

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CHRIS ROBERT MARTINEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. 83754

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Elizabeth A. Brown
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Appeal from the Fourth Judicial District Court
County of Elko, State of Nevada
The Honorable Alvin R. Kacin, District Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i-iii
STATEMENT OF JURISDICTION.....	1
ROUTING STATEMENT.....	1
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2-6
STATEMENT OF THE FACTS.....	6-12
SUMMARY OF ARGUMENT.....	12
ARGUMENT.....	12-20
1) The Evidence was Insufficient to Convict Mr. Martinez	13-16
2) The District Court Errored By Denying the Defenses' Request to Have the Jury Instructed that Law Enforcement Was Grossly Negligent when It Failed to Gather Evidence.....	16-19
3) The District Court Errored When It Treated Officer Sanchez as a Victim During Sentencing Despite the Jury Acquitting the Defendant of the Charge Related to That Witness.	19-20
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE.....	21-22
CERTIFICATE OF SERVICE.....	23

TABLE OF AUTHORITIES

Cases:

<i>Barnier v. State</i> , 119 Nev. 129, 67 P.3d 320(Nev. 2003).....	18
<i>Bearden v. Boulder City</i> , 89 Nev. 106, 507 P.2d 1034, 1035(Nev. 1979)...	17
<i>Brooks v. State</i> , 124 Nev. 203, 180 P.3d 657(Nev. 2008).....	13
<i>Daniels v. State</i> , 114 Nev. 261, 956 P.2d 111(Nev. 1998).....	16-17
<i>Hernandez v. State</i> , 118 Nev. 513, 50 P.3d 1100(Nev. 2002).....	12
<i>Jackson v. State</i> , 128 Nev. 598, 291 P.3d 1274(Nev. 2012).....	13
<i>Keys v. State</i> , 104 Nev. 736, 766 P.2d 270(Nev. 1988).....	13
<i>Mendoza v. State</i> , 122 Nev. 267, 130 P.3d 176(Nev. 2006).....	13-14
<i>Randolph v. State</i> , 117 Nev. 970, 36 P.3d 424(Nev. 2001).....	16
<i>Silks v. State</i> , 92 Nev. 91, 545 P.2d 1159(Nev. 1976).....	19
<i>Somee v. State</i> , 124 Nev. 434, 187 P.3d 152(Nev. 2008).....	12
<i>State v. Milosovich</i> , 42 Nev. 263,175 P. 139(Nev. 1918).....	13
<i>Wright v. State</i> , 94 Nev. 415, 581 P.2d 442(Nev. 1978).....	13

Rules:

NRAP 4(b)(1)(A).....	1
NRAP 17(b)(2)(A).....	1

1	NRAP 28(e)(1).....	22
2		
3	NRAP 32(a)(4).....	21
4		
5	NRAP 32(a)(5).....	21
6		
7	NRAP 32(a)(6).....	21
8		
9	NRAP 32(a)(7).....	21
10	<u>Statutes:</u>	
11		
12	Nev. Rev. Stat. § § 177.015.....	1
13		
14	Nev. Rev. Stat. § § 193.330.....	13
15		
16	Nev. Rev. Stat. § § 200.010.....	13
17		
18	Nev. Rev. Stat. § § 200.020.....	13
19		
20	Nev. Rev. Stat. § § 200.030.....	13
21		
22	Nev. Rev. Stat. § § 200.310.....	13
23		
24	Nev. Rev. Stat. § § 200.330.....	14
25		
26	Nev. Rev. Stat. § § 177.015.....	14

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STATEMENT OF THE CASE

The pertinent facts for this case occurred on or about November 17, 2016.

App. 111-117. The State filed the criminal complaint against Mr. Martinez on November 18, 2016, charging him with the following: Count 1: Attempted Murder with the Use of a Deadly Weapon, a Category B Felony; Count 2: Attempted Murder with the Use of a Deadly Weapon, a Category B Felony; Count 3: Possession of an Explosive or Incendiary Device in or Near Certain Public or Private Areas, a Category D Felony. *App. 1-8.*

