Shuman
CLERK OF THE COURT

1 **ORDR**
2 MICHAELA C. RUSTIA MOORE
3 NORTH LAS VEGAS CITY ATTORNEY
4 Nevada Bar #9676
5 AMANDA R. MATHER
6 Deputy City Attorney
7 Nevada Bar #14238
8 2332 North Las Vegas Blvd.
9 Las Vegas, Nevada 89030
10 (702) 633-2100
11 Attorneys for Respondent.
12 City of North Las Vegas

8 **EIGHTH JUDICIAL DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 **NERVY FONSECA,**

11
12 Appellant.

13 -vs-

14 **CITY OF NORTH LAS VEGAS,**

15
16 Respondent(s).

Case No.: C-21-356402-A

Hearing Date: 08/26/21

Dept. No.: 12

17 **ORDER DENYING APPEAL**

18 THIS MATTER, having come before the Honorable Court on the 26th day of August,
19 2021, upon Appellant's (Defendant in the underlying Matter) Appeal and Appellant Brief,
20 and upon Respondent's (Plaintiff in the underlying Matter) Response via Respondent's
21 Answering Brief, the Matter having been set for argument and appearance before this
22 Honorable Court on said date and time, the Court having reviewed all of the submissions by
23 the Parties, the Appellant's and Respondent's Briefings, any oral argument which was
24 adduced at the time of the hearing in this Matter, in consideration of all applicable Law and
25 Statute, and the Court having taken the Matter under advisement, rules as follows:
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27
28

1
2 **DECISION**

3 **STANDARD OF REVIEW**

4
5 An appellate court, as this Court functions for the Justice and Municipal courts, reviews
6 questions of law de novo. *S.O.C. v. Mirage Casino-Hotel*, 117 Nev. 403, 407 (2001) (citing
7 *SIIS v. United Exposition Servs. Co.*, 109 Nev. 28, 30 (1993)); see also NRS 177.015;
8 *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659 (2005) (district courts have
9 final appellate jurisdiction in cases arising in Justice Courts and such other inferior tribunals
10 as may be established by law). Conversely, factual determinations are entitled to deference
11 and will be reviewed for clear error. *Rosky v. State*, 121 Nev. 184, 190 (2005).
12

13 In considering an appeal, deference will be given to a lower court's factual findings so
14 long as they are supported by substantial evidence, which has been defined as evidence that a
15 reasonable mind might accept as adequate to support a conclusion. *First Interstate Bank v.*
16 *Jafbro's Auto Body*, 106 Nev. 54, 56 (1990). Moreover, the Nevada Supreme Court has
17 stated that when the sufficiency of evidence is challenged on a criminal appeal, [t]he relevant
18 inquiry for this Court is whether after reviewing the evidence in the light most favorable to
19 the prosecution, any rational trier of a fact could have found essential elements of the crime
20 beyond a reasonable doubt. *Koza v. State*, 100 Nev. 245, 250 (1984) (quoting, *Jackson v.*
21 *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979)). Finally, where an error, defect,
22 irregularity, or variance does not affect substantial rights [it] shall be disregarded. NRS
23 178.598.
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///

1 provides a court with authority, on appeal, to review plain errors and defects of substantial
2 rights, even if not preserved by objection. *Id.*

3 a. The Respondent's Use at the Opening Statement.

4 Appellant argues that the passage, beginning at the bottom of page 2 down to the first
5 third of page 3, illustrates Respondent's attempt to question about Appellant's invocation of
6 his right to retain counsel. And that somehow, by simply questioning such invocation,
7 Respondent is attempting to prove a consciousness of guilt. *J.A.*, at 2-3. However, a full
8 review of the referenced passage, including a couple of contextual paragraphs prior and after,
9 show that Respondent was explaining the available evidence of the case (as a proper opening
10 statement). *Id.* To do so necessitates a review of the potential witnesses and what they
11 might testify to. Further, it is noteworthy, that Appellant is still relying on *Dettloff* here, but
12 that case only applied to improper references made during Respondent's case-in-chief, not its
13 opening statements.
14

15 b. Respondent's Direct Examination of the Detective.

