R v Farina

Advice to

DPP

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1. Factual Theory

At about 7.40pm on 16 December, 2004, David Baxter-Jones was involved in a fight with Tony Batista. This fight was planned by Batista, Sal Farina and others. Batista was armed with a knife and he stabbed Baxter-Jones, inflicting life-threatening injury. Farina was a willing participant in the planning and was actively involved, in a supporting role, in the subsequent fight.

2. Real Issues

The prosecution will seek to demonstrate beyond reasonable doubt that:

1. Batista caused serious injury to Baxter-Jones
2. Batista did so intentionally
3. Batista did so without lawful excuse
4. There was an understanding or agreement between Batista and Farina as to causing serious injury to Baxter- Jones
5. Batista's actions in causing serious injury to Baxter-Jones were done in accordance with, and furtherance of, this understanding or agreement
6. Farina was present when Batista caused serious injury to Baxter-Jones.

There are certain elements of the prosecution case that will be undisputed (at least at this stage of preparing the prosecution case). These include:

- the identification, description and involvement of the two cars (the Camry and the Commodore)
- the identification of the major participants, who they are and when they were involved
- the identification of voices (mainly of Batista and Baxter-Jones) on telephone conversations

3. Proving the Factual Propositions

In this section of the advice, the prosecution's case against Farina will be outlined and, where appropriate, evaluated without regard to issues of admissibility which will be discussed further in Section 4.

This presentation of the case is based upon detailed charting of logic and the supporting evidence (see attachments) , but will focus on the most important elements.[1] The presentation is structured around the six key issues highlighted in Section 2 above.

Batista caused serious injury to Baxter-Jones

Here, there are two elements to be proved, as indicated in Chart 1

The injury was serious, on the left, and caused by a knife

There is little doubt that Baxter-Jones' injury that was serious. The extent of the necessary surgery and the opinion of Dr Dimitroff that the surgery was 'life-saving' seems conclusive. Similarly, there is no doubt that the wound was on Baxter-Jones left-hand side.

As Chart 1A indicates, however, it is important, and somewhat more difficult to prove that the wound was caused by stabbing with a knife. While it is clear that Dr Dimitroff is of the opinion that it was a stab wound, it is useful to eliminate other possibilities. Contact with the fence provides no explanation and there was no suggestion by any protagonists of any other causes (such as broken glass). As discussed next, there were knives available in the vicinity and thus any cause, other than a knife, is implausible.

[1] Detailed references to the sources of evidence is provided in the charts using the convention [name of source, page number]

Batista had a knife

As Chart 1B illustrates, this can be demonstrated by proving two points:

1. Batista was handed a knife just before the fight. The existence of three kitchen knives in the car was admitted by Rambaudi, who will also provide evidence that he saw Garcia give a knife to Batista. This is (somewhat weakly) corroborated by Baxter-Jones who noted that some unspecified object was given to Batista by Garcia.
2. Batista was seen with a knife in his hand before, during and after the fight.

Together these two points leave little doubt that Batista had a knife.

Batista's actions were consistent with Baxter-Jones' wound

There was only witness who stated that it was Batista who stabbed Baxter-Jones. This was Garcia, but this aspect of his evidence may not be admissible. Hence, it is necessary to draw inferences from observed behaviour. The *first* element is, as illustrated in Chart 1C, that Bond noticed something unusual in Batista's movements, in particular that after Batista had got away from the fence and stood up he was:

> " sort of punching Baxter up under the left armpit where the ribcage is. Tony had a closed fist but wasn't punching him with his fist as you would when you punch someone, but was using the side of his fist in a shanking motion. I couldn't see if anything was in his hand.[2]

This strongly suggests that Batista was attempting to stab Baxter-Jones. If he had *no* knife he would punch in a conventional way and would concentrate on the head or the solar plexus, rather than the ribcage. The observed shanking motion is, it can be inferred, an attempt to stab Baxter-Jones.

[2] Bond, p 12.

The *second* element is that a stab wound on Baxter-Jones' left ribcage is consistent with an assailant holding a knife in his right hand. It is clear that Batista held the knife in his right hand – it was noted by Baxter-Jones who also observed that Batista threw the can with his left hand. The throwing of the can was a minor aspect of the injury to be done to Baxter-Jones and any inaccuracy in throwing it was acceptable provided that Batista kept a firm grip on the knife with his right hand.

There is additional evidence that suggests that Batista was holding a knife in his right hand during the fight. There are the two "scratches" on his left arm which were caused by a sharp object, such as a knife, and the left arm would be more likely to receive a glancing blow from a knife held in the right hand during a fight than other parts of the body. Holding a knife may also explain Batista's inability to quickly extricate himself from the fence and the ineffectual swinging of Batista's right hand. [3]

No-one else could have made the wound

Here the argument is simple, namely that Batista had a knife and that on-one else was seen with a knife. The only alternative is that Farina could have made the wound but, for the reasons outlined in Chart 1D, this alternative is highly improbable.

Batista was aware that he stabbed Baxter-Jones

There is no doubt of this (see Chart 1E). Batista made a number of damaging admissions, such as 'it went in pretty deep' and his post-offence conduct can only be plausibly explained in terms of his awareness of his guilt.

Batista carried out his threat to stab Baxter-Jones

Here there is a statement of one of the participants, Garcia, which directly supports this proposition.[4] In addition, there is, as Chart 1F illustrates, a more detailed circumstantial argument with two arms. One relies on (1) evidence of the specific threats made by Batista and (2) the generalisation that people who make such threats

[3] Observed by Baxter-Jones, p7.
[4] Garcia, p 22. Note that there may be admissibility problems with this evidence, see 4.1.4 below.

are more likely to carry them out in the heat of the moment (eg after a very heated discussion or after some initial skirmishes) when they are not able to make a dispassionate assessment of the most appropriate course of action. The second arm is that Batista is, by virtue of his experience with weapons and because of peer group pressure, much more likely than others to carry out his threat.