On January 26, 2017, the State filed an amended criminal complaint, including: Count 1: Attempted Murder with the Use of a Deadly Weapon, a Category B Felony; Count 2: Attempted Murder with the Use of a Deadly Weapon, a Category B Felony; Count 3: Possession of an Explosive or Incendiary Device in or Near Certain Public or Private Areas, a Category D Felony Count 4: Battery with a Deadly Weapon, a Category B Felony; Count 5: Assault with a Deadly Weapon, a Category B Felony; Count 6: Assault with a Deadly Weapon, a Category B Felony; Count 7: Attempted Robbery with the Use of a Deadly Weapon, a Category B Felony; Count 8: Discharging a Firearm Within a Structure in a Populated Area, a Category B Felony; Count 9: Eluding a Police Officer in a Manner Posing Danger to Persons or Property, a Category B Felony; Count 10: Possession of a Firearm by a Person Previously Convicted of a Felony Offense, a Category B Felony; and Count 11:

1 Possession of a Firearm by a Person Previously Convicted of a Felony Offense, a
2 Category B Felony; Count 12: Possession of a Firearm by a Person Previously
3 Convicted of a Felony Offense, a Category B Felony; Count 13: Possession of a
4 Firearm by a Person Previously Convicted of a Felony Offense, a Category B Felony;
5 Count 14: Possession of a Firearm by a Person Previously Convicted of a Felony
6 Offense, a Category B Felony. *App. 9-17.*

7 The State filed a Second Amended Criminal Complaint on November 6, 2018.
8 *App. 18-28.* This complaint alleged the same offenses as the Amended Criminal
9 Complaint, but added Count 15: Kidnapping, First Degree, with the use of a deadly
10 weapon, a category A Felony. *Id.*

11 After bind-over, the State filed a Criminal Information on December 21, 2018.
12 *App. 33-41.* The charges in the Criminal Information mirrored those from the Second
13 Amended Criminal Complaint. *Id.*

14 On July 15, 2019, Mr. Martinez filed a motion to consolidate Counts 10
15 through 14. *App. 45-52.* The State Opposed the motion. The District Court granted
16 the motion, and the State filed a writ to this court. *State v. Fourth Judicial Dist. Court*
17 *of Nev.*, 481 P.3d 848, 137 Nev. Adv. Rep. 4.(Nev. 2021). This Court denied the
18 State's petition. *Id.*

1 On March 9, 2021, the State filed an Amended Criminal Information
2 consolidating Counts 11 through 14 into a single count, with Count 15 becoming
3 count 11. *App.* 78-85.

4 On May 20, 2021, Mr. Martinez filed a Motion to Dismiss or in the
5 Alternative Require a Jury Instruction Favorable to the Defense. *App.* 86-103. Mr.
6 Martinez asked the District Court to dismiss or instruct on gross negligence for
7 several counts, but the only conviction relevant for this appeal is Kidnapping in the
8 2nd degree with the Use of a Deadly Weapon. *App.* 90(the remaining counts at issue
9 in the Motion being moot because of acquittals and dismissals prior to sentencing,
10 and the jury convicting Mr. Martinez of the lesser-included-offense of Kidnapping in
11 the 2nd Degree rather than Kidnapping in the 1st degree). The State filed its
12 Opposition on June 1, 2021. *App.* 104-110. The District Court held a hearing on the
13 motion on June 10, 2021. *App.* 188-127. The District Court initially denied the
14 motion *App.* 128-132. At the close of evidence at trial, Mr. Martinez renewed the
15 motion in part, asking for an instruction for gross negligence regarding law
16 enforcement's failure to gather evidence, which the court denied. *App.* 531-533.

17 On May 21, 2021, Mr. Martinez filed a Motion to Suppress Evidence. *See,*
18 *App.* 111-117. On June 1, 2021, the State filed a Reply to Motion to Suppress and
19 Motion to Dismiss Count 3 of the Amended Criminal Information. *Id.* The District
20

1 Court ordered that evidence suppressed and dismissed Count 3 at the hearing for the
2 motion on June 10, 2021. *App. 118-120.*

