

MEMORANDUM OF ADVICE ON EVIDENCE

R v FARINA

Salvatore Farina (“the defendant”) has been charged with intentionally causing serious injury (on the basis that he acted in concert with Antonio Batista) to David Baxter-Jones on 16 December 2004.

This memorandum advises the Director of Public Prosecutions on the prospects of convicting the defendant.

I THE FACTUAL THEORY

The legal case against the defendant is that Batista and the defendant shared an understanding that serious injury would be caused to Baxter-Jones; that, in accordance with and furtherance of this understanding, Batista intentionally, and without lawful excuse, caused serious injury to Baxter Jones; and that the defendant was present at the time that injury was caused.

The prosecution’s factual theory accounts for all the elements that must be proved beyond reasonable doubt in order to convict the defendant. The theory is as follows:

On 12 December 2004, the defendant received a call from David Baxter-Jones, who accused the defendant (and Antonio Batista, Manuel Garcia and Giovanni Rambaudi) of stealing his car stereo the previous night. Baxter-Jones had reasonable grounds to believe this: Baxter-Jones’ mother had reported seeing the defendant and the co-accused in the area approximately 45 minutes before Baxter-Jones discovered his stereo had been stolen; the defendant had charges pending for theft from a motor vehicle; and the defendant and his co-

accused knew which car belonged to Baxter-Jones. However, the defendant denied involvement totally. In the ensuing days, Baxter-Jones made multiple calls to Batista. Baxter-Jones knew Batista and the defendant better than the other co-accused. Batista never answered.

On the morning 16 December 2004, Manuel Garcia called and spoke to Baxter-Jones twice. They discussed the missing stereo, at some length on the second occasion. The phone calls were heated and resulted in Baxter-Jones hanging up on Garcia.

After finishing work on that same day in Auburn, the defendant called each of his co-accused to arrange for them to meet to discuss Baxter-Jones, whom they believed had named them in his report to police about the theft of his car stereo. He spoke at greatest length with Batista and Garcia, and arranged for Rambaudi to pick each of them up in his car.

By approximately 18:15, the defendant and his co-accused were together in Rambaudi's car. They discussed the Baxter-Jones accusations. There was consensus in the group that Baxter-Jones should be taught a lesson.

After just over an hour in the car, the defendant dialled Baxter-Jones' number on his phone, and handed the phone to Batista. The defendant and the other two co-accused were privy to the heated exchange that ensued between Baxter-Jones' and Batista, as the phone was on speaker. Batista threatened Baxter-Jones. Batista proposed Baxter-Jones meet the party near East Boundary Road Pools so they could "sort it out", and Baxter-Jones agreed. It was expected by both parties that this would involve a physical altercation. However, Batista directed Rambaudi to drive so that they would meet Baxter-Jones en route. The defendant understood that this was the party's intention.

The car carrying the defendant and his co-accused encountered Baxter-Jones on Centre Road, Carnegie. Rambaudi, on Batista's instruction, executed a u-turn and parked behind Baxter-Jones, who had pulled over after seeing Rambaudi outside 491 Centre Road. As Rambaudi slowed the car to a stop, Garcia, who was sitting beside Batista in the back seat, passed Batista one of three steak knives belonging to Rambaudi. Batista put the knife in his pocket. Batista spoke to the defendant and picked up a spray can from the car. The defendant was aware that Batista had armed himself with the knife and spray can, and understood that the former would be used to cause serious injury to Baxter-Jones.

Batista and Baxter-Jones got out of their respective cars and began to argue on the road. The defendant also got out of Rambaudi's car. Batista threw the spray can at Baxter-Jones. The can hit Baxter-Jones' shoulder, then fell to the ground. Baxter-Jones adopted a fighting stance and a fist-fight ensued. Batista and Baxter-Jones moved from the road to the nature strip. Baxter-Jones pushed Batista over the front fence of 491 Centre Road. It was here that Batista withdrew the steak knife from his pocket and stabbed Baxter-Jones in the chest, lacerating his lung and left ventricle of his heart. This was a very serious, life-threatening injury. In shock and oblivious to the stab wound, Baxter-Jones continued to struggle with Batista. The defendant grabbed Baxter-Jones by the neck and dragged him to the ground. When blood appeared on Baxter-Jones' chest, the fight ended. The defendant and the co-accused understood that Batista had stabbed Baxter-Jones with the steak knife. The parties returned to their respective cars and drove away.

In summary, the defendant facilitated the assembly of the co-accused for the purposes of exacting revenge against Baxter-Jones; he shared an understanding with Batista that Baxter-Jones would be "sorted out" by way of physical altercation, he shared an understanding with

Batista that Batista would use a knife in that physical altercation, knowing that use of the knife would cause serious injury; and by his presence at the crime scene demonstrated tacit support for that course of action.

II THE REAL ISSUES IN THE CASE

A Issues Unlikely to be in Dispute

There are a number of important facts that are unlikely to be disputed by the defendant at trial. First, the defendant is unlikely to dispute that Baxter-Jones was stabbed, and that the stab wound he suffered constituted a serious injury. The statement by Dr Ivan Dimitroff, a treating physician at the Alfred Hospital, places this fact beyond reasonable doubt.¹ Second, the defendant is unlikely to dispute that he and Batista were both present at the crime scene. The defendant's own admissions in this respect, corroborated by every other witness account, place this also beyond reasonable doubt.² Third, the defendant will not deny that he played an instrumental role in bringing the co-accused together on the afternoon of 16 December 2004. This is placed beyond reasonable doubt by the defendant's own admissions, which are supported by the record of calls made from the defendant's phone.³

B Issues Likely to be in Dispute

The issues likely to be in dispute at trial are those fundamental to a finding of guilt. To satisfy the court beyond reasonable doubt that the defendant is guilty of intentionally causing serious injury on the basis that he acted in concert with Batista, the prosecution must prove the following key factual propositions:

A. That Batista intentionally stabbed Baxter-Jones in the chest;

¹ Dimitroff, p53.

² Farina, p64; Baxter-Jones, p7; Rambaudi, p32; Bond, p11; Garcia, 38.

³ Farina, pp58-60; Call records, pp42-43.

- B. That Batista was not acting in self-defence when he stabbed Baxter-Jones; and
- C. That Batista and the defendant agreed that Batista should resolve the Baxter-Jones “issue” physically; and
- D. That Batista stabbing Baxter-Jones was in accordance with and furtherance of this agreement.

Each of these factual propositions, together with those issues not in dispute, must be proven for the Court is to be satisfied beyond reasonable doubt that the defendant acted in concert with Batista to cause serious injury to Baxter-Jones.

