IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY CHRIS ROBERT MARTINEZ,

Appellant,

vs. CASE NO.83754

THE STATE OF NEVADA,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF

THE HONORABLE AARON D. FORD
ATTORNEY GENERAL OF NEVADA
100 N. CARSON STREET
CARSON CITY, NV 89701

TYLER J. INGRAM
State Bar Number 11819
540 Court Street, 2nd Floor
Elko, NV 89801

ATTORNEYS FOR RESPONDENT

MATTHEW PENNELL
State Bar Number: 13298
569 Court Street
Elko, Nv 89801

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

STATEMENT OF THE FACTS

The State accepts Martinez' statement of facts and it simply cites to additional facts in support of its arguments below which are contained in the Joint Appendix and Joint Supplemental Appendix.

SUMMARY OF ARGUMENT

First, there was sufficient evidence to prove that Martinez intended to kill Officer Pantelakis based on his motive, use of a deadly weapon (firearm), video evidence, law enforcement testimony, and independent eyewitness testimony.

Second, there was also sufficient evidence to prove that the kidnapping was not incidental to any other crime because Martinez was not convicted of any other crime directly related to the kidnapping, and there was sufficient evidence for any trier of fact to conclude that Herrera was detained against his will.

Third, the District Court did not err in denying Martinez' request for an adverse jury instruction because he failed to show materiality and the failure to collect was mere negligence.

Finally, the record is abundantly clear that the District Court did not treat Officer Sanchez as a victim, and even if did, it was harmless error because the sentence that Martinez received was within the statutory parameters.

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ARGUMENT

I. Standard of Review

A. The Evidence was Sufficient to Convict

Attempted Murder with the use of a Deadly Weapon

Martinez argues that the evidence was not sufficient to convict him of attempted murder – specifically that the evidence was insufficient to show that he had the intent to kill Officer Pantelakis. The State disagrees and so did the jury. Importantly, Martinez does not argue that the evidence was insufficient to prove any other element of attempted murder; therefore, the State will not address those other elements and the sufficiency of proof thereof.

"The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Leonard v. State,* 114 Nev. 1196, 1209-1210 (1998) (internal citations omitted).

Attempted murder "is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice,

namely, with the deliberate intention unlawfully to kill." *Keys v. State*, 104 Nev. 736, 740 (1988); also see NRS 193.330 and NRS 200.020. Intent to kill "can rarely be proven by direct evidence of a defendant's state of mind . . . ."*Sharma v. State*, 118 Nev. 648, 659 (2002). Intent to kill can be inferred "from the facts and circumstances ... such as the use of a weapon calculated to produce death, the manner of use, and the attendant circumstances characterizing the act." *Washington v. State*, 132 Nev. 655, 662 (2016). "[C]ircumstantial evidence may constitute the sole basis for a conviction." *Canape v. State*, 109 Nev. 864, 869 (1993).

The jury was properly instructed on the elements of attempted murder with the use of a deadly weapon. *Supp. App.* 12. The jury was properly instructed that the crime is a specific intent crime. *Supp. App.* 26 and 30. The jury was properly instructed on express malice. *Supp. App.* 29, 31, and 32.

Martinez relies nearly entirely on the fact that the incident was not captured by Officer Pantelakis' body-worn camera or dash-camera. Martinez failed to mention that it was captured on Officer Sanchez's dash-camera and that was admitted at trial as Exhibit 103 and played for the jury. The State will file a Motion with this Court to have that exhibit transmitted.

Immediately after committing at least second-degree kidnapping with the use of a deadly weapon at the strip club, Martinez eluded police officers – i.e. Martinez endeavored to flee from cops so as not to get caught for the act(s) which he just committed. *App.* 322, p. 192-197. When Martinez crashed his vehicle while eluding cops, he immediately got out of his vehicle and began firing at Officer Pantelakis and then Officer Sanchez. *App.* 324, p. 198-200. Martinez fired his gun at least 11 times as evidenced by the bullet casings found at the scene. *App.* 409-411. That motive provided substantial evidence of express malice. 11 shots fired at police officers is absolutely a clear intention to kill. Martinez's DNA was on the gun that he fired. *App.* 464, p. 106.

Martinez argues that there is almost no way to tell who fired their gun first. The State strongly disagrees. Not only does Exhibit 103 show Martinez getting out of his vehicle and pointing in the direction of Officer Pantelakis, but the familiar and unmistakable sound of shots can be heard. Pantelakis was very clear in his testimony – he did not fire first. Martinez fired first. Additionally, an independent eyewitness, Andrew Schumaker, who was stopped across the street from the incident, testified that it was man who crashed the vehicle, Martinez, who shot first and he was shooting in the direction of the officers. *App.* 318.