Batista did so intentionally

Here, as Chart 2 illustrates, there are three elements to support this proposition.

Batista was under peer pressure

As will be demonstrated in Section 3.4 below, all four "common purpose" defendants had an agreement and Batista was the instigator and leader. He could not back down and so his actions were deliberate.

Batista's past conduct made intent more likely

As discussed in 3.1.6,[5] Batista had made a number of threats against Baxter-Jones. His previous convictions for assault suggest that, on at least one occasion, he has gone from merely making a threat to actually carrying out the threat. Given the risk of such assaults (of physical danger in the assault and of subsequent apprehension by the police), Batista now knows what is involved in 'actualising' a threat – when he makes a threat he means it.

There was no other explanation

There was no evidence of inadvertence or reflexive action, Batista kept holding the knife and did not stop fighting when there was a break. The evidence suggests that he used the opportunity provided by Farina's 'restraint' of Baxter-Jones to start the second phase of the fight. In addition, Baxter-Jones had made some conciliatory remarks at the beginning of the altercation, 'I wasn't accusing you, all I wanted to do

[5] See also Chart 1F.

was find out.'[6] However, Batista did not avail himself of this opportunity to find alternative means to resolve the matter. He intended to fight.

Batista did so without lawful excuse

He would have behaved differently if there was a lawful excuse

As Chart 3A indicates, this is a simple argument. If Batista had any reasonable excuse he would have contacted police rather than go into hiding. The fact that he did not get his wound treated (despite its significance) can be put down to his unwillingness to take the risk that he would be identified or that awkward questions would be asked if he went to a doctor. Similarly, he would not have disposed of the bloodied knife and shirt, nor would he have attempted to flee the country if he had a lawful excuse for his actions. The attempt to leave Australia seems particularly significant – it is a major change (of occupation, friends, family and so on), requires funds and assistance from others and is a clear sign of his awareness of his guilt. In short it is a high-risk approach and suggests that there was no excuse or justification for his actions.

There can be no appeal to self-defence

Chart 3B outlines in some detail what is a relatively simple and convincing argument, based on two points. First, that Batista's life was not at risk since Baxter-Jones was unarmed and Batista knew this. Second, Batista had numerical superiority (three supporting males compared to one for Baxter-Jones). Moreover, his supporters were tougher (in particular Farina) and there were additional knives if necessary.

Batista and Farina had an understanding

Baxter-Jones was unpopular for a reason

[6] Bond, p 11.

It is important to note briefly that all four members of Batista's group had reasons to be concerned about Baxter-Jones. All four were implicated in the theft of sound equipment from Baxter-Jones car. Rambaudi's car had been seen in Foch Street during the period when the theft occurred, and three of the four occupants had been identified by Baxter-Jones' mother. Baxter-Jones had 'raised the stakes' by notifying the police of the theft and the four suspected that Baxter-Jones had told the police of his suspicions. Batista and Farina had an additional reason to be concerned about Baxter-Jones actions, namely that they both had charges pending for thefts of a similar nature. Regardless of whether the group were responsible for the theft, it is clear that Baxter-Jones had, by contacting the police, both transgressed an important social norm and also exposed members of the group, in particular Batista and Farina, to the risk of additional, unwelcome police scrutiny.

There was a general agreement

Chart 4A outlines in some detail what is a somewhat complex argument with four elements. The first is that an agreement was reached before the fight – this can be inferred from the amount of time that the participants spent on the phones and on evidence from Rambaudi and Garcia. The second point is also clear, namely that Baxter-Jones was to be harmed. Thirdly, it is also clear that Batista was the leader and fourthly, there were indications of planning (ie of pre-arrangement) at the fight, inferred from the behaviour of the participants (with respect to weaponry, positioning outside the car etc).

Farina had greater involvement than the two others

This proposition relies on two arguments, as indicated in Chart 4B. First, that Farina had a specific role in the agreement. He was the number two person in the group and he had a defined task, namely to assist Batista in the fight. Farina's claims that he was restraining Baxter-Jones to stop the fight and because Batista was getting hurt are not credible. Second, Farina and Batista have worked together on criminal endeavours in the past (in assault and in theft) and it is likely that this mutual involvement would be an element of the arrangement.

Batista acted in accordance with the agreement

Chart 5 illustrates the three major elements of this proposition.

Batista's group wanted to meet with Baxter-Jones

This is included because there is some testimony from Rambaudi[7] and Garcia that Batista did not want to fight Baxter-Jones. However, as the argument in Chart 5 indicates, it is much more likely that both parties wanted to meet.

There were indications of a agreed approach

This is similar to the approach used in 3.4.2 above.

Batista fulfilled key terms of the agreement

Here, the point to be made is that Batista did what was agreed (and expected) by carrying out the threat to harm Baxter-Jones.

Farina was present when Baxter-Jones was harmed

Farina was in the general area

This point is illustrated in the left side of Chart 6, and would seem relatively uncontentious.

Farina was very close to the fight in particular

This is also relatively uncontentious because Farina was the only other participant in the fight, the only other one to get blood on his clothes and he admitted to being close to the fighters.

[7]For example, Rambaudi said he was confused when Batista told him to drive off, Rambaudi p 32.