3 The State filed a Second Amended Criminal Information on June 16, 2021.
4 *App. 111-117.* The Counts were as follows: 1: Attempted Murder with the Use of a
5 Deadly Weapon, a Category B Felony (Officer Pantelakis); Count 2: Attempted
6 Murder with the Use of a Deadly Weapon, a Category B Felony (Officer Sanchez);
7 Count 3: Battery with a Deadly Weapon, a Category B Felony; Count 4: Assault with
8 a Deadly Weapon, a Category B Felony; Count 5: Assault with a Deadly Weapon, a
9 Category B Felony; Count 6: Attempted Robbery with the Use of a Deadly Weapon,
10 a Category B Felony; Count 7: Discharging a Firearm Within a Structure in a
11 Populated Area, a Category B Felony; Count 8: Eluding a Police Officer in a Manner
12 Posing Danger to Persons or Property, a Category B Felony; Count 9: Possession of a
13 Firearm by a Person Previously Convicted of a Felony Offense, a Category B Felony;
14 Count 10: Kidnapping, First Degree, with the use of a deadly weapon, a category A
15 Felony, a Category B Felony. *Id.*

16 The trial commenced on July 6, 2021. *App. 158-272.* Before the reading of
17 jury instructions to the jury, the State moved to dismiss Count 7: Discharging a
18 Firearm Within a Structure in a Populated Area. *App. 534.* The District Court
19 dismissed the charge. *Id.* After the parties concluded arguments, the jury convicted
20 Mr. Martinez of Counts 1, 3, 4, 8, and the lesser-included offense of Second-Degree

1 Kidnapping with a Deadly Weapon in Count 10. The jury acquitted Mr. Martinez of
2 Counts 2, 5, and 6. *App. 551-552*. Rather than proceed with the second part of the
3 bifurcated trial, the State moved to dismiss Count 9 (Possession of a Firearm by a
4 Person Previously Convicted of a Felony Offense). *Id.*

5 On July 19, 2021, Mr. Martinez filed a motion for new trial (regarding Counts
6 3 and 4). *App. 133-135*. In response, the State submitted a Motion and Order for
7 Dismissal of Two Counts and Non-Opposition (regarding counts 3 and 4) which the
8 District Court granted on October 6, 2021. *App. 140-143*.

9 On October 1, 2021, the District Court sentenced Mr. Martinez on Count 1
10 Attempted Murder with a Deadly Weapon, Count 8 Eluding a Police Officer in a
11 Manner Posing Danger to Persons or Property, and Count 10 Second-Degree
12 Kidnapping with a Deadly Weapon to eight-hundred-and-forty (840) months
13 imprisonment in the Nevada Department of Corrections with the minimum aggregate
14 term of imprisonment being three-hundred-and-thirty-six (336) months. *App. 136-*
15 *139*. As of October 1, 2021, Mr. Martinez had served one-thousand-two-hundred-
16 and-eight (1208) days. *Id.*

17 **STATEMENT OF THE FACTS**

18 On November 17, 2021, Anthony Martinez came to the Southern X-Posure
19 strip club located in West Wendover, Nevada. *App. 283-284, 301-302*. Rosendo
20 Herrera, a security guard at Southern X-Posure, met Mr. Martinez at the front door

1 around 7 P.M. *App.* 283-284. Mr. Herrera testified that Mr. Martinez returned
2 between 8:30 P.M. and 9:00 P.M. *App.* 285. Both Mr. Herrera and the manager of
3 Southern X-Posure, Manuel Ruiz Barbosa, met Mr. Martinez near the front door.
4 *App.* 285-286, 301-302. Mr. Herrera testified that Mr. Martinez had a gun. *App.* 285-
5 286. Mr. Herrera testified that Mr. Martinez and Mr. Ruiz Barbosa went outside,
6 came back, and stopped after coming in the front entrance. *Id.* Mr. Herrera and Mr.
7 Barbosa testified that Mr. Martinez then pointed a gun at Mr. Herrera and Mr. Ruiz
8 Barbosa. *App.* 285-286, 303-304. *Id.* Mr. Herrera testified that Mr. Ruiz Barbosa
9 grabbed Mr. Martinez' gun, and then both Mr. Ruiz Barbosa and Mr. Martinez went
10 back outside a second time. *Id.* Mr. Herrera testified that Mr. Ruiz Barbosa and Mr.
11 Martinez did this a second and third time. *Id.* When Mr. Martinez came back inside,
12 Mr. Herrera claimed that Mr. Martinez hit him in the back of the head with the gun.
13 *App.* 287. At this point, Mr. Ruiz Barbosa left the room and did not see anything else
14 that transpired inside the club. *App.* 303.