III PROVING THE FACTUAL PROPOSITIONS LIKELY TO BE CONTESTED

The following section will explain how the prosecution can prove its factual theory using the key factual propositions enumerated above and the evidence contained in the brief. An overview is provided in the table below:

- A. That Batista intentionally stabbed Baxter-Jones in the chest
 - 1. Baxter-Jones was stabbed during the fight with Batista
 - (a) Baxter-Jones was not injured before fighting Batista
 - (b) Baxter-Jones emerged from the fight with a stab wound to the chest
 - 2. Batista, and Batista only, had the opportunity to stab Baxter-Jones
 - (a) Batista had a knife in his possession while fighting with Baxter-Jones
 - (b) Batista was the only person close enough to Baxter-Jones to stab him in the chest

- (c) Batista emerged from the fight covered in Baxter-Jones' blood
 - (a) Batista emerged from the fight covered in blood
 - (b) Batista's injuries were not sufficiently serious to account for the quantity of blood on his shirt
 - (c) Batista and Baxter-Jones were the only persons bleeding
3. The knife in Batista's possession was the knife used to stab Baxter-Jones
- (a) The knife was not covered in blood before the fight
 - (b) The knife was covered in blood after the fight
 - (c) No other person is alleged to have been injured by the knife
 - (d) Baxter-Jones' injuries were consistent with being stabbed by the knife in Batista's possession
4. Batista wanted to cause injury to Baxter-Jones
- (a) Batista and his co-accused believed Baxter-Jones had named them in his report to police about a stolen car stereo
 - (b) Batista was angry about this accusation and threatened Baxter-Jones
 - (c) Batista intended that the accusation issue be sorted out in a violent altercation with Baxter-Jones
 - (d) Batista armed himself with a knife before meeting Baxter-Jones on Centre Road
 - (e) Batista used the knife in his fight with Baxter-Jones
5. Batista had a tendency to engage in violence with a weapon
- (a) Batista had been convicted of assault with a weapon
 - (b) Batista and his co-accused had a reputation for violence and the use of weapons

6. Batista and his co-accused understood that Batista had caused serious injury unlawfully

- (a) Batista disposed of his shirt and knife immediately after the incident
- (b) The defendant washed and hid his clothes
- (c) Batista sought to avoid police in Melbourne
- (d) Batista sought to flee the jurisdiction
- (e) The co-accused were concerned about Baxter-Jones' condition
- (f) Rambaudi made a full confession to police

B. That Batista was not acting in self-defence when he stabbed Baxter-Jones

1. Batista was not facing danger sufficiently serious to justify stabbing another person in self-defence

- (a) Batista was fighting one other person of roughly equal size
- (b) Baxter-Jones was unarmed

2. Batista and his co-accused were the aggressors

- (a) Batista suggested that the parties meet
- (b) Batista threatened Baxter-Jones
- (c) There was consensus among the co-accused that Baxter-Jones should be "slapped around" for the accusations he was making
- (d) Batista started the physical fight with Baxter-Jones

C. That Batista and the defendant agreed that Batista should resolve the Baxter Jones "issue" physically

1. The defendant facilitated the assembly of the co-accused for the purpose of resolving the Baxter Jones “issue”
 2. The defendant agreed that the group should take revenge on Baxter-Jones
 3. The defendant was aware of Batista’s history of armed assault
 4. The defendant knew that Batista had entered the fight with Baxter-Jones with a knife in his possession
 5. The defendant was present at the fight between Batista and Baxter-Jones
 6. The defendant became physically involved in the fight
- D. That Batista stabbing Baxter-Jones was in accordance with and furtherance of this agreement

A That Batista intentionally stabbed Baxter-Jones in the chest

1 Baxter-Jones was stabbed during his fight with Batista

(a) Baxter-Jones was not injured before fighting Batista

There is nothing in any of the witness accounts, nor anything in the statement tendered by attending physician Dr Ivan Dimitroff, to suggest that Baxter-Jones suffered injury prior to his fight with Batista. Baxter-Jones was in continuous company from soon after 18:00 to the time of the fight. Medical evidence indicates that Baxter-Jones would not have survived an injury as severe as the one he sustained had he not sought emergency treatment.⁴ That the injury was not pre-existing is beyond reasonable doubt.

(b) Baxter-Jones emerged from the fight with a stab wound to the chest

Witness statements by Bond and Rambaudi indicate that Baxter-Jones emerged from a wrestle or clinch with Batista over or near the fence with a large amount of blood on his

⁴ Dimitroff, p53.

clothes.⁵ It is expected that a wound of the type suffered by Baxter-Jones would cause significant bleeding, and it may be inferred that the stabbing wound he did suffer was the source of the blood. Indeed, there is no other explanation for the large quantity of blood on Baxter-Jones' clothes, nor that found at the crime scene.⁶

Bond and Rambaudi both state that Baxter-Jones appeared to be in shock at first, and oblivious to his injuries, but upon noticing the blood on the left side of his arm and chest realised he had been stabbed.⁷ Baxter-Jones said at that time, "I'm bleeding, I'm bleeding. I've been stabbed" while holding his left side.⁸ Baxter-Jones states that initially he felt okay but was worried about the blood he was losing.⁹

Both Bond and Baxter-Jones report that Baxter-Jones was having difficulty breathing and lost consciousness in the car.¹⁰ These symptoms are consistent with the lacerated lung and left chamber of the heart detected and repaired by surgeons at the Alfred Hospital, which in turn, in the opinion of Dimitroff, are injuries consistent with a stabbing to the left side of the chest.¹¹

2 Batista, and Batista only, had the opportunity to stab Baxter-Jones

(a) Batista had a knife in his possession while fighting with Baxter-Jones

In his witness statement, Rambaudi states that he saw Garcia hand Batista a steak knife before the altercation.¹² The knife belonged to a set of three, which were kept in the back of

⁵ Bond, p12; Rambaudi, p33; Garcia, p39.

⁶ Exhibit 3, Choi, p15.

⁷ Ibid.

⁸ Bond, p12.

⁹ Baxter-Jones, p8.

¹⁰ Bond, p12; Baxter-Jones, p8.

¹¹ Dimitroff, p53.

¹² Rambaudi, p32.

Rambaudi's driver's seat.¹³ This is consistent with Baxter-Jones' observation that Garcia passed "something" to Batista before Batista approached Baxter Jones.¹⁴

Baxter-Jones recalls seeing Batista pull a knife out of his pocket when Batista first approached, and later, seeing Batista point the knife at him, motioning for him to "get the fuck out of here".¹⁵

(b) *Batista was the only person close enough to Baxter-Jones to stab him in the chest*

The various witness accounts of the physical fight between Batista and Baxter-Jones place Batista within arm's reach of Baxter-Jones on at least two occasions: first, during an initial exchange of punches on the road;¹⁶ and second, following Baxter-Jones' tackle of Batista into and over the fence, and the exchange of punches and wrestling that followed.¹⁷ The witness statements in support of this second encounter are consistent with Batista's white cap being found behind the relevant part of the fence.¹⁸

Given the serious nature of the injury suffered by Baxter-Jones, it is unlikely he could have gone on fighting if stabbed during his first encounter with Batista. It can therefore be inferred that the stabbing occurred after this time.

On the second occasion, Bond observed Batista "sort of punching" Baxter-Jones "up under the left armpit where the rib cage is"... "using the side of his fist in a shanking motion".¹⁹

This is most likely the moment that Batista stabbed Baxter-Jones. There is agreement

¹³ Ibid.