4. Admissibility of Evidence

Evidence must be relevant to be admissible. In this advice, the relevance of the various items of evidence discussed below can be regarded as being established by their use to support the factual propositions (and their sub-elements) discussed in section 3 above. This analysis is generally structured in terms of the different categories of evidence.

Witness testimony

Baxter-Jones

Most of Baxter-Jones' testimony will be admissible as a first-hand account of events, such as his identification of the people in both cars and the description of the fight. His version of these matters can be tested in court. However, there are some important components of hearsay evidence in his testimony, in particular the specific threats that Batista made, such as "I'm going to come and stab you" and, later, "I'm going to fucking kill you bitch". The prosecution case is that these statements are not puffs, ie. threats that will not be followed through. Instead, the prosecution contends that in terms of s59 (1) of the Evidence Act[8], Batista "intended to assert" that he intended to stab Baxter-Jones. This statement is thus hearsay and inadmissible unless there is an applicable exception.

One approach would be to use the exception provisions of s66A to introduce the representation into evidence; Batista's threats were contemporaneous representations of his intentions, and hence an allowable hearsay exception. Then the dual relevancy exception of s60 (1) would be used to admit the representation and hence to prove that Batista made the threats. Another approach is to use the admissions exception. It is

[8] Except where otherwise indicated, reference to provisions of an act refer to the (soon-to-be-introduced) Evidence Act 2008

clear from both parts (a) and (b) of the Evidence Act's definition of admission that these statements of Batista's are admissions (he is a defendant (a) and the representation is adverse to his interests (b)). The admission is first-hand when recounted by Baxter-Jones, so s82 poses no problem, nor do other potentially applicable sections; there is no evidence of violent or other influencing behaviour (s84) nor does s85(1) apply since the admission was made to the victim not to an investigating official or other person who could influence a decision to prosecute.

The defence may try to have this evidence excluded under s90, but there is, in these circumstances, little to suggest that its admission would be unfair to Batista.

Aspects that may not be admitted are:

- his report that his mother had seen Batista, Farina, Rambaudi and another in Foch St at about the time of the theft. This is a hearsay account, but this should not be a problem as it would appear likely that his mother would be willing to testify accordingly (if required).
- his assertion that Batista stated the fight and stabbed him. This could be regarded as opinion evidence (and thus inadmissible under s76) because Baxter-Jones did not claim to have seen Batista stab, rather than attempt to stab, him. Nevertheless, this opinion would be admissible since, under s78(a) the opinion was based on what Baxter-Jones saw, and, under 78(b), as the victim of a serious assault, Baxter-Jones' opinion helps in understanding his perceptions of the incident.

One issue that the defence may seek to raise is that the statement was made 20 days after the fight. There was evidence that Baxter-Jones was "sitting comfortably in bed" less than 24 hours after the fight. There would thus have been both the (1) opportunity for Baxter-Jones to collude so as to ensure that his evidence matched that of his friend Bond (which was given about three hours after the fight) and (2) concern about the accuracy of some of his testimony, such as the details of what was said in the phone conversation with Batista, when it was recalled after almost three weeks.

Bond

Many of the important aspects of Bonds' testimony will be admissible because it is, like Baxter-Jones', first-hand. The same argument in 4.1.1 above regarding the use of s66A/s60 (1) and admissions (Part3.4) would apply to Bond's account of Batista's threats, such as 'I'm going to stab you'. With respect to the wording of the threats made by Batista, it should be noted that many are closely corroborated by the statement of Rambaudi, although the latter's are less damaging to Batista. .

The defence will almost certainly seek to exclude Bond's statement that 'those guys … don't use fists, they use weapons and things like that.'[9] This is his opinion about Batista and his associates and, as such, is excluded by s76. The opinion could only be admitted by means of s78, the exception for lay opinions, which has two provisions. The first (a) will be the hardest to satisfy as it requires that Bond has '[seen], heard or otherwise perceived' Batista and his associates actually using weapons. If he has not done so, but has formed his opinion based on the observations of others or on the basis of the general reputation of Batista and his associates, then s78 (a) will not be satisfied. If he has, for example, directly observed their use of weapons (and s78(a) is satisfied) then it is necessary to consider s78(b). Here, the concern is whether the evidence of the opinion is "necessary to obtain an adequate account … of the person's perceptions of the matter or event." In the circumstances, it would thus seem unlikely that Bond's evidence would be admissible.

The aspect of Bond's evidence that is most susceptible to attack by the defence is the reliability of his observations. Bond was concerned about Batista and his friend ("they use weapons") and so he remained in the car (pretending to be on the phone) for most of the fight. Thus he was watching through the side- or rear windows of the car – not an ideal vantage point. Nevertheless, (1) the light was good (at 7.40pm one week before the summer solstice), (2) his claims are reasonable (ie. he did not purport to see a knife), and (3) it is likely that some of his evidence would be corroborated by Stella George, who was also in the car.

[9] Bond, 10.

Apart from this concern about how much he saw, there seems little ground to attack the credibility of Bond.

Rambaudi

Rambaudi has pleaded guilty and will testify. Again, like Baxter-Jones and Bond, much of his testimony is first-hand account. His testimony is very important to the prosecution case, in particular since it:

- establishes the development of the agreement to harm Baxter-Jones
- corroborates much of the phone conversation between Batista and Baxter-Jones
- establishes that knives were present and that Garcia passed one to Batista
- confirms elements of the fight
- establishes that Batista was covered in blood and held a bloody knife
- establishes how Batista disposed of the bloodied knife and shirt, and got new clothes

It is thus to be expected that his testimony will come under strong attack by the defence, who may raise concerns about:

1) inducements, i.e. that Rambaudi had been improperly persuaded to make this admission. There is little to support such a contention, and Rambaudi expressly denies it twice in his statement.
2) internal inconsistency, between his initial statement to SD Choi ("What stabbing, I wasn't there") and the later admission. This change in approach by a defendant such as Rambaudi is not exceptional[10], more so if he got legal advice as indicated.
3) inconsistency with other testimony, such as identifying the can as Pepsi, rather than spray.