15 Mr. Herrera testified that Mr. Martinez forced him to walk inside the club. *Id.*
16 Hr. Herrera then testified that Mr. Martinez hit him with the gun again, demanded
17 money, and shot a bullet past his left ear. *Id.* Ruta Murphy, a dancer at the club, saw
18 Mr. Martinez hit Mr. Herrera. *App.* 298-299. Ms. Murphy did not see anything else
19 after that. *Id.* But she did hear a shotgun fire before leaving through the emergency
20 exit. *App.* 299

1 Mr. Herrera said that he offered Mr. Martinez money, placing it on the club
2 stage. *App.* 287-288. Mr. Herrera testified that lights in the club started flashing and
3 an alarm sounded. *Id.* Mr. Herrera told Mr. Martinez, “[t]he cops are coming.” *App.*
4 288. After that Mr. Martinez apparently forced Mr. Herrera to leave the club. *Id.*
5 Before leaving the building, Mr. Martinez struck Mr. Herrera with the gun near the
6 front desk. *Id.* Mr. Martinez forced Mr. Herrera to put his hands down. *App.* 288-289.
7 Both men left the club side-by-side. *App.* 289. Mr. Herrera testified that Mr. Martinez
8 still had his gun drawn when they left the club. *App.* 293-294.

9 But Mr. Herrera admitted that when he testified at a previous hearing, when
10 his memory of the event was better, that Mr. Martinez already had his gun in his
11 pocket when they left the club. *App.* 294. Also, Mr. Herrera testified that when they
12 left the club, Mr. Martinez did not point a gun at him, Mr. Martinez did not fire the
13 gun, Mr. Martinez did not yell at him, and Mr. Martinez did not physically grab him.
14 *Id.* Mr. Herrera ran away, and Mr. Martinez did not chase him. *Id.*

15 Mr. Martinez left the club in his car. *App.* 474. Officers chased Mr. Martinez
16 down the main boulevard of West Wendover. *App.* 322-323. During the chase, Mr.
17 Martinez crashed his car into a guard rail in front of the Rainbow Casino. *App.* 323,
18 474. Mr. Martinez was dazed and in and out of consciousness. *App.* 474. He only
19 remembers opening the car door, being told to keep his hands up, and trying to keep
20 his “guts” inside his body. *App.* 474-475.

1 Officer Pantelakis testified that he was following Mr. Martinez and parked his
2 vehicle about 30 yards behind the now crashed vehicle. *App.* 324. Officer Pantelakis
3 got out of his vehicle, drew his weapon, and walked towards Mr. Martinez's vehicle.
4 *Id.* Officer Pantelakis saw the driver side of the car open, watched Mr. Martinez exit
5 the vehicle, and saw him making punching movements. *Id.* Less than a second later,
6 Officer Pantelakis was firing at Mr. Martinez *App.* 327. Officer Pantelakis fired shots
7 while walking backwards, fired more as he fell to the ground, and fired more after
8 getting back up. *App.* 328. Officer Pantelakis had a body-worn camera and a dash-
9 camera in his vehicle. *App.* 326-327. Neither device captured any moment of the
10 pursuit or shooting. *Id.*

11 Officer Alejandro Sanchez was involved in the pursuit, and after the crash, he
12 parked his car in the median to the left of Officer Pantelakis' parked car. *App.* 378,
13 384. Officer Sanchez saw Officer Pantelakis walk toward the crashed car. *Id.* Officer
14 Sanchez heard gunshots. *App.* 379. Officer Sanchez claimed that he was being shot
15 at. *App.* 335. Officer Sanchez pointed his service rifle at Mr. Martinez and fired. *Id.*
16 Mr. Martinez had three bullet wounds: one to his abdomen, one that blew his calf off,
17 and a wound to the other calf. *App.* 387-388.

18 At trial, Officer Sanchez listened to an interview with a detective and himself
19 that occurred the day after the shooting. *App.* 379-383. Officer Sanchez admitted that
20 during that interview he never mentioned that Mr. Martinez' arm was extended

1 towards him, he never mentioned seeing Mr. Martinez' gun, and never mentioned
2 Mr. Martinez firing his gun at him. *Id.* The jury acquitted Mr. Martinez of the
3 attempted murder charge with Officer Sanchez as the listed victim.