¹⁴ Baxter-Jones, p7.

¹⁵ Baxter-Jones, pp7-8.

¹⁶ Baxter-Jones p7; Bond, p11; Rambaudi, p33; Garcia, p38; Farina, p69.

¹⁷ Baxter-Jones, p8; Bond p11-12; Garcia, p39; Farina, p57.

¹⁸ Exhibit 4: Choi, p15

¹⁹ Bond, p12.

between the witnesses that fighting continued briefly afterwards until the defendant intervened, separating Baxter-Jones from Batista.²⁰ That intervention involved grabbing Baxter-Jones around the neck from behind²¹ or, alternatively, pinning Baxter-Jones' arms behind his back.²² Neither scenario places the defendant or any other person in a position where he could have stabbed Baxter-Jones in the chest.

The witnesses have reported seeing blood on Baxter-Jones at this time²³ and exclamations by other witnesses as to his bloody state.²⁴ It may be inferred from the foregoing that Baxter-Jones was stabbed during his second physical encounter with Batista, and given Batista was the only person in close proximity to Baxter-Jones, that it was Baxter-Jones that stabbed him. This is further supported by the accounts of Rambaudi and the defendant, who recall a blood stain on the defendant's left sleeve.²⁵ From this it may be inferred that Baxter-Jones was already bleeding by the time the defendant intervened.

3 Batista emerged from the fight covered in Baxter-Jones' blood

(a) Batista emerged from the fight covered in blood

Bond and Rambaudi describe Batista as having a significant amount of blood on his hand and clothes following his fight with Baxter-Jones.²⁶ So soiled were his clothes that Batista was prompted to remove his shirt in the car and subsequently dispose of it in a garbage bin.²⁷ The consciousness of guilt that might be inferred from these actions is discussed later in the memorandum.

²⁰ Baxter-Jones, p8; Rambaudi, p33; Bond, p12; Farina, p77.

²¹ Baxter-Jones, p8; Farina, p77.

²² Bond, p12.

²³ Bond, p12; Rambaudi, p33.

²⁴ Garcia said, "Get off him, he got stabbed": Rambaudi, p33; Batista said, "He's bleeding, he's bleeding": Bond, p12; Baxter-Jones said, "I'm bleeding, I'm bleeding. I've been stabbed": Bond, p12.

²⁵ Rambaudi, p33; Farina, p75.

²⁶ Rambaudi, p33; Bond, p12.

²⁷ Rambaudi, p33; Garcia, p49.

(b) Batista's injuries were not sufficiently serious to account for the quantity of blood on his shirt

The report tendered by Dr Michael Hitchens of the Victorian Institute of Forensic Medicine indicates that Batista suffered a number of scratches and bruises in his fight with Baxter-Jones, as indicated by the marks and scab lesions Batista presented with upon examination on 22 December 2004.²⁸ In the doctor's opinion, the scabbed areas – the remnants of injuries most likely to have been the source of blood from Batista – were consistent with the removal of surface layers of skin, rather than deep cuts or gashes.²⁹ As the doctor examined Batista's entire body, it may be inferred that Batista suffered no injury during his fight with Baxter-Jones that caused him to bleed significantly. Thus, it may be further inferred that the significant amount of blood on Batista's shirt, following the fight, was not his own.

(c) Batista and Baxter-Jones was the only persons bleeding

There is nothing in any of the witness statements to suggest that any other person suffered injuries or bled for any reason at the scene. It having been concluded that the blood was not Batista's own, it can be therefore inferred that the blood on Batista was Baxter-Jones'.

4 The knife in Batista's possession was the knife used to stab Baxter Jones

(a) The knife was not covered in blood before the fight

There is nothing in any of the witness statements to suggest that the knife handed to Batista by Garcia before the fight was unclean.

²⁸ Hitchens, p50.

²⁹ Ibid.

(b) *The knife was covered in blood after the fight*

In his witness statement, Rambaudi describes Batista holding the same knife after the fight, then bloodied and wrapped in a white cloth or tissue.³⁰ Rambaudi's statement is supported by the finding of bloody tissue paper by police at the scene of the crime.³¹ Forensic analysis of that item, however, is required.

(c) *No other person is alleged to have been injured by the knife*

It may therefore be inferred that the blood on the knife belonged to Baxter-Jones.

(d) *Baxter-Jones' injuries were consistent with being stabbed by the knife in Batista's possession*

Rambaudi, the owner of the knife in Batista's possession, describes a steak knife with a 10 centimetre blade.³² This is consistent with medical evidence that suggests that Baxter-Jones was stabbed at least on one occasion with a knife matching that description.³³ This evidence further supports the conclusion drawn above.

5 Batista wanted to cause serious injury to Baxter-Jones

(a) *Batista and his co-accused believed Baxter-Jones had named them in his report to police about a stolen car stereo*

This is supported by all witness accounts, and follows Baxter-Jones reporting to police that his car stereo had been stolen on the evening of 11 December 2004, phone conversations

³⁰ Rambaudi, p33.

³¹ Exhibit 2: Choi, p14.

³² Rambaudi, p32.

³³ Weaver in interview with Farina, p88.

between Baxter-Jones, the defendant and Garcia, and multiple attempts by Baxter-Jones to speak with Batista.³⁴ Batista was aware that these events had taken place.³⁵

(b) Batista was angry about this accusation and threatened Baxter Jones

A phone call was made from the defendant's phone to Baxter-Jones at 19:26:52, during which discussion between Batista, to whom the defendant handed the phone, and Baxter-Jones became quickly heated, and insults were exchanged. Batista asked Baxter-Jones, "Why did you do this?" in apparent reference to the accusations of theft, and was heard to use such threats as, "You're a dead man walking" and "You're the living dead",³⁶ and words to the effect that heads would be "bashed and kicked in".³⁷ From these statements, it might be inferred that Batista intended to injure Baxter-Jones in an act of retaliation.

(c) Batista intended that the accusation issue be sorted out in a violent altercation with Baxter-Jones

Batista ended his call to Baxter-Jones with an invitation to meet at a car park on East Boundary Road to sort the issue out, "one on one".³⁸ Bond believed that a fight was inevitable; he called his friend, Harry, with news that "Baxter is going to punch on with Tony" and was concerned about his safety.³⁹ It might be inferred from the behaviours of Batista and Bond that there was a shared understanding that a physical altercation would occur. That the parties didn't meet is not fatal to this conclusion, as there is evidence that

³⁴ Phone records, p42; Baxter-Jones, p5.

³⁵ Garcia, p38.

³⁶ Bond, p10; Rambaudi p32.

³⁷ Garcia, p38.

³⁸ Garcia, p38; Bond, p10; Baxter-Jones, p6; Rambaudi, p32; Farina, pp64-66.

³⁹ Bond, p10.