These seem only minor concerns and Rambaudi's credibility as a witness should remain intact.

[10] Particularly for a defendant such as Rambaudi who was, and feels, less involved and less culpable than the other defendants.

The defence may also attempt to exclude as hearsay some particularly incriminating words of Batista, in particular “he’ll be going to hospital” and “it went pretty deep in”. These words of Batista’s should be admissible using the reasoning used for similar hearsay evidence of Baxter-Jones and Bond (in 4.1.1 and 4.1.2 above).

Garcia

Much of the evidence in Garcia’s statement is useful because it corroborates other testimony; for example, his evidence supports that there was an agreement on a common purpose (see Chart 4B). More important to the prosecution case, however, is his report of Batista’s utterance, “Oh man, I hope Baxter’s alright. What have I done to him?” (see Chart 1E). This admission of Batista should, following the approach in 4.1.3 to similar evidence of Rambaudi, be admissible.

The record of the conversation between SD Choi and Garcia has significant probative value for the prosecution case since it confirms that Batista stabbed Baxter-Jones. However, the record may not be admissible because of s464H of the Crimes Act since (1) it appears that Choi’s representation of the conversation is based on his notes or his recollection, and (2) that the substance of this conversation (ie. that Batista did stab Baxter-Jones) was **not** confirmed in a subsequent tape-recorded interview. If, however, Choi did record the discussion with Garcia,[11] then it would be admissible under s464H (1) (c) or (e).

It is unlikely that the circumstances of this interaction between Choi and Garcia are sufficiently exceptional to admit the evidence (s464H (2)), since the warrant and interview process appeared sound and SD Choi is an experienced police officer, who should be expected to know the procedures and who did apply them in the earlier interview with Farina.

[11] As the discussion between SC Oduwo and Farina was recorded by Choi, 20.

Farina

One important immediate issue with respect to Farina's interview is whether he was given the appropriate warnings and the opportunity to contact a friend or a lawyer. From the transcript, it appears that the relevant warnings and notifications were made (Questions 3, 4 and 5).

Farina expressed a desire to speak to a friend but this was denied by SD Weaver on the basis that there could be a loss of evidence. This denial is allowed (s464C (1) (c)) if there are reasonable grounds to suspect fabrication or destruction of evidence. As the police (1) were already aware of destruction of evidence by Farina (the washing of blood out of his clothes) and (2) had not yet interviewed Garcia or Rambaudi, this denial would seem reasonable.

More concerning, perhaps, is whether Farina was given sufficient opportunity to contact a lawyer. He was given two opportunities – after Questions 4 and 7 – and it appears that he did not wish to get a lawyer. However, the words of SD Weaver in Question 8 are not clear and could perhaps be interpreted to suggest that Farina **did** wish to exercise his right to contact a lawyer. On balance, however, this interpretation should be rejected and Weaver's action in continuing the interview was not improper - Farina was given two opportunities to contact a lawyer.

It should be noted that little use is made of Farina's evidence in the prosecution case. As discussed in the section on Post-offence Conduct (se 4.5 below), there is little of evidentiary value in his statement. It is clearly a poorly improvised and self-serving fabrication, whose major use is in suggesting a consciousness of guilt – no other explanation (except perhaps mental impairment) seems plausible.

Dexter

The first five paragraphs of Dexter's statement indicate extensive, specialised knowledge of fingerprint identification developed from study and experience over 16 years.

The remainder of his statement is confined to the procedures he undertook and the conclusions he reached. It is clear that his conclusions, with respect to Farina's fingerprints, are substantially (if not wholly) based on his specialised knowledge. Accordingly, his conclusions will be admissible, due to the exception of s79.

Hitchens

Like Dexter, Dr. Hitchens has sufficient expertise, experience and qualifications to fulfil the special knowledge requirement of s79. It also seems that his opinions are based on his specialised knowledge and, as such, his evidence should be admissible. It should be noted that he is not dogmatic (eg. using the term "consistent with") and he does not speculate, eg. by identifying a knife as the "sharp-tipped object". The tribunal of fact can thus interpret his evidence – its role has not been usurped.

Dimitroff

The evidence of Dr. Dimitroff is less clear-cut than that of Dexter and Hitchens. His position at the Alfred Hospital and the extent and nature of his experience is not specified. In particular, it is not clear whether he has had any relevant forensic medical training which would support some of his opinions such as "findings are consistent with sharp, penetrating injury". More importantly, however, is that he has not applied his knowledge directly. Rather, it appears that his report is based largely on hearsay, having been compiled (it would appear) from an examination of hospital (and perhaps ambulance) records from initial reception in the Accident and Emergency department (A & E) to the records of the two surgeons. Dimitroff's own examination of Baxter-Jones does not play a big part in his statement.

It may be possible to argue for admission of his statement under s79 if, for example, he had significant experience dealing with victims of violent crime in A & E departments.[12] If this seemed insufficient, the prosecution would need to consider either (1) obtaining the relevant hospital records (using the Business Record

[12] In particular, if he had a substantial record of working on Friday and Saturday night shifts.