4 Several law enforcement officers continued the investigation. Officer
5 Fernando Uribe, went to the Southern-Xposure to "preserve any type of evidence."
6 *App 313.* Officer Uribe met the club manager, Mr. Ruiz-Barbosa. *Id.* Officer Uribe
7 testified that it was his duty to investigate any crimes that occurred at the Southern-
8 XPosure. *App 313-314.* Officer Uribe was aware that the club had video surveillance.
9 *App. 314.* Officer Uribe was aware the Southern-Xposure had a surveillance system
10 that covered most of the club. *App 315.* Officer Uribe knew based on his training and
11 experience that the surveillance videos were important to his investigation, that they
12 could get erased or lost, and that he needed to obtain and preserve them as soon as
13 possible. *Id.* Officer Uribe did not obtain any of the surveillance footage from any
14 camera. *Id.*

15 Detective Jonathon Moore and Detective Mike Marshowsky of the Elko Police
16 department also participated in the investigation at Southern-XPosure. *App 395-398.*
17 Detective Moore knew that collecting video surveillance there was important,
18 especially since it was part of his training as a detective to do so. *App. 396.* Neither
19 Detective Moore nor Detective Marshowsky asked any club employee about
20 obtaining surveillance. *App 395-398.* Both detectives agreed that these types of clubs

1 often have surveillance systems and that it would be unusual for them not to. *Id.*

2 Neither Detective Moore nor Detective Marshowsky collected video surveillance. *Id.*

3 Mr. Ruiz Barbosa testified that the club did have a surveillance system with
4 approximately twenty-four cameras. *App 304, 308.* Those cameras covered nearly
5 every part of the club save for the private areas. *App 308.* Importantly, that on
6 November 17, 2021, he had access to the system. *Id.* He also said that not a single
7 law enforcement officer asked him for any surveillance footage that day. *Id.* Mr. Ruiz
8 Barbosa did later provide two abridged videos and two photographs from the
9 surveillance system from two different cameras. *App 304-305, 308.* Mr. Ruiz
10 Barbosa erased the full videos from the two cameras that caught some video and all
11 the footage from the other twenty-two cameras. *App. 305, 308.*

12 Not a single law enforcement officer ever approached Mr. Ruiz Barbosa with a
13 request for the surveillance footage despite him interacting with several officers with
14 several officers. *App. 308.* This despite at least three officers being on scene to collect
15 evidence. This despite approximately thirteen officers from the West Wendover
16 Police Department being part of the response and investigation. *App. 315.* This
17 despite officers from the Elko Police Department, the Elko County Sherriff's Office,
18 Nevada Highway Patrol, the Nevada Division of Investigation, and the Utah
19 Highway Patrol responding and assisting the West Wendover Police Department.
20 *App. 315-316.*

1 At sentencing, the District Court judge stated, “now I realize the defendant
2 was not convicted of attempting to murder Sanchez, but the fact of the matter is
3 that guy was there taking fire from Mr. Martinez.” *App.* 586. Even though the
4 District Court judge admitted that Officer Sanchez was not a victim and Sanchez
5 did not submit a victim impact statement, the judge determined that the Court had
6 already seen a victim impact statement based on the testimony at trial and how
7 upsetting the experience was to Officer Sanchez. *Id.*

8 **SUMMARY OF THE ARGUMENT**

9 The jury had insufficient evidence to convict Mr. Martinez of attempted
10 murder and second-degree kidnapping. The District Court erred when it refused to
11 instruct the jury that law enforcement’s failure to gather evidence was grossly
12 negligent. The District Court abused its discretion by usurping the jury’s authority to
13 find the existence of any fact the law makes essential for punishment.

14 **ARGUMENT**

15 **A. Standard of Review**

16 On appeal, this Court reviews a District Court’s legal conclusions de novo
17 while reviewing factual findings for clear error. *Somee v. State*, 124 Nev. 434, 441,
18 187 P.3d 152, 157-158(Nev. 2008). The Court can reverse a jury verdict when
19 substantial evidence does not support the verdict. *Hernandez v. State*, 118 Nev. 513,
20 531, 50 P.3d 1100, 1112(Nev. 2002). The standard of reviewing the sufficiency of

1 the evidence is to determine if the jury, acting reasonably, could have been convinced
2 by competent evidence of the defendant's guilt beyond a reasonable doubt. *Id.* This
3 Court reviews the District Court's refusal to grant a jury instruction for abuse of
4 discretion. *Brooks v. State*, 124 Nev. 203, 206, 180 P.3d 657, 658-659(Nev. 2008).
5 Abuse of discretion is the standard to review a District Court's sentencing decision.
6 *Goodson v. State*, 98 Nev. 493, 495-496, 654 P.2d 1006, 1007(Nev. 1982).