Batista directing Rambaudi to intercept Baxter-Jones en route.⁴⁰ The defendant, when questioned, agreed that it was pre-planned to meet Baxter-Jones' car on Centre Road.⁴¹

(d) Batista armed himself with a knife before meeting Baxter-Jones on Centre Road

It is widely known that use of a sharp knife against another person in a fight will result in serious injury. It may be inferred from Batista's decision to carry a knife into a situation in which a fight was likely to precipitate that he was willing to cause Baxter-Jones serious injury.

(e) Batista used the knife in his fight with Baxter-Jones

Having concluded that Batista did stab Baxter-Jones in the chest in the context of a pre-planned, physical altercation, and having regard to the vital area of the body targeted by Batista,⁴² it may be inferred that Batista intended to cause serious injury to Baxter-Jones.

6 Batista had a tendency to engage in violence with a weapon

(a) Batista had been convicted for assault with a weapon

The defendant agreed during his interview with police that he had been convicted of assault in company and assault with a weapon in July 2004.⁴³ The convictions related to an incident in which Batista was also involved and for which, presumably, he was also convicted. From this, and the generalisation that persons who have committed armed assault are more likely to do so in the future, it may be inferred that Batista has a tendency to intentionally engage in violence with a weapon.

⁴⁰ Rambaudi, p32; Farina, pp64-66.

⁴¹ Farina, p64.

⁴² Dimitroff, p53.

⁴³ Farina, p96.

(b) Batista and his co-accused had a reputation for violence and the use of weapons

This is supported by Bond's witness statement, in which Bond recalls feeling "worried" before meeting with the Batista and his co-accused, due to his belief that "they use weapons and things like that."⁴⁴ As weapons, in an assault context, are generally used to cause injury to others, it may be inferred that Batista had a tendency to intentionally cause injury.

7 Batista and his co-accused understood that Batista had caused serious injury unlawfully

(a) Batista disposed of his shirt and knife immediately after the incident

Rambaudi and Garcia agree that Batista removed his shirt in the car.⁴⁵ Rambaudi provides evidence in both his witness statement and interview with police that Batista disposed of his bloodied shirt and the knife used in the stabbing of Baxter-Jones in a wheelie bin in the vicinity of 12 Rica Street, Moorabbin, being careful to conceal both items beneath a garbage bag.⁴⁶ Generally, people do not dispose of clothing or other reusable items in the manner in which Batista did unless they are seeking to hide something. Thus, it may be inferred that Batista sought to conceal the evidence of his crime of intentionally causing serious injury to Baxter-Jones. This is indicative of a guilty conscience.

(b) The defendant washed and hid his clothes

Upon searching the defendant's room, police discovered a wet long-sleeved red t-shirt and blue shirt, clothing the defendant admitted wearing on the night in question, tied in a plastic bag, and wet jeans hanging in his wardrobe, with a belt attached.⁴⁷ Police observed, and the defendant admitted in police interview, that he had hand-washed the clothes upon returning

⁴⁴ Bond, p20.

⁴⁵ Rambaudi, p33; Garcia, p49.

⁴⁶ Rambaudi, 34; Choi, p24.

⁴⁷ Exhibit 1 & Exhibit 2: Choi, p20; Farina, pp93-94.

home from the fight.⁴⁸ Washing clothes is not an activity the defendant usually engaged in, as the defendant's mother usually washed his clothes. Placing wet shirts in a plastic bag is highly unusual behaviour for any person, it being generally known that clothes will not dry under such conditions. It may be inferred from Farina's actions that he was seeking to conceal his involvement in the stabbing by removing Baxter-Jones' blood from his shirt and concealing from his mother and others that he had done so. This inference is supported by Rambaudi's statement that Farina had "some blood" on his shirt following the fight.⁴⁹

(c) Batista sought to avoid police in Melbourne

Batista was not at home when police arrived to arrest him the morning after the event, and it appeared Batista had not slept in his room.⁵⁰ That Batista avoided going home so as to evade the police is supported by Rambaudi, who provides evidence that Batista, after learning that a police car had driven by his home in Cheltenham, arranged to meet his mother at their new house in Bentleigh, and indicated he would stay there until things were "sorted".⁵¹ Rambaudi reports that Batista and his co-accused were wary of police on the road. As people who do not believe they have committed a crime are generally not concerned about speaking to police, it may be inferred that Batista's actions were motivated by a consciousness of guilt.

Further, Batista refused to describe the evening's events to his mother over the phone.⁵² From this it may be inferred that Batista feared detection by police, which is consistent with the proposition that he suffered a guilty conscience.

⁴⁸ Farina, pp94-95.

⁴⁹ Rambaudi, p33.

⁵⁰ Choi, p19.

⁵¹ Rambaudi, p35.

⁵² Ibid.

Batista's concern about avoiding detection explains the multiple unanswered calls he made from Corbinelli's phone to Garcia and Rambaudi's phones the morning after the incident.⁵³ That Batista made these calls may be inferred from the fact that Garcia and Rambaudi were his friends, and Batista had access to his mother's phone while staying with her in Bentleigh. As call records indicate that Batista's phone had been in operation the day prior,⁵⁴ it may be inferred that Batista opted to use his mother's phone, rather than his own, in order to avoid detection.

(d) *Batista sought to flee the jurisdiction*

Relevantly, Rosa Corbinelli, Batista's mother, has been charged as an accessory after the fact, on the basis that she assisted Batista in his efforts to leave the jurisdiction.⁵⁵ Corbinelli understood that a warrant had been issued for Batista's arrest, and had agreed to present Batista for police interview on 19 December 2004. As Batista was residing with Corbinelli in Bentleigh, it may be inferred that Batista was also aware that he was wanted by police.

Later, Batista was detected at Sydney Airport with a ticket to Bangkok, and an onward ticket to Rome.⁵⁶ Given his knowledge that a warrant had been issued for his arrest, it may be inferred that Batista was seeking to evade arrest by travelling overseas. Batista's two Italian passports, subsequently discovered by police at Corbinelli's home,⁵⁷ support this inference, as they would have better enabled Batista to avoid detection by Australian immigration authorities.⁵⁸ That travel was arranged so quickly after the incident involving Baxter-Jones, as evidenced by calls made to European Travel Agency in the 24 hours that followed, further supports the inference.

⁵³ Call records, p45.

⁵⁴ Call records, p43.

⁵⁵ Instructions to Counsel, *R v Farina*.

⁵⁶ Choi, p26.

⁵⁷ Exhibit 3 & 4: Choi, p29.

⁵⁸ Choi, p21.

It may be further inferred from Corbinelli signing for and removing Batista's personal belongings, before they could be examined by investigators, that Batista and Corbinelli were conscious that their plan would be discovered by police.⁵⁹

(e) The co-accused were concerned about Baxter-Jones' condition

Multiple phone calls were made by the co-accused – to Stella George at 20:56:20 and 22:38:19, to Max Baxter-Jones at 22:55:55, 01:42:42 and 02:01:58, to David Baxter-Jones at 01:20:04 and 01:35:38 – in the hours following the incident.⁶⁰ Witness statements by the defendant, Garcia and Rambaudi all indicate that these calls were made to ascertain Baxter-Jones' condition. As some of the calls were made while Batista and all co-accused were present, it may be inferred that each of them understood that Batista had caused Baxter-Jones injuries sufficiently serious to warrant ambulance attendance and hospitalisation.