16 Appellant makes the same arguments regarding the direct examination of the Detective.
17 *J.A.*, at 63-64. However, the lower court did not go so far as to consider Appellant's pre-
18 arrest silence as evidence of guilt but, rather toward his credibility, not because he chose not
19 to incriminate himself, but because his silence prevented him from assisting the police with
20 their investigation by not revealing that Appellant was in fact the victim. Reading the
21 surrounding statements, show that the Detective is being questioned about his initial
22 interview of Appellant, the two alleged aggressors, and what information was obtained. The
23 detective was asked if there were other witnesses to the subject incident, were they
24 interviewed, and was Appellant contacted/interviewed. *Id.* There was really only one way

1 that the detective could answer: yes, he contacted Appellant, but did not get any information
2 because he said he didn't want to talk to me without a lawyer... Id. Respondent's purpose in
3 the questioning was further illustrated by the specific follow-up questions: did Appellant
4 state that he was battered, attacked, or injured? The goal was one of credibility. Appellant
5 alleges he was a victim, but never made any indication of such to the responding officer.
6 This is the only section of Appellant's four challenges that might have triggered *Dettloff*.
7 However, the record is clear that Appellant's invocation of his right to retain counsel was
8 nowhere on the radar; relegated to merely a single, tangential blurb of a multi-paragraph
9 excerpt. Id.

12 **c. Respondent's Cross During Appellant's Case-in-Chief.**

13 The next incident that the Appellant cites is the Respondent's cross of the Appellant's
14 case-in-chief. J.A., at 80-83. Appellant objected to Respondent's questioning, and the lower
15 court made an evidentiary ruling. "Reviewing courts review a [] court's decision to admit or
16 exclude evidence for abuse of discretion, and ... will not interfere with the [] court's exercise
17 of its discretion absent a showing of palpable abuse." *M.C. Multi Family Dev. v. Crestdale*
18 *Assocs.*, 124 Nev. 901, 913 (2008). Here, the lower court clearly explained findings to
19 support its decision to overrule Appellant's objection. The lower court found that no
20 constitutional privilege attached to references of Appellant's retention of counsel because
21 Appellant provided prior testimony on the matter. Further, Respondent was entitled to illicit
22 testimony on whether or not [Appellant] provided information to the officer about the
23 incident, alleged incidents, or about anything that happened that evening. J.A., at 81.
24 Nothing in that explanation triggers a showing of palpable abuse. Thus, this Court cannot
25 touch the lower court's allowance of Respondent's line of questioning.

1 d. Respondent's Closing Arguments.

2 Finally, the Appellant cites the Respondent's use of Appellant's retention of counsel at
3 closing arguments. J.A., at 92-93. Although this is outside the purview of *Dettloff*, because
4 it is in the closings and not Respondent's case-in-chief, this is perhaps Appellant's strongest
5 example of a potential constitutional violation. Here, Respondent directly references and
6 cites to Appellant's invocation of his right to retain counsel: "You can talk to my lawyer."
7 J.A., at 93. However, while this may be the strongest example, it still fails. As stated, it is
8 outside Respondent's case-in-chief. More importantly, the context of this statement is a
9 summary of the totality of the evidence against Appellant and his claims of being the victim.
10 *Dettloff* requires Appellant's invocation to be, "in and of itself," evidence of consciousness
11 of guilt. *Dettloff*, 120 Nev. at 599. Here, Respondent is arguing that Appellant is guilty
12 because of: (1) inconsistencies and contradictions between other witnesses and Appellant;
13 (2) the internal consistencies between all of the other witnesses, who were separated when
14 giving their statements; (3) the injuries on the alleged aggressors; (3) Appellant's refusal to
15 speak with the detective; and (4) Appellant's failure to make an indication that he was a
16 victim in the subject altercation at the scene or anytime thereafter. Thus, even if,
17 Respondent was using Appellant's invocation as evidence of a consciousness of guilt, it was
18 clearly not the only evidence of guilt. Consequently, *Dettloff* is not and could not be
19 triggered. *Id.*

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21 3. THE APPELLANT'S MIRANDA RIGHTS DO NOT ATTACH PRE-ARREST.