Exception, s69) or (2) having witness testimony from one of the doctors directly involved (or both).

Documentary evidence

Telephone Call logs

In order to admit the call logs, it will be necessary to use the Business Records Exception.

This applies, according to s69, to a document which (1) either "is or forms" part of "the records … [of] a business", or "at any time was or formed part of such a record" and which (b) contains a previous representation recorded in the course of the business. There seems little doubt that (b) is fulfilled, since the six items of information related to each call are collected for billing (and other) purposes by the telephone networks. More problematic is whether the actual call record included in the prosecution brief, which is information *extracted* from a much more extensive electronic database, fulfils the requirement of s69 (1) (a). The call records are documents which are extracted or formed *from* the records, rather than comprising *part of* the records.

If this issue of statutory interpretation can be resolved in favour of a broad definition of document under s69 (1) (a), then the hearsay exception should apply under s69 (2). The existence of statements "from the relevant officer of the telephone network" and of a protocol (WEBTRACE) for producing these record is suggestive that the enforcement agencies have made particular efforts to develop protocols that ensure that such evidence would be admissible. It should be noted that the use of the call records for the prosecution does not rely on the content of the calls, just that they were made between the specified parties, at the particular time and so on. In this respect, the admissibility of the call logs is similar to the admissibility of electronic communications, as in s71, which are admissible as representations of the sender, the recipient and the time of the communication. In short, there is no suggestion of any issues of electronic surveillance.

Other documentary evidence

There is little other relevant documentary evidence of note. The records of the travel agent and the related air tickets which provide supporting evidence of Batista's intention to flee Australia could fall into this category, but (1) the case would appear strong in the absence of such records, and (2) the business records exception (s69) should ensure that they are admissible.[13]

Real evidence

There is not a lot of real evidence that is both essential for the prosecution case and that is also contentious for admissibility.

The spray can thrown by Batista at Baxter-Jones is an example. Its existence is helpful, but not essential, to the prosecution case – it confirms other witness testimony of the throwing of the can but, because of Dexter's evidence that it had Farina's fingerprints, it contradicts Farina's statement that he didn't know where Batista got the can from.[14] However, such discrepancies are of little probative value.

The major problem with real evidence is the lack of it. Not being able to produce the bloodied knife and shirt is most unfortunate, but explicable as a result of a conscious act by Batista. The absence of any evidence from blood swabbing carried out by SD Choi or from the buccal swab of Farina is puzzling, but outside the scope of this advice. If such evidence were to become available, then the identification of clothing worn by the various participants would assume greater importance.

Tendency Evidence

An important part of the prosecution case (see Charts 1F, 2, 3B and 4B) will be to demonstrate that Batista and Farina have relevant criminal tendencies, in particular (1)

[13] It should be noted that greater reliance on the 'paper trail' for the purchase and payment of the air tickets may be necessary for the prosecution of Batista's mother on accessory charges.
[14] Farina, Q 96, p 67.

to assault in company, and (2) to assault with weapons. This can be shown by their recent convictions for these crimes[15] which provide solid evidence of their conduct on at least one instance. To extend the argument to a tendency would generally require something more. This could be evidence of (1) their reputation with weapons (as alluded to by Bond in 4.1.2 above), (2) their possession of weapons (here, the knife found hidden in Farina's socks could be useful, and, if possible, (3) other evidence of Batista and/or Farina being involved in acts of group (or at least non-singular) violence. It is not simple to get such tendency evidence admitted – it requires that (1) reasonable notice is provided to the defence (s97 (1) (a)), and for criminal proceedings that (2) the probative value substantially outweighs any prejudicial affect (s101 (2)).

Here the probative value is high because, as noted above, the tendency evidence could be used in four of the six main propositions. As well, however, the prejudicial is correspondingly high and the tribunal of fact could well be unduly influenced by the evidence. There is no way at this stage to predict how a judge may balance the two issues. In any event, an additional prosecution task will be to see whether more tendency evidence can be obtained.

Post-Offence Conduct

Two elements of post-offence conduct are relevant to the prosecution case. The first relates to the conduct of Batista who:

(i) disposed of the bloodied knife and shirt
(ii) did not contact police
(iii) attempted to flee the country

The disposal of the knife and shirt (point (i)) has been discussed above (in section 4.1.3). Point (ii) is not contentious and point (iii) should present few difficulties. Batista's attempt to leave the country can be supported by eye witness accounts and his tickets (certainly admissible under the business records exception).

[15] Farina, Q 289, p 96

The second relates to the conduct of Farina. Here, the major component is his attempt (apparently successful) to wash the blood from his clothes. His explanations of this conduct, which extend over four pages of the transcript are, to say the least, very unconvincing – he appears to suggest that his reason for washing his clothes was that he was more scared of his mother than the police.[16] These explanations are unlikely to be readily accepted by the tribunal of fact.

More broadly, Farina's whole approach to his testimony could be regarded as a manifestation of the consciousness of his guilt. He knows he is guilty and so:

1. he desperately searches for answers (often improbable answers such as those he offered regarding the washing of his clothes)
2. makes assertions that can be contradicted (such as the presence of his finger prints on the spray can which make his denial of where Batista obtained the can implausible)
3. invents otherwise unsupportable events (such as the alleged unauthorised entering of his father's house)[17]
4. gets very confused about whether he did or did not talk to, or hear from, Baxter-Jones [18]

More generally, much of his evidence conflicts with that of the other witnesses, ie Baxter-Jones, Bond, Rambaudi and Garcia. He is not a credible witness.