Comments made by Batista and the co-accused in the car following the incident indicate a similar awareness that Batista had caused Baxter-Jones serious injury.⁶¹ Given these and other circumstances already mentioned, the denial of knowledge by the defendant during police interview is incredible and renders those aspects of his statement unreliable.

(f) Rambaudi made a full confession to police

From this it may be inferred that Rambaudi believed any case against Batista would be so strong that confessing to police the extent of his involvement would be in his best interests. States Rambaudi: "I have told the police what happened because I don't want to spend my

⁵⁹ Ibid.

⁶⁰ Call records, pp43-44.

⁶¹ Batista said, "He'll be going to the hospital": Rambaudi, p33; Batista said, "I hope Baxter's alright. What have I done to him?": Garcia, p40.

life in prison for something I didn't do.”⁶² The act of confession, as well as the confession's content, which is used as evidence throughout, strongly supports the proposition that Batista intentionally caused serious injury to Baxter-Jones.

B That Batista was not acting in self-defence when he stabbed Baxter-Jones

1 Batista was not facing danger sufficiently serious to justify stabbing another person in self-defence

(a) Batista was fighting one other person of roughly equal size

The defendant agrees that Batista and Baxter-Jones began the fight “on equal footing”, as they were both “big blokes of the same size”.⁶³ There is no evidence to suggest that any other person would join Baxter-Jones in the fight; in fact, the boys in Batista's party outnumbered the boys in Baxter-Jones' party 2:1.⁶⁴ Further, descriptions of the fight by witnesses indicate that Batista and Baxter-Jones appeared to be evenly matched, with each delivering and receiving blows, and wrestling together.⁶⁵

(b) Baxter-Jones was unarmed

There is no evidence to suggest that Baxter-Jones was carrying a knife or any other weapon such as might warrant the self-defensive use of a knife by Batista.

2 Batista and his co-accused were the aggressors

(a) Batista suggested that the parties meet

Evidence supporting this proposition is discussed in A5(c). From this, together with the surrounding circumstances, it may be inferred that Batista always intended for the encounter

⁶² Rambaudi, p34.

⁶³ Farina, p70.

⁶⁴ Consistent with the statements of all witnesses.

⁶⁵ Baxter-Jones, pp7-8; Bond, pp11-12; Rambaudi, p33; Garcia, p38; Farina, p69.

between him at Baxter-Jones to be violent. On this basis, it may be further inferred that Batista's carrying and use of the knife against Baxter-Jones was pre-meditated, and not a self-defensive measure taken in response to some previously unforeseen danger.

(b) *Batista threatened Baxter-Jones*

Evidence for this proposition is set out in A5(b). The threats Batista was heard to have made are consistent with his subsequent use of the knife against Baxter-Jones. From this it may be similarly inferred that Batista intended to use the knife against Baxter-Jones, and did not do so in self-defence.

(c) *There was consensus among the co-accused that Baxter-Jones should be "slapped around" for the accusations he was making*

Rimbaudi provides evidence that as much was said by Garcia and the defendant, that Batista had threatened Baxter-Jones with violence and that he followed Batista's instructions such that the party intercepted Baxter-Jones and his friends en route to the car park.⁶⁶ Violence towards Baxter-Jones was intended by Batista and the co-accused; Batista's actions were pre-meditated and were not executed in self-defence.

(d) *Batista started the physical fight with Baxter-Jones*

Of the five witness accounts available, three⁶⁷ agree that Batista threw the first punch of the fight, and a fourth⁶⁸ could not say which of the two hit first. From this, and the consensus between the witnesses that Batista threw "something" – probably a spray-can⁶⁹ – at Baxter-

⁶⁶ Rimbaudi, p31.

⁶⁷ Baxter-Jones, p7; Bond, p11; Rimbaudi, p33.

⁶⁸ Farina, p69.

⁶⁹ A spray can was found at the scene, Exhibit 1: Choi, p14.

Jones before the fight began,⁷⁰ it may be concluded that Batista began the physical fight with Baxter-Jones. The incident is not one capable of being described as an attack on Batista, which warranted the use of a knife in self-defence. Rather, the incident was instigated by him, and came to an end after he stabbed Baxter-Jones in the chest.

C That Batista and the defendant agreed that Batista should resolve the Baxter-Jones issue physically

1 The defendant facilitated the assembly of the co-accused for the purpose of resolving the Baxter Jones "issue"

On 16 December 2004, the defendant called Batista and each of his co-accused to arrange for them to discuss Baxter-Jones.⁷¹ The defendant and Batista both believed that Baxter-Jones had named them in his report to police about the theft of his car stereo. Evidence of this shared belief is found in Rambaudi and Baxter-Jones' statements.⁷² The defendant spoke at greatest length with Batista, to whom Baxter-Jones had made multiple phone calls, and Garcia, who had spoken with Baxter-Jones twice that morning.⁷³ Witness statements confirm that these calls were – or in the case of the unanswered calls to Batista, intended to be – in relation to Baxter-Jones' stolen stereo.⁷⁴ The defendant also admits receiving calls from Baxter-Jones, who told him the police would intervene in the matter of the stolen stereo if the defendant did not confess.⁷⁵ From this it may be inferred that the defendant understood well the animosity felt by the group towards Baxter-Jones and the purpose of their gathering. The defendant arranged for Rambaudi to pick each of them up in his car.⁷⁶

⁷⁰ Baxter-Jones, p7; Bond, p11; Rambaudi, p33; Garcia, p39; Farina, p66.

⁷¹ Call records pp42-43.

⁷² Baxter-Jones, p6; Rambaudi, p31.

⁷³ Baxter-Jones, p5; Call records, p42.

⁷⁴ Baxter-Jones, p5; Garcia, p37.

⁷⁵ Farina, p61.

⁷⁶ Rambaudi, p31; Garcia, p38; Farina, pp58-60; Call records, pp42-43.

2 The defendant agreed that the group should take revenge on Baxter-Jones

By approximately 18:15, the defendant, Batista and their co-accused were together in Rambaudi's car.⁷⁷ They discussed the Baxter-Jones accusations; indeed this was a purpose of their getting together.⁷⁸ There was consensus in the group that Baxter-Jones should be taught a lesson. This is supported by the evidence explored in B2(c). Specifically, the defendant was heard to say that Baxter-Jones had "fucked up" by implicating his friends, and that he would be slapped around for it.⁷⁹ Further, the defendant was present for the phone call made by Batista to Baxter-Jones, during which Batista made threats of violence against Baxter-Jones.⁸⁰ The defendant denies knowing the content of the conversation between Batista and Baxter-Jones or hearing those threats being made, however this is inconsistent with the more credible account provided by Rambaudi, who says the phone was on speaker, and Garcia, who reports Batista making threats in a raised voice. Given the confined space of the car, it may be inferred that the defendant was aware that those threats had been made.