22 The Court finds that the third issue, regarding Appellant's 5th Amendment right to
23 remain silent, can be summarily disposed of. It is fundamental criminal law that Miranda
24 rights do not attach unless and until a defendant is in-custody/arrested and questioned on the
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1 subject matter of the crimes charged. Because Appellant's conversation with the Detective
2 was on the phone, while Appellant was free to discontinue the questioning (which he
3 ultimately did), there was no custodial interrogation to trigger his 5th Amendment rights.
4 Further, any 5th Amendment privilege retained at trial was waived when Appellant took the
5 stand to testify in his own defense. See *Raffel v. United States*, 271 U.S. 494, 496-97 (1926)
6 ("The immunity from giving testimony is one which the defendant may waive by offering
7 himself as a witness ... [h]e may be examined for the purpose of impeaching his
8 credibility"). Thus, Appellant's 5th Amendment arguments, both federal and state, must fail.
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11 Finally, the Court finds that because it was established that there was no violation of
12 Appellant's 5th or 6th Amendment rights, through *Detloff* or otherwise, there can be no
13 error by the lower court in its consideration of the evidence to make its ruling. Therefore,
14 the Court need not address Appellant's arguments in that regard.
15

16 CONCLUSION

17 The Court DENIES Appellant's Appeal of the Judgment of the North Las Vegas
18 Municipal Court, AFFIRMS the lower court's ruling, and REMANDS this matter. The Court
19 notes that this matter is no longer before Dept. 19, pursuant to the reassignments of
20 Administrative Order (AO) 21-06. However, because this matter was heard on this Court's
21 docket prior to the reassignment, the Court finds issuance of this Order to be proper.
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23
24 **THEREFORE**, the Court having found good cause,

25 **THE COURT ORDERS, ADJUDGES AND DECREES** THAT Appellant's appeal is
26 **DENIED**, Appellant's conviction is **AFFIRMED**, and the matter **REMANDED** back to the
27 lower court.
28

1 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES THAT that
2 Appellant misapplies *Dettloff v. State*, 120 Nev. 588 (2004), missing a key qualifying clause:
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4 Respondent and the lower Court's use and reference to Appellant's retention of counsel.
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7 Appellant's 5th Amendment arguments, both federal and state, must fail as a matter of law.
8

9 THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that there was no
10 violation of Appellant's 6th Amendment rights, through *Dettloff* or otherwise, as a matter of
11 law.

12 SO ORDERED this _____ day of _____, 2021 by:

Dated this 6th day of October, 2021



DISTRICT COURT JUDGE

9FA 862 C920 36E0
Crystal Eller
District Court Judge

17 JOINTLY SUBMITTED AND AGREED TO BY:

18 

19 AMANDA R. MATEER, ESQ.
20 BAR NUMBER 14238
Attorney for Respondent

21
22
23 

24 JOSEPH P. REIFF, ESQ.
25 BAR NUMBER 6469
Attorney for Appellant
26
27
28

1 CSERV
2

3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Nery Gustavo Fonseca,
7 Appellant(s)

CASE NO: C-21-356402-A

8 vs

DEPT. NO. Department 12

9 North Las Vegas City Of,
10 Respondent(s)

11
12 **AUTOMATED CERTIFICATE OF SERVICE**

13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 10/6/2021

16 Amanda Mateer

mateera@cityofnorthlasvegas.com

CERTIFICATE OF SERVICE

I hereby certify that I did serve a true and correct copy of the Petitioner's
Appendix to the Petition for Writ of Mandamus on the Respondent and Real
Parties In Interest via electronic mail to:


Micaela R. Moore, Esq.
City of North Las Vegas
City Attorney

moorem@cityofnorthlasvegas.com
CACriminal@cityofnorthlasvegas.com

Crystal J. Eller
District Court Judge
Eight Judicial District Court
dept19lc@clarkcountycourts.us

and

Dated this 29 day of November 2021.



Joseph P. Reiff, Esq.