Formalities

Problems with giving appropriate warnings and statements of rights have been discussed above with respect to Farina's interview. There are no grounds to suggest that the police were better or worse in the other interviews, but there is an impression from the transcripts that the police do offer the warnings and statements of rights in a somewhat perfunctory manner. This approach, when applied to young people and while they are barely awake (as for some of the searches) could attract the attention of zealous defence counsel.

[16] Farina, Q 286, p 95.
[17] Farina, Q 169, p77.
[18] Farina, q 171 to 175, p 77-8.

The formalities with recording questions before formal interviews have been discussed in relation to Garcia's first statements to police (see 4.1.4 above). The relevant procedures here are more precise (to avoid verballing) and well known to police. The courts will generally not be sympathetic to any breaches or improprieties in this regard, but none are obvious in this case.

Other Considerations

It should be noted that the discussions above on admissibility have focussed largely on Parts 3.1 to 3.7 of the Evidence Act, with reference to some provisions of the Crimes Act. However, it is important to note that Part 3.11 gives considerable discretion to the court to exclude or limit evidence (ss135 and 136) generally.

In criminal proceedings, s137 requires the court to exclude prosecution evidence if its probative value is outweighed by its prejudicial effect. As discussed in section 4.4, striking the balance between probative value and prejudice is not simple, nor are there legal 'tests' or sets of criteria that can be used. The admission of illegally or improperly obtained evidence is also controlled by s138. On the basis of the prosecution brief, there do not seem to be any reasons that s 137 or s138 would be invoked in this case.

5. Likelihood of Conviction

This will be a difficult case for the prosecution, particularly as it requires proving six separate factual propositions.

The prospects for the first three propositions seem fair. It would not seem unreasonable that a jury would be satisfied, beyond a reasonable doubt, that Batista had a knife, that he intended to harm Baxter-Jones and that he did, indeed, stab Baxter-Jones.

The fourth proposition, namely that there was an understanding between Farina and Batista to harm Baxter-Jones is more problematic. While there were indications of some type of arrangement or understanding, it is difficult to specify the terms of the agreement or its bounds. For example, what degree of harm to Baxter-Jones was intended? Was death a contemplated result? What were the roles of the four participants? What were Farina's particular tasks? Were there any contingency plans? Indeed, was there an agreement at all? Perhaps there were four different, and unarticulated, versions of an agreement.[19]

The proof of the fifth proposition will depend on the strength of the case for the fourth; they are really not independent. The final proposition, that Farina was present when Baxter-Jones was injured, would appear not too difficult to prove.

Much of the hearsay evidence should be admissible, but it will be difficult for the prosecution to get the tendency evidence admitted. This cannot be assured but it does not appear that the prosecution case is hopeless if the tendency evidence is not admitted – it is just makes a difficult case somewhat more difficult.

The major problem for the prosecution is not with the admissibility of evidence; rather the problem is the lack of evidence as to the precise nature of the alleged agreement. On this basis, it seems that the likelihood of conviction of Farina is low. Other charges should be considered.

[19] One can almost hear defence counsel demanding, with associated rhetorical flourishes, that the prosecution provide full details of the agreement –" if it exists as you say, then spell it out!"

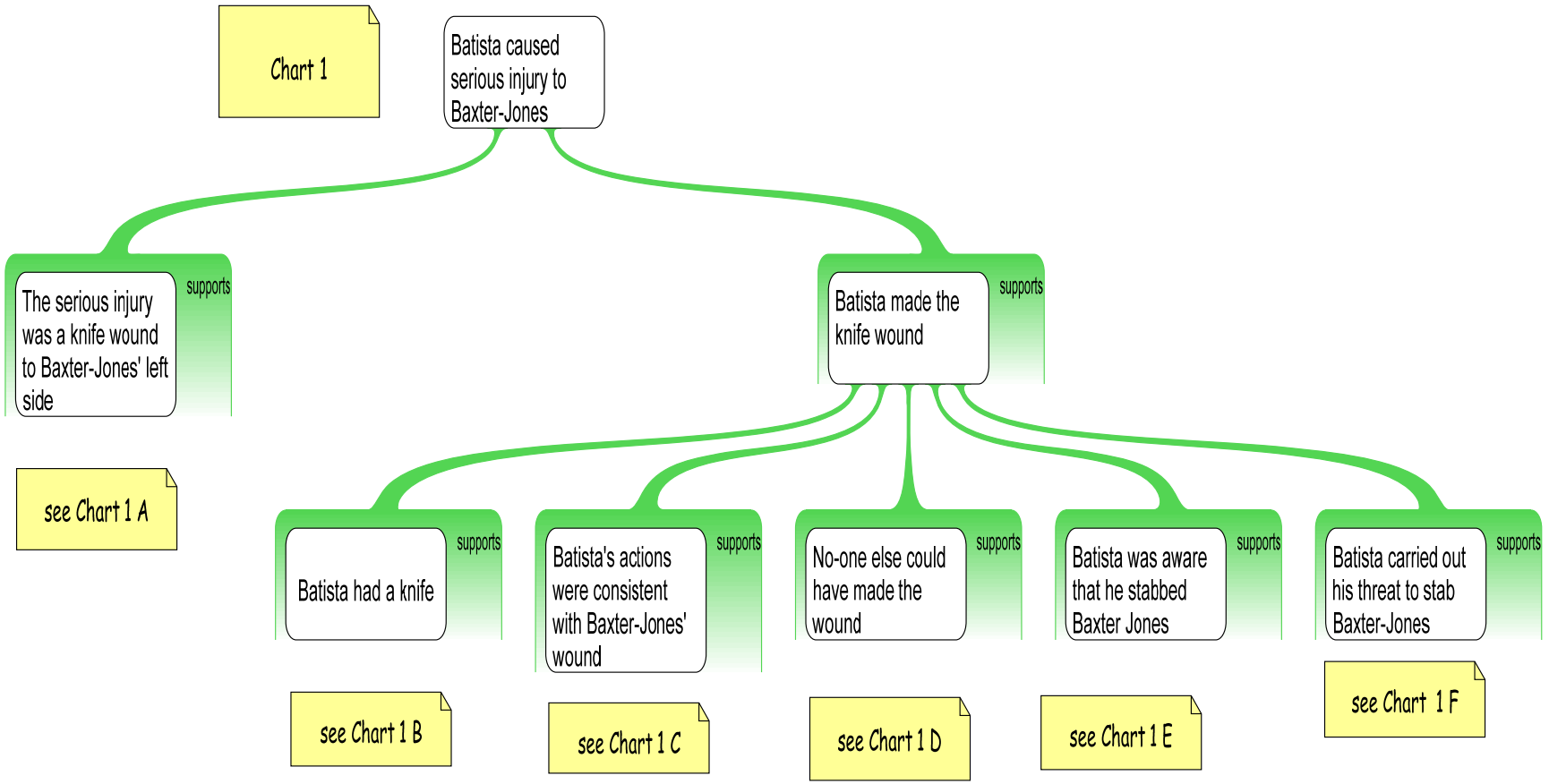
Chart 1
Batista caused serious injury to Baxter-Jones
The serious injury was a knife wound to Baxter-Jones' left side
supports
see Chart 1 A
Batista made the knife wound
supports
Batista had a knife
supports
see Chart 1 B
Batista's actions were consistent with Baxter-Jones' wound
supports
see Chart 1 C
No-one else could have made the wound
supports
see Chart 1 D
Batista was aware that he stabbed Baxter Jones
supports
see Chart 1 E
Batista carried out his threat to stab Baxter-Jones
supports
see Chart 1 F