3 The defendant was aware of Batista's history of armed assault

As per A6(a), the defendant agreed during his interview with police that he had been convicted of assault in company and assault with a weapon in July 2007.⁸¹ The convictions related to an incident in which Batista was also involved, apparently as the principal offender.⁸² As Batista and the defendant had co-offended in the past, it may be inferred that the defendant understood well Batista's tendency to engage in offending behaviour, and that it was likely – if not intended – that Batista, given the circumstances, was likely to engage in

⁷⁷ Call records, p43; Farina, p60.

⁷⁸ Rambaudi, p31.

⁷⁹ Rambaudi, p31.

⁸⁰ See A5(b).

⁸¹ Farina, p96.

⁸² Ibid.

such conduct on this occasion. Any claim by the defendant that he was ignorant of this possibility is without foundation.

4 The defendant knew that Batista had entered the fight with Baxter-Jones with a knife in his possession

That Garcia handed Batista a steak knife before Batista met with Baxter-Jones on Centre Road is established by the evidence set out in A2(a). Despite on-the-record denials by Garcia and the defendant,⁸³ (who may be discredited on grounds that their statements diverge irreconcilably from those of other witnesses) it is very unlikely that the defendant was not aware that this had occurred. That the defendant was privy to Batista taking possession of the knife can be inferred from the confined space in which the defendant and his co-accused were sitting, and the extent to which each man was involved in preparation for the encounter. From this knowledge, taken together with the defendant's knowledge that a fight was to take place and Batista's tendency to violence, it may be further inferred that the defendant, at a minimum, tacitly endorsed Batista taking the knife into his possession, knowing full well that it was possible he would use it.

5 The defendant was present at the fight between Batista and Baxter-Jones

This is a fact that is beyond doubt. It may be inferred from the defendant's presence at the scene that he endorsed the course of action adopted by Batista, particularly given the circumstances described above.

6 The defendant became physically involved in the fight

As per the evidence presented in A2(b), the defendant physically intervened in the fight between Batista and Baxter-Jones, restraining Baxter Jones and therefore advantaging

⁸³ Garcia; p41.

Batista.⁸⁴ It may be inferred from the defendant's actions that he was loyal to and aligned with Batista.

D That Batista stabbing Baxter-Jones was in accordance with and furtherance of this agreement

The evidence set out above similarly supports the proposition that Batista stabbing Baxter-Jones was carried out in accordance with, and in furtherance to, the agreement between the defendant and Batista.

The defendant and Batista agreed that Batista should resolve the Baxter-Jones "issue" by fighting Baxter-Jones. It may be implied by the circumstances that the defendant was aware that fighting, for Batista, could involve the use of weapons. He nevertheless endorsed – through his speech and by his presence – this course of action.

Ultimately, Batista did stab Baxter-Jones, a result that should have been reasonably foreseeable by the defendant.

IV ADMISSIBILITY

The defendant – together with his co-accused – has been committed to stand trial in the County Court of Victoria in August 2009. This part of the memorandum concerns whether the evidence relied upon to prove the factual propositions likely to be contested at trial will be lawfully available to the prosecution.

⁸⁴ Baxter-Jones, p8; Farina, p77; Bond, p12.

The following analysis proceeds on the assumption that the *Evidence Act 2008* (Vic) (“the Evidence Act”) is in force and that questions of admissibility will be resolved by reference to the relevant provisions. The analysis will concern only those items of evidence for which admissibility questions are likely to arise, and will be performed systematically, addressing those items of evidence – or where appropriate, clusters of items of evidence – in a similar order to that in which they are utilised in the argument set out above.

A Opinion evidence contained in the statement by Dr Dimitroff

Dr Dimitroff’s statement contains two expressions of opinion utilised as evidence in the prosecution’s argument:

1. That “[Baxter-Jones] was saved due to timely examination and urgent life saving surgery... Patient is lucky to survive.”⁸⁵
2. That the “[laceration of lung and left ventricle of the heart] are consistent with a sharp penetrating injury to very vital area of chest”

The relevance of both expressions of opinion is clear: the first is relevant to the probability that Baxter-Jones was stabbed during his fight with Batista, and the second is relevant to the probability that Baxter-Jones was stabbed using the knife in Batista’s possession. It is for these purposes that the prosecution would seek to have Dr Dimitroff’s statement admitted into evidence.

Evidence of an opinion, however, is generally not admissible to prove the existence of fact, where the opinion expressed is that such a fact exists,⁸⁶ as is the case with Dr Dimitroff’s statement. An exception exists to this rule exists, however, where the person expressing that

⁸⁵ Dimitroff, p53.

⁸⁶ *Evidence Act 2008* (Vic) s 76.

opinion has specialised knowledge based on his or her training, study or experience, and the opinion is wholly or substantially based on that knowledge.⁸⁷ Objection may be taken to Dr Dimitroff's statement on grounds that his specialised knowledge is limited to general medicine and surgery, and in particular does not extend to forensic medicine. He is not qualified, the defence might argue, to draw conclusions as to the cause of Baxter-Jones' injury, nor the likelihood that Baxter-Jones would have died from that injury had emergency surgery not been performed.

These objections are easily rebutted. First, Dr Dimitroff does not make any definitive statement as the cause of Baxter-Jones' injuries, only that they are *consistent* with the stabbing wound alleged. As a surgeon, understanding well the anatomy of the human body and the causes and consequences of interference with it, Dimitroff is qualified to arrive at the opinion expressed; it falls easily within his scope of specialised knowledge. The same argument can be put in relation to Dimitroff's second claim. Both are likely to be admitted into evidence.

B Contemporaneous statements by witnesses in relation to Baxter-Jones' apparent injuries

Two witness statements contain evidence that Garcia, Batista and Baxter-Jones each spoke words indicating that they believed Baxter-Jones had been stabbed and/ or was bleeding:

1. "Get off him he got stabbed he got stabbed": Garcia, reported by Rambaudi;⁸⁸
2. "He's bleeding, he's bleeding": Batista, reported by Bond;⁸⁹
3. "I'm bleeding, I'm bleeding. I've been stabbed": Baxter-Jones, reported by Bond.⁹⁰

⁸⁷ *Evidence Act 2008* (Vic) s 79(1).

⁸⁸ Rambaudi, p33.

⁸⁹ Bond, p12.

⁹⁰ *Ibid.*

These reported comments are relevant to the probability that Baxter-Jones emerged from his fight with Batista with a stab wound, and in turn the inference that Batista stabbed Baxter-Jones during the pair's altercation. It is for this purpose that the prosecution would seek to have these statements admitted into evidence.

Objection may be taken to evidence of these statements on grounds that it is hearsay. Evidence of a previous representation made by a person is generally not admissible to prove the existence of fact that the person intended to assert by the representation.⁹¹ There can be no argument that each of the statements – each a previous representation made by a witness as to the existence of a state of affair – is not hearsay.