Martinez makes mention of the fact that he was holding his innards inside his body. The State submits that is irrelevant to any argument regarding the State proving intent to kill beyond a reasonable doubt because it was very evident that Martinez was shot by officers which occurred after Martinez fired at the officers. His intent was formed before a single bullet was fired by law enforcement. Likewise, being dazed and confused is belied by the video. Martinez, as captured in Exhibit 103, appears to be very calculated in his movements. Martinez knew exactly what he was trying to do and that was to kill an officer.

Viewing that evidence in a light most favorable to the prosecution, this isn't a close call. As pointed out in *Sharma*, we can rarely prove a defendant's intent by direct evidence; however, shooting at officers 11 times after eluding those same officers after committing a felony is not only circumstantial evidence of Martinez's intent, but also very strong circumstantial evidence. That evidence would allow any rational trier of fact to find the essential element of intent to kill beyond a reasonable doubt.

Second Degree Kidnapping with the use of a Deadly Weapon

The same standard applies. "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. There is

sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Leonard v. State,* 114 Nev. 1196, 1209-1210 (1998) (internal citations omitted).

NRS 200.310(2) states, "A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree which is a category B felony." The jury was instructed as such. *Supp. App.* 22.

The jury was also instructed that in order to find Martinez guilty of Kidnapping in the second degree with or without the use of a deadly weapon, that it must conclude beyond a reasonable doubt that 1) any movement of Rosendo Herrera was not incidental to that necessary to attempt to commit robbery upon him or from him; or 2) any incidental movement of Rosendo Herrera substantially increased the risk of harm to him over and above that necessary to attempt to commit robbery upon of from him; or 3) any incidental movement of Rosendo Herrera substantially exceeded that required to commit robbery upon or from him; or 4) the

movement had an independent purpose or significance. Supp. App. 23. That jury instruction complies with this Court's holding in *Mendoza v. State*, 122 Nev. 267, (2006).

Martinez argues that there was insufficient evidence to support second degree kidnapping with the use of a deadly weapon because there was no evidence that Martinez specifically intended to seize Herrera to secretly imprison him or convey him outside the State of Nevada. He also argues that there was insufficient evidence to show that Martinez detained Herrera in a manner that was not incidental to the offenses the jury convicted Martinez for.

The first argument is easy to dispose of. Even if there was no evidence that Martinez intended to imprison Herrera or convey him outside of the State of Nevada, that's not dispositive because there are other ways to commit that crime – namely that Herrera was detained against his will. NRS 200.310(2).

Here, Herrera testified that after Martinez hit him in the head with the gun, that Martinez told him to put his hands up and they walked 5 steps during which Martinez asked Herrera where the money was. *App.* 287, p. 50-51. Even after Herrera told Martinez that there was no money, Martinez kept asking for money. *App.* 287, p. 51. Martinez then fired his gun near

Herrera's left ear. *Id.* After Martinez again asked for money, Herrera emptied his pockets and put money from his wallet on the stage and told Martinez to take the money. *App.* 287, p. 52. Martinez did not take the money. *App.* 288, p. 54. When the emergency alarm and lights started, Herrera told Martinez that the cops were coming. *App.* 288, p. 56. Martinez told Herrera to put his hands up and "let's go outside." Martinez told Herrera, "put your hands down motherfucker." Herrera did not want to go outside with Martinez, but felt like he had to. *App.* 289, p. 57. While outside, Herrera was able to run away back inside the club. *Id.* While Herrera testified that Martinez put his gun in his pocket, Herrera knew that Martinez still had the gun. *App.* 296, p. 85. This evidence clearly showed that Martinez detained Herrera against his will. That's second-degree kidnapping.

For the second argument it is important to note that the jury found Martinez guilty of Battery with the use of a Deadly Weapon (Herrera); guilty of Assault with a Deadly Weapon (Barbosa); and guilty of Second-Degree Kidnapping with the use of a deadly weapon (Herrera); and NOT guilty of attempted robbery. *App.* 552, p. 105.

Martinez argues that the "relevant inquiry" for this argument are the convictions for Assault with a Deadly Weapon and Battery with a Deadly

Weapon. Immediately, this Court may dispose of his argument based on the Assault with a Deadly Weapon conviction because that conviction was for a crime committed against a different victim than the kidnapping. Certainly, Martinez cannot successfully argue that the Assault with a Deadly Weapon was incidental to the Kidnapping. The Assault with a Deadly against Barbosa occurred well-before the Kidnapping. *App.* 286, p. 45-47. Those are separate and distinct crimes. The Assault with a Deadly Weapon clearly stood alone with an independent significance. *See Mendoza*, supra, at 275.