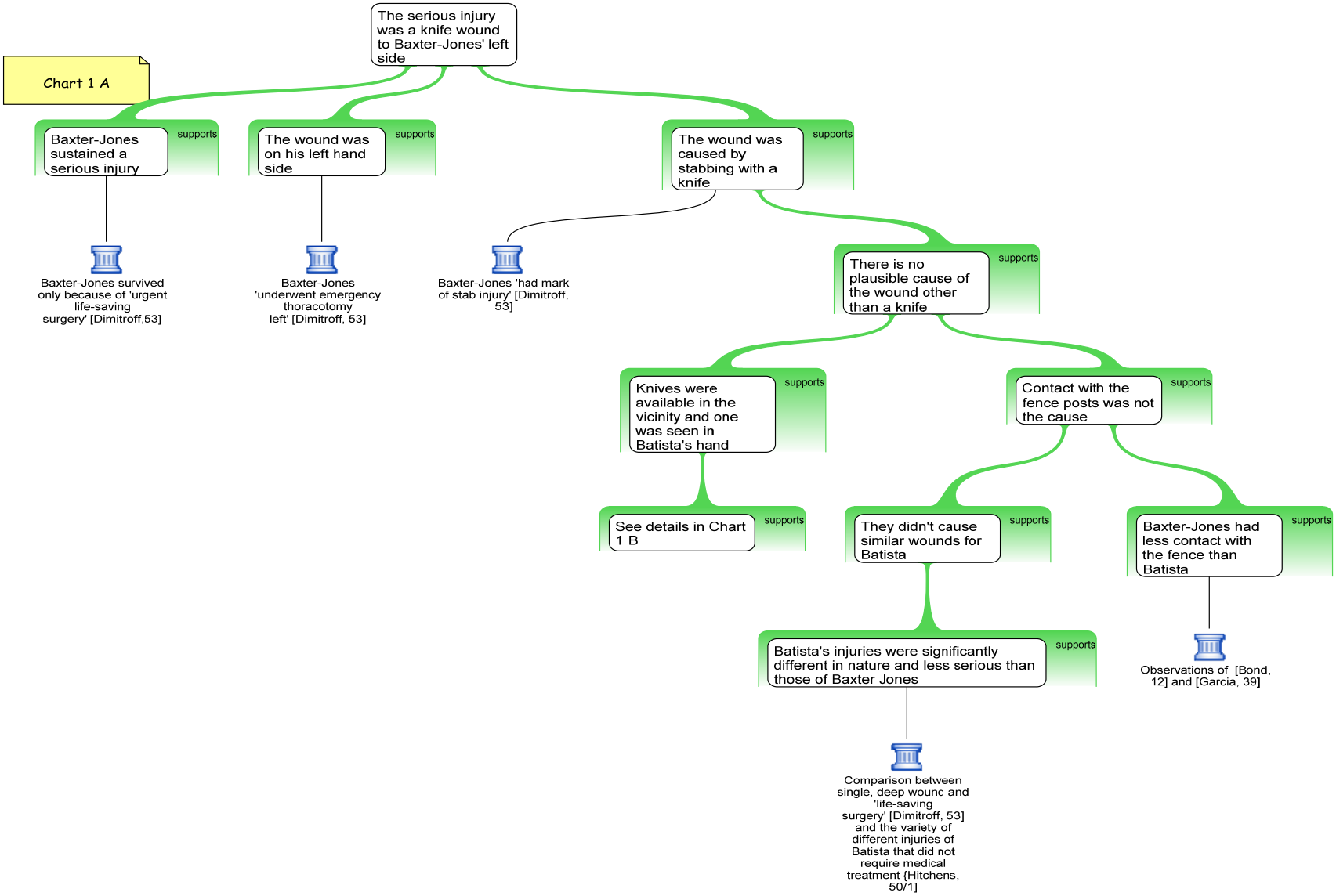
Chart 1 A
The serious injury was a knife wound to Baxter-Jones' left side
Baxter-Jones sustained a serious injury
supports
The wound was on his left hand side
supports
The wound was caused by stabbing with a knife
supports
Baxter-Jones survived only because of 'urgent life-saving surgery' [Dimitroff,53]
Baxter-Jones 'underwent emergency thoracotomy left' [Dimitroff, 53]
Baxter-Jones 'had mark of stab injury' [Dimitroff, 53]
There is no plausible cause of the wound other than a knife
supports
Knives were available in the vicinity and one was seen in Batista's hand
supports
Contact with the fence posts was not the cause
supports
See details in Chart 1 B
supports
They didn't cause similar wounds for Batista
supports
Baxter-Jones had less contact with the fence than Batista
supports
Batista's injuries were significantly different in nature and less serious than those of Baxter Jones
supports
Observations of [Bond, 12] and [Garcia, 39]
Comparison between single, deep wound and 'life-saving surgery' [Dimitroff, 53] and the variety of different injuries of Batista that did not require medical treatment {Hitchens, 50/1]