An exception to this general rule is made in criminal proceedings where the person who made the representation is available to give evidence about the fact.⁹² The hearsay rule does not apply to evidence given by the person making that representation, or another person who heard the representation being made, if at the time the representation was made the occurrence of the relevant fact was fresh in the mind of the person making the representation.⁹³ This latter element is satisfied by each of the statements, which were made contemporaneously to the appearance of the phenomena that motivated them.

As Garcia is expected to give evidence at trial, representation 1 above will be admitted under the s 66(2)(b) exception. It should be noted, however, that if Garcia's testimony is consistent with his written statement, he is likely to deny totally that he made the representation, or deny that it reflected his belief that Baxter-Jones had been stabbed.

⁹¹ *Evidence Act 2008* (Vic) s 59.

⁹² *Evidence Act 2008* (Vic) s 66(1).

⁹³ *Evidence Act 2008* (Vic) s 66(2).

As Baxter-Jones is also expected to give evidence at trial, Representation 3 will be admissible under the s 66(2)(b) exception and will likely to be corroborated by Baxter-Jones. That corroboration will also be admissible by virtue of the s 66(2)(a) exception.

It is presently not clear whether Batista will be called to give evidence at trial. Representation 2 will only be admissible under the s 66(2)(b) exception if this occurs.

Another exception to the hearsay rule is made in criminal proceedings where the person who made the representation is not available to give evidence, but where evidence is given by the person who heard the representation being made, and the representation was made *at the same time as* or shortly after the asserted fact occurred and in circumstances that suggest it is unlikely to have been fabricated.⁹⁴ Each of these elements is satisfied in the case of Representation 2, a statement that Bond heard Batista make upon noticing the blood on Baxter-Jones in the immediate aftermath of their altercation. Thus, if Batista is not called to give evidence, Representation 2 will be likely to be admitted under the s 65(2)(b) exception.

Objection might also be made to the inclusion of Representations 1 and 3 on grounds that they constitute evidence of an opinion – the opinion that Baxter Jones had been stabbed. The opinion rule, however, does not apply to evidence of an opinion expressed by a person if the opinion is based on what that person saw, heard or otherwise perceived, and evidence is necessary to gain an adequate account or understanding of the person's perception of the matter or event about which the opinion was expressed.⁹⁵ Given the short time frame over which the altercation between Batista and Baxter-Jones occurred, the representations are

⁹⁴ *Evidence Act 2008* (Vic) ss 65(1) & 2(b).

⁹⁵ *Evidence Act 1998* (Vic) s 78.

fundamental to piecing together what occurred on the evening in question from the perspective of each witness. The representations are therefore likely to be admitted.

C Opinion evidence contained in the statement by Dr Hitchens

Dr Hitchens' statement contains an expression of opinion relied upon as evidence in the prosecution's argument: he states that the "scabbed areas [observed by him on Batista's right wrist, lower abdomen and left knee] had an appearance suggesting the removal of surface layers of skin."⁹⁶

Dr Hitchens' statement is relevant to the probability that the large quantity of blood observed on Batista's shirt in the immediate aftermath of his fight with Baxter-Jones was not his own, and in turn the inference that the blood was Baxter-Jones'. It is for this purpose that the prosecution would seek to have Dr Hitchens' report admitted into evidence.

It is unlikely to be successfully argued by the defence that Dr Hitchens' opinion is not wholly or substantially based on his specialised knowledge as an experienced forensic physician. This item of evidence is likely to be admitted.

D Accounts of threats made by Batista

Four witness statements contain consistent evidence that Batista verbally threatened Baxter-Jones during their phone call, prior to the fight:

1. "You are digging your own grave" ... "You're a dead man walking" ... "I'm going to come and stab you, I'm going to fucking kill you": Batista, reported by Baxter-Jones;
2. Words to the effect that "heads would be bashed and kicked in": Batista, reported by Garcia;

⁹⁶ Hitchens, p51.

3. “You’re a dead man walking” ... “I’m going to stab you”: Batista, reported by Bond;
4. “You’re living dead” ... “You’re dead man walking” and words to the effect that he was going to stab Baxter-Jones: Batista, reported by Rambaudi.

Objection may be taken to evidence of these statements on grounds that they are hearsay. However, while each statement is a previous representation made by a person, it is not clear that the person – Batista – intended to assert the existence of particular facts in making them.

Even if it is determined that Batista did so intend, and that the statements are in fact hearsay, they will nevertheless be admissible on grounds that they are relevant for a non-hearsay purpose.⁹⁷ The representations are relevant to the probability that there was a shared understanding between Batista, the defendant and the other co-accused as to Batista’s state of mind with respect to Baxter-Jones, and the inference that there was agreement that Batista should resolve the Baxter-Jones “issue” physically. In other words, it is the fact that these words were spoken by Batista, not the truth of those words, which are most relevant to the prosecution’s case.

The representations are also relevant to the credibility of the defendant, the only witness to deny hearing that Batista threatened Baxter-Jones. That three witnesses are in almost total agreement as to the words spoken by Batista, and a fourth recalls words being said that were of similar effect, is damaging to the defendant’s credibility. As the defendant makes a number of statements during his interview with police that are inconsistent with the prosecution’s factual theory, undermining the defendant’s credibility is critical to the case.

This evidence is likely to be admissible.

⁹⁷ *Evidence Act 2008 (Vic)* s 60.

E Bond's statement: "Baxter is going to punch on with Tony"

Objection may be taken to evidence that Bond reported the prospective fight between Batista and Baxter-Jones to his friend, Harry, on grounds that it is hearsay.

If Bond is called to give evidence, the statement may be admitted under the exception provided by 66(2)(a), as the representation was made by Bond himself in circumstances where the asserted fact – that Baxter-Jones was planning to fight with Batista – was contemporaneously observed by him. If the Court takes the view that Bond's statement concerns second-hand, rather than first-hand hearsay, however, the exception will not be available.⁹⁸

Bond's statement is relevant to the probability that Batista and Baxter-Jones had unambiguously agreed to resolve their disagreement physically, and thus the inference that the defendant had an understanding with Batista that this was intended to occur. That the prosecution is seeking to admit this item for a non-hearsay purpose means that the hearsay rule does not apply to it, and may be ruled admissible. If admitted for this non-hearsay purpose, Bond's evidence may also be used for other purposes, such as proof of the assertion that Baxter-Jones planned to fight Batista. The argument is highly nuanced, but is reasonably likely to be accepted by the Court.

F Police interview with the defendant

Objection may be taken to the transcript of interview with the defendant on grounds that the evidence contained therein was improperly obtained.⁹⁹ The impropriety likely to be alleged

⁹⁸ *Evidence Act 2008 (Vic)* s 62.

⁹⁹ *Evidence Act 2008*, s 138.

is that police, contrary to the requirement in s 464C of the *Crimes Act 1958* (Vic), did not defer Farina's interview until such time as he was able to contact a friend or relative to inform that person of his whereabouts.