Moreover, Martinez was NOT ultimately convicted of Battery with a Deadly Weapon nor was he convicted of Assault with a Deadly Weapon because the State asked the court to dismiss those counts and it did. *App.* 140-142. Therefore, the jury's finding of guilt on those two counts is of no consequence because Martinez was not subjected to dual criminal liability as stated in *Mendoza*.

Finally, as to Martinez's argument that that there was insufficient evidence to show that the kidnapping was not incidental to the battery with a deadly weapon, the record overwhelmingly showed that the kidnapping occurred after the times that Martinez struck Herrera with the gun. Herrera was inside the club when those acts occurred. Martinez forced Herrera to leave the club against his will. Martinez, even if he did not yell at Herrera,

did not fire the gun at Herrera, did not physically grab Herrera, and did not chase after Herrera when Herrera ran, completed the crime of kidnapping when he detained Herrera against his will.

B. The District Court did NOT error by Denying Martinez's Request for Adverse Jury Instruction

Martinez argues that the District Court erred when it denied his request to give the jury an adverse jury instruction as it relates to the kidnapping conviction only. Specifically, he argues that the District Court should have found that law enforcement was grossly negligent by not collecting video surveillance from the club; therefore, the District Court should have instructed the jury that the uncollected video would have been unfavorable to the State. The State does not contest the point that law enforcement failed to collect potentially available video surveillance from the club; however, at least two video clips provided by Mr. Barbosa, were introduced into evidence. *App.* 310, p. 142 (trial exhibit 106). Those videos were given to law enforcement by Barbosa. *App.* 304, p. 119. Barbosa also testified that he had other videos, but he, not law enforcement, accidentally erased them. *App.* 305, p. 121.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion

or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 746, 748 (2005). Failure to collected evidence requires a two-part analysis. First, the defense must show that the evidence was material – "that there is a reasonable that, had the evidence been available to the defense, the result of the proceeding would have been different". *Daniels v. State*, 114 Nev. 261, 267 (1998). Second, "[i]f the evidence is material, the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." *Id.*

The District Court twice considered this issue – once before trial and once during the settling of jury instructions. *App.* 118 (pretrial motions hearing); *App.* 531. Both times, the District Court had the opportunity to observe the witnesses who testified regarding their failure to collect video surveillance from the club. The District Court was in the best position to judge the credibility of those witnesses and it determined that law enforcement did not act in a grossly negligent manner. Instead, it was mere negligence. *App.* 532, p. 28. The District Court made a specific finding that the evidence was not material. *App.* 533, p. 29.

Here, Martinez failed to show that the uncollected video surveillance was material. In support of his argument that they were material, Martinez argues, "The surveillance videos would have provided a panoramic and continuous view of Mr. Martinez' entry into the club, his actions while inside the club, and the actions of others inside the club. *Appellant's Opening Brief*, p.17. That is a conclusory statement unsupported by the record in this case. Martinez cannot know whether everything was or was not captured on video. There was clear testimony regarding the kidnapping and the State submits that the video surveillance would have corroborated the State's witnesses' testimony, not refuted it. The only evidence whatsoever that may be considered to contradict the witnesses was Martinez' own testimony. His testimony was completely unbelievable and contradicted by the evidence presented at trial. Even the District Court questioned, outside the presence of the jury during its ruling on the adverse jury instruction request, Martinez' testimony.

Martinez further argues that the evidence is related and material to his argument regarding whether the kidnapping was incidental to the other charges. In addition to the State's argument that this argument is moot because Martinez was not convicted of any other crime related to the

kidnapping, there was also substantial evidence that the kidnapping was not incidental as argued above.

Moreover, Martinez had ample opportunity to cross examine the applicable witnesses about their failure to gather video surveillance from the club and he did so. He extensively questioned Officer Uribe about his failure to collect it. *App.* 315. He did the same with Lt. Hillaker. *App.* 390. He did the same with Det. Hood. *App.* 394. He did the same with Det. Moore. *App.* 396. He did the same with Det. Marshowsky. *App.* 398. The District Court even instructed the jury about investigative deficiencies. *Supp. App. 56.*

Importantly, Martinez' only argument in support of materiality in his Motion to Dismiss or in the alternative Require Jury Instruction favorable to the Defense, is that without the video surveillance "the defense is unable to rebut State's witnesses with objective video evidence. *App.* 89. During the settling of jury instructions after the close of evidence at trial, Martinez' only argument in support of materiality was that the video surveillance would have contradicted witness testimony and would have corroborated Martinez' version of events. *App.* 531-532. Those are simply "hoped-for" conclusions which do not satisfy the materiality requirement. (See *Daniel v. State*, 119 Nev. 498, 520 (2003) ("It is not sufficient that the showing disclose merely a

hoped-for conclusion from examination of the destroyed evidence" or "that examination of the evidence would be helpful in preparing [a] defense."))