7 **A. The Evidence was Insufficient to Convict Mr. Martinez.**

8 Attempted murder requires the State to show an intent to kill, malice
9 aforethought, and failure to complete the crime of murder. Nev. Rev. Stat. §
10 193.330, 200.010, 200.020, 200.030, *Jackson v. State*, 128 Nev. 598, 607, 291 P.3d
11 1274, 1280(Nev. 2012). Additionally, malice aforethought must be express rather
12 than implied. *Keys v. State*, 104 Nev. 736, 740-742, 766 P.2d 270, 273-274(Nev.
13 1988)(ruling that one cannot attempt to kill another with implied malice because
14 attempt, by nature, is a failure to accomplish what one intended to do; thus one
15 cannot attempt to be negligent or attempt to have general malignant recklessness
16 contemplated by the legal concept of implied malice). And, though, deliberation does
17 not itself constitute an element of murder, its existence helps determine whether
18 someone committed the crime with express malice. *State v. Milosovich*, 42 Nev. 263,
19 277, 175 P. 139, 142(Nev. 1918).

20 There was insufficient evidence to show that Mr. Martinez had the intent to
kill Officer Pantelakis. The testimony was not supported by any video from Officer

1 Pantelakis' body-worn camera or dash-cam. Given how rapidly the events unfolded
2 after the car crash, there is almost no way to tell who fired their gun first. Officer
3 Pantelakis testified that within a second of seeing punching movements, he fired his
4 gun. It is not possible to discern beyond a reasonable doubt if Mr. Martinez was
5 shooting first or simply reacting to gun fire. That is coupled with the fact that Mr.
6 Martinez was dazed, slipping in and out of consciousness, and holding his innards
7 inside his body. Attempted murder makes it very specific that a person must have
8 express malice before a conviction for attempted murder can stand. Also, deliberation
9 helps assist the trier of fact to determine if express malice exists, and here, the
10 combination of being discombobulated and rapidly unfolding events cannot support
11 the idea that Mr. Martinez deliberated or possessed the state of mind necessary to
12 show he acted with express malice.

13 Second-degree kidnapping requires the State to show that Mr. Martinez
14 willfully, unlawfully, and with specific intent seized (*et seq.*) Mr. Herrera to either
15 secretly imprison him, convey him outside the State of Nevada, or in any manner
16 service or detain him against his will. Nev. Rev. Stat. § 200.310, 200.330, *Wright v.*
17 *State*, 94 Nev. 415, 581 (Nev. 1978), *Mendoza v. State*, 122 Nev. 267, 130 P.3d
18 176 (Nev. 2006). But movement or restraint incidental to an underlying offense
19 where restraint or movement is inherent does not expose a defendant to criminal
20 liability for both kidnapping and the underlying offense. *Mendoza v. State*, 122

1 Nev. 267, 274-275, 130 P.3d 176, 180(Nev. 2006)(articulating a number of
2 underlying offenses: “i.e., robbery, extortion, battery resulting in substantial bodily
3 harm or sexual assault”). That is, unless the movement or restraint substantially
4 increases the risk of harm to the victim over and above that necessarily present in
5 an associated offense or where the seizure, restraint, or movement of the victim
6 substantially exceeds that required to complete the associated offense. *Id.*

7 There was no evidence, nor did the State argue, that Mr. Martinez
8 specifically intended to seize Mr. Herrera to secretly imprison him or convey him
9 outside of the State of Nevada. There also was insufficient evidence to show that
10 Mr. Martinez detained Mr. Herrera in a manner that was not incidental to the
11 offenses the jury convicted Mr. Martinez for. Those relevant for this inquiry being
12 assault with a deadly weapon and battery with a deadly weapon.

13 If Mr. Herrera’s claims are true, then Mr. Martinez assaulted and battered
14 him at the front entrance, again in the club, and once more before leaving the club.
15 Importantly, the State’s charging documents show that the State’s theory on the
16 battery charge included striking Mr. Barbosa with the handgun one or more times.
17 The plain language makes it clear that the State wanted to tie the initial assault and
18 battery together and bind it factually to the other two times Mr. Martinez battered
19 Mr. Herrera. The State clearly wanted to present the greatest number of
20 opportunities to convict Mr. Martinez of battery with a deadly weapon.