This may be rebutted in two ways. First, the provision of the Crimes Act upon which the defence would rely confers on the investigating official discretion to commence interviewing immediately when the official believes on reasonable grounds that communication between the interviewee and his nominated friend or relative would result in the fabrication or destruction of evidence.¹⁰⁰ Indeed, it was the 'destruction of evidence' explanation Detective Senior Constable Weaver gave the defendant.¹⁰¹ The defendant asking to call "a friend", who he was reluctant to name, in circumstances where up to eight of his friends were witnesses to the incident about which he was to be interviewed is likely to be deemed "reasonable grounds" for the purposes of s 464C. The defence may argue that, even accepting that reasonable grounds existed to deny the defendant contact with a friend, Weaver did not then permit the defendant to contact an alternative person – a relative, for example – before interviewing commenced. This may be persuasive on the Court.

However, even if the Court takes issue with the propriety of the interview, it remains within the Court's discretion to admit the evidence if the desirability of doing so outweighs the undesirability of admitting evidence obtained in contravention of s 464C.¹⁰² Given the serious nature of the offence with which the defendant and his co-accused have been charged, the probative value of the evidence and the procedural nature of the impropriety alleged, the evidence may be ruled admissible. However, this should not be relied upon.

¹⁰⁰ *Crimes Act 1958* (Vic) s 464C(1)(c).

¹⁰¹ Farina, p55.

¹⁰² *Evidence Act 2008* (Vic) s 138(1).

G Prior charges and convictions

The defendant provides evidence that both he and Batista were convicted of assault in company and assault using a weapon in August 2004. This is relevant to the probability that Batista had a tendency to engage in violence with a weapon; the defendant knew of this tendency in Batista; and the accuracy of the inference that the defendant understood that Batista was likely to use a weapon in his fight with Baxter-Jones.

Objection is likely to be raised in respect of this evidence on two grounds:

1. Evidence of a tendency in a person is *prima facie* not admissible to prove that a person has that tendency;¹⁰³
2. In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.¹⁰⁴

In response to the first objection, the prosecution may successfully argue that the evidence of the prior convictions has both significant convergent and conjunctive probative value. Alone, the evidence supports the proposition that Batista had a tendency to engage in violence with a weapon and that the defendant was aware of this tendency; when combined with other evidence, it supports the proposition the defendant understood that Batista was likely to use a weapon in his fight with Baxter-Jones. It being within the discretion of the court to rule the evidence admissible on this basis, the evidence may be admitted. If the prosecution intends to lead this evidence, it is required to give reasonable notice to all other parties as to its intent.

¹⁰³ *Evidence Act 2008* (Vic) s 97(1).

¹⁰⁴ *Evidence Act 2008* (Vic) s 137.

In the alternative, the prosecution may argue that the purpose of leading the evidence is not to prove Batista's tendency, but the defendant's knowledge of it. However, given that the four accused will be tried jointly, the Court is unlikely to accept the distinction. Unlike the law in relation to hearsay, tendency evidence admitted for a non-tendency purpose may not then be lead to prove tendency in a person.

The distinction may be more readily accepted in respect of evidence that the defendant had been charged with theft from a motor vehicle, it being relevant to the probability that Baxter-Jones had reasonable grounds to believe that the defendant and his friends were involved in the theft of car stereo, and incapable of implicating any other person on trial. Evidence that Rosa Corbinelli has been charged as an accessory after the fact might also be admissible on similar grounds.

In respect of the convictions, the second objection is likely to prevail in the circumstances. Evidence of prior offending for the purposes of proving a tendency to offend is likely to be ruled inadmissible on grounds that it is highly prejudicial – that is, that its probative value is outweighed by the danger of unfair prejudice to the defendant¹⁰⁵ – to the cases of both the defendant and Batista. That the defendant was a juvenile at the time he was convicted¹⁰⁶ lends even greater weight to that outcome.

The prosecution may seek to argue that the probative value of the evidence is such that exclusion of it would undermine the prosecution's case against the defendant. This, however, is unlikely to persuade the Court.

¹⁰⁵ *Evidence Act 2008* (Vic) s 137.

¹⁰⁶ Farina, pp55 & 96.

H *Reputation of Batista and the co-accused*

In his witness statement, Bond reports feeling “really worried” about meeting Batista and the co-accused due to his belief that “these guys ... don’t use fists, they use weapons and things like that.” This evidence is again relevant to the probability that Batista had a tendency to engage in violence with a weapon; the defendant knew of this tendency in Batista; and the accuracy of the inference that the defendant understood that Batista was likely to use a weapon in his fight with Baxter-Jones.

Objection will be raised to this evidence on grounds that it is evidence of an opinion, and falls outside the exceptions to the opinion rule; that it is hearsay, and falls outside the exceptions to the hearsay rule; that it is evidence of tendency, and falls outside the exceptions to the tendency rule; and that its probative value is outweighed by its prejudicial effect. It can be reasonably concluded that this item will be ruled inadmissible.

I *Batista’s refusal to describe events on the phone*

There is evidence in Rambaudi witness statement that Batista would not describe the events involving Baxter-Jones over the phone to his mother. This is relevant to the inference that Batista was conscious of his guilt and feared detection by police.

Objection may be raised on grounds that this evidence falls foul of the hearsay rule, that it concerns previous representations made by Batista relating to facts – here, his unwillingness to tell his story over the phone – the existence of which he intended to communicate to his mother. It is not the *content* of Batista’s phone conversation with Corbinelli that interests the prosecution as much as Batista’s conduct, that is, his reluctance to engage in

conversation with his mother. The Court is likely to rule the evidence admissible on grounds that the prosecution seeks to have it admitted for a non-hearsay purpose.¹⁰⁷

J Evidence of statements made by Batista and the co-accused after the incident

Two witness statements provide evidence that Batista was conscious of the injury Baxter-Jones had suffered:

1. “He’ll be going to the hospital”: Garcia, reported by Rambaudi;¹⁰⁸ and
2. “I hope Baxter’s alright. What have I done to him?”: Batista, reported by Garcia.¹⁰⁹

As per the discussion above, any objection to this evidence on grounds that it is hearsay will be unsuccessful, as it will have significantly greater probative value to the prosecution’s case if admitted for a non-hearsay purpose. This is evidence that goes to Batista’s awareness of Baxter-Jones’ injuries in the immediate aftermath of their altercation, rather than the truth of the proposition that Baxter-Jones was on his way to hospital. It is likely to be ruled admissible.

V LIKELIHOOD OF CONVICTION

The case against Batista is strong. The evidence in the brief permits no explanation for the stabbing injury suffered by Baxter-Jones other than that put forward by the prosecution. Batista is very likely to be convicted of intentionally causing serious injury to Baxter-Jones.

The case against the defendant is less strong, and will be likely to turn on whether the evidence pertaining to Batista’s tendency to and reputation for violence is ruled admissible.

¹⁰⁷ *Evidence Act 2008* (Vic) s 60.

¹⁰⁸ Rambaudi, p33.

¹⁰⁹ Garcia, p40.

Given that this is unlikely, a conviction for intentionally causing serious injury (on the basis of the doctrine of acting in concert) is unlikely to be secured against the defendant.