This Court should affirm the District Court's decision to not instruct the jury adversely.

C. The District Court did NOT treat Officer Sanchez as a Victim

Martinez argues that he should receive a new sentencing because the District Court considered Officer Sanchez a victim, thus violating his Sixth Amendment rights. "So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed." *Silks v. State*, 92 Nev. 91, 94 (1976).

The only citation to the Transcript of Sentencing that Martinez uses to support his argument is that the District Court said, "Now I realize the defendant was not convicted of attempting to murder Sanchez, but the fact of the matter is that guy was there taking fire from Mr. Martinez." Importantly, the District Court did not refer or even imply that Sanchez was a victim. Sanchez was indeed taking fire from Martinez and that evidence was clearly presented at trial. Sanchez, at trial, said, "I was putting my car in park. And I heard a loud thump. And I noticed that he was shooting at me now. I

ducked. Grabbed my rife that I set in the passenger seat." *App.* 335, p.243, lines 5-8. Officer Sanchez also testified that there were holes in his patrol vehicle that were consistent with bullet holes which were not in his patrol vehicle prior to this incident and were there after this incident. *App.* 381, p.29, lines 10-16. Officer Sanchez also heard what he believed to be the impact of bullets being fired in his direction. *App.* 381, p.29, lines 17-19.

Certainly, Martinez cannot argue to this Court that the District Court cannot consider those facts presented at trial. This was sworn testimony. There is nothing whatsoever to suggest that those facts were impalpable or highly suspect. NRS 176.015(6) "does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing." Again, the only statement Martinez is relying on to support his argument is the one quoted above. Since that statement is in fact supported by the evidence, then the District Court did nothing wrong.

Interestingly, Martinez did not cite to the numerous times when the District Court made it abundantly clear that it was not considering Officer Sanchez as a victim. Specifically, the District Court noted that it only reviewed a victim impact statement from Officer Sanchez. *App.* 579, p.14, lines 12-14. The District Court reiterated that there were only two victims at two different locations – Barbie (Herrera) and Officer Pantelakis. *App.* 584,

p. 35, lines 1-17. The District Court also said, "And I know he's here saying, I didn't mean to hurt anybody, but the jury says beyond a reasonable doubt he attempted to murder Miguel Pantelakis." *App.* 585, p. 38, lines 12-15. Again, the District Court emphasized that the jury found Martinez guilty of attempted murder with the use of a deadly weapon against Miguel Pantelakis and that it impacted him. *App.* 585, p. 39, lines 19-21; *App.* 586 p. 41, lines 19-20. Finally, the District Court said, "So clearly this has a great impact on the officers, and the—I have to focus on the victim, and that's Pantelakis, so..." *App.* 586, p. 44, lines 911.

The record is devoid of any indication that the District Court relied on impalpable or highly suspect evidence and Martinez failed to demonstrate that he was prejudiced by any mention of Officer Sanchez. Afterall, every sentence that Martinez received was within the parameters of the applicable statutes. Martinez's lengthy and just sentence was a direct result of him attempting to murder a cop with a gun; him eluding police officers; and him kidnapping Barbie (Herrera) with a gun.

Even if this Court believes the District Court erred, it was harmless because the sentences that the Martinez received were within the statutory parameters. This Court should reject Martinez's argument and affirm his sentence.

CONCLUSION

The State is respectfully requesting this Court to affirm the District Court's judgment and find that Martinez' claims do not warrant reversal.

RESPECTFULLY SUBMITTED this 15 day of April, 2022.

TYLER J. INGRAM
Elko County District Attorney

By: _____
TYLER J. INGRAM
District Attorney
State Bar Number: 11819

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Answering 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). This Respondent's Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

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 Respondent's Answering Brief exempted by NRAP32(a)(7)(C), because it contains 3570 words.

I hereby certify that I have read the Respondent's Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record

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on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15 day of April, 2022.

TYLER J. INGRAM
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801

By: _____
TYLER J. INGRAM
District Attorney
State Bar Number: 11819

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 15th day of April, 2022. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

and

Matthew Pennell
Attorney for Appellant

Carisa Anchondo
Carisa Anchondo
Assistant Office Manager

DA#: AP-21-02672