1 The confines produced by the charging language make any forced
2 movement or restraint during the initial assault through the final battery incidental
3 to the actions necessary to convict on those two separate charges. The completed
4 offense of battery, according to the charging language, only ended with the final
5 strike upon Mr. Herrera near the front entrance. At that point, Mr. Martinez put
6 away his gun, and both men left the club side-by-side. Mr. Herrera ran back into
7 the club shortly after. Mr. Martinez did not point the gun at Mr. Herrera, did not
8 fire the gun at him, did not yell at him, did not physically grab him, nor did he
9 chase after Mr. Herrera as he ran away. This brief moment in time did not
10 substantially increase the risk of harm to Mr. Herrera over and above that
11 necessarily present in the battery and did not substantially exceed the movement
12 beyond the actions of the completed offense of battery. If anything, it provided Mr.
13 Herrera an opportunity to escape danger, which he did.

14 **B. The District Court Errored By Denying the Defenses' Request to Have**
15 **the Jury Instructed that Law Enforcement Was Grossly Negligent when**
16 **It Failed to Gather Evidence.**

17 Failing to gather exculpatory evidence may warrant sanctions against the
18 State. *Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (Nev. 2001).

19 Although law enforcement generally has no duty to collect all potential evidence,
20 this rule is not absolute. *Daniels v. State*, 114 Nev. 261, 268, 956 P.2d 111, 115,
(Nev. 1998).

1 In review, this Court must answer two questions to decide if a remedy is
2 available to Mr. Martinez by law enforcement failing to gather the video evidence
3 in his case; Mr. Martinez must show materiality of evidence and that law
4 enforcement was grossly negligent in collecting that evidence. *Id.* Materiality
5 exists if there is reasonable probability that, had the evidence been available to the
6 defense, the result of the proceedings would have been different. *Id.*

7 Gross negligence is the failure to exercise even a slight degree of care. *Bearden*
8 *v. Boulder City*, 89 Nev. 106, 109, 507 P.2d 1034, 1035-1036(Nev. 1979). It is an
9 act or omission of a legal duty aggravated by a lack of even slight diligence. *Id.* It
10 is the indifference to duty and indifference to the legal obligations that affect the
11 legal rights of other people. *Id.* When gross negligence is involved, the defense is
12 entitled to a presumption that the evidence would have been unfavorable to the
13 State. *Daniels* 114 Nev at 268, 115. A defendant has the burden of proof to show
14 both materiality and gross negligence by a preponderance of the evidence. *Id.*

15 The surveillance videos would have provided a panoramic and continuous view
16 of Mr. Martinez' entry into the club, his actions while inside the club, and the
17 actions of others inside the club. This is related and material to Mr. Martinez'
18 argument that the evidence was insufficient to convict him of second-degree
19 kidnapping. The footage could have shown more clearly if the movement of Mr.
20 Herrera was incidental to the other charged acts, if the movement substantially

1 increased a risk of harm, or if the movement substantially exceeded the movement
2 of the other related charges.

3 At least three police officers were tasked with investigating the Southern-
4 XPosure. Officer Uribe was personally familiar with the surveillance system and
5 Mr. Barbosa-Ruiz. Yet, he failed to take even the slightest initiative to gather the
6 video footage from any of the twenty-four cameras in the club. Detectives Moore
7 and Marshowsky were seasoned detectives with the training and experience to
8 know that the Southern-Xposure was the kind of business that would have
9 surveillance video. Yet, neither of them bothered to even check if they could
10 collect surveillance footage. Mr. Barbosa Ruiz said that not a single officer
11 approached him about the video, despite multiple law enforcement agencies
12 assisting with investigation. The dereliction of duty here is more than ample and
13 preponderating to show that law enforcement acted in a grossly negligent manner
14 that affected Mr. Martinez' rights to a fair trial.

15 This court evaluates appellate claims concerning jury instructions using a
16 harmless error standard of review. *Barnier v. State*, 119 Nev. 129, 132, 67 P.3d
17 320, 322(Nev. 2003). Considering how closely related the claims of insufficient
18 evidence for second-degree kidnapping and failing to instruct on law
19 enforcement's failure to gather surveillance footage are, this failure clearly
20 prejudiced Mr. Martinez' ability to hold the State to its burden of proof; this error

1 contributed beyond a reasonable doubt to the jury's erroneous conviction for
2 second-degree kidnapping.

3 **C. The District Court Errored When It Treated Officer Sanchez as a**
4 **Victim During Sentencing Despite the Jury Acquitting the Defendant of**
5 **the Charge Related to That Witness.**

6 A defendant's Sixth Amendment rights are violated when a judge imposes a
7 sentence that is not solely based on facts reflected in a jury verdict or admitted by the
8 defendant. *United States v. Booker*, 543 U.S. 220, 232, 125 S. Ct. 738, 749, (2005).
9 That holds true because a defendant has the right to have the jury find the existence
10 of any fact the law makes essential for punishment. *Id.* Specifically, the Constitution
11 protects every defendant against conviction except upon proof beyond a reasonable
12 doubt of every fact and element necessary to convict a defendant of the charged
13 crimes. *Id.* at 230, 748. These basic precepts, firmly rooted in the common law, form
14 the foundation for properly interpreting modern criminal statutes and sentencing
15 procedures. *Id.*

16 Sentencing is not a second trial. *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d
17 1159, 1161(Nev. 1976). Though the District Court can consider facts and
18 circumstances not admissible at trial during sentencing, those facts and circumstances
19 cannot be palpable or highly suspect. *Goodson* 98 Nev at 495-496, 1007. In other
20 words, the District Court cannot usurp the jury's findings of fact by substituting its
own conclusions and inferences to determine a fact essential for punishment.

1 Otherwise, the District Court abuses its discretion. *Id.*(vacating the sentence when the
2 District Court relied on unsubstantiated claims in the presentence investigation
3 report).

4 The jury did not convict Mr. Martinez for attempting to murder Officer
5 Sanchez. Despite the acquittal, the judge considered Officer Sanchez a victim and
6 sentenced Mr. Martinez accordingly. The District Court abused its discretion by
7 doing so, and Mr. Martinez suffered an improper sentence on his three convictions
8 because the District Court usurped the jury's authority by substituting its own
9 conclusions and inferences to determine a fact essential for punishment.

10 CONCLUSION

11 Mr. Martinez asks this court to vacate the jury's verdict and order a new
12 trial. The jury had insufficient evidence to convict the defendant of attempted
13 murder and second-degree kidnapping. Additionally, the District Court's refusal to
14 instruct the jury on the presumption that the absence of the surveillance footage
15 was unfavorable to the State's case merits a new trial. Mr. Martinez also asks this
16 Court to vacate his sentence and reorder a sentencing on all three convictions since
17 the District Court trespassed into the jury's exclusive right to form conclusions and
18 inferences to determine a fact essential for punishment

19 ///

20 ///

1 DATED this 24th day of March, 2022.

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12 CERTIFICATE OF COMPLIANCE

13 1. I hereby certify that this brief complies with the
14 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
15 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has
16 been prepared in a proportionally spaced typeface using Microsoft Word in size 14
17 Times New Roman font.

18 2. I further certify that this brief complies with the page or
19 type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief
20 exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and
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words or _____ lines of text; or

1 [x] Does not exceed 30 pages.

2 3. Finally, I hereby certify that I have read this appellate brief, and to the
3 best of my knowledge, information, and belief, it is not frivolous or interposed for
4 any improper purpose. I further certify that this brief complies with all the
5 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
6 which requires every assertion in the brief regarding matters in the record to be
7 supported by a reference to the page and volume number, if any, of the transcript
8 or appendix where the matter relied on is found.

9 I understand that I may be subject to sanctions if the accompanying brief is
10 not in conformity with the requirements of the Nevada Rules of Appellate
11 Procedure.

12 DATED this 24th day of March, 2022.

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(b) I further certify that on this 24th day of March 2022, electronic service of the foregoing document shall be made in accordance with the Master Service List to Aaron D. Ford, Nevada Attorney General; and Tyler J. Ingram, Elko County District Attorney.

(c) I further certify that on this 24th day of March, 2022,
I mailed, postage paid at Elko, Nevada, one (1) copy to ANTHONY
CHRISTOPHER MARTINEZ, ELY STATE PRISON # 1249714, P.O. Box 1989,
ELY, NV 89301.

DATED this 24th day of March, 2022.

SIGNED: /s/ Matthew Pennell

Employee of the Elko County Public Defender