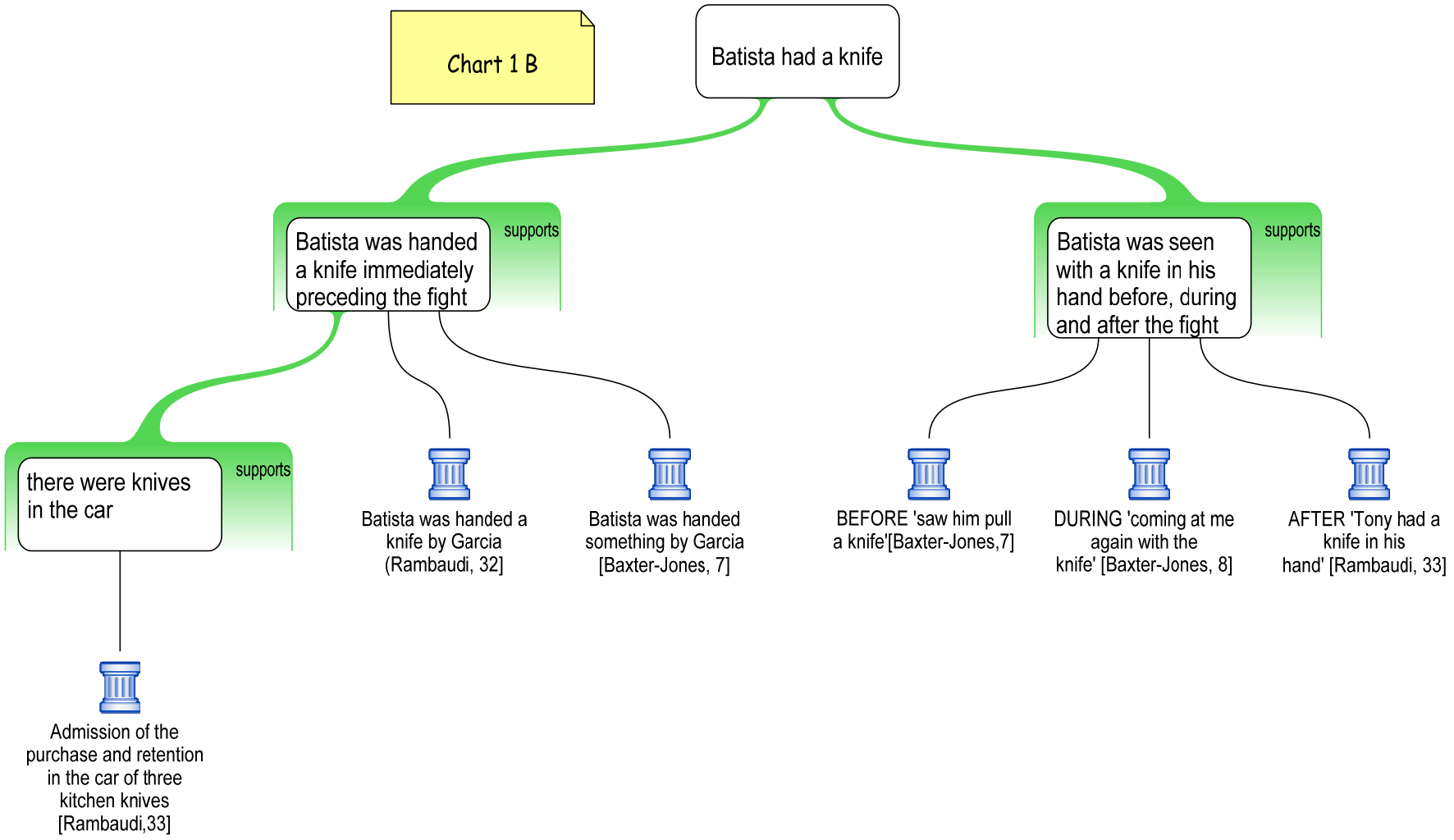
Chart 1 B
Batista had a knife
Batista was handed a knife immediately preceding the fight
supports
Batista was seen with a knife in his hand before, during and after the fight
supports
there were knives in the car
supports
Batista was handed a knife by Garcia (Rambaudi, 32]
Batista was handed something by Garcia [Baxter-Jones, 7]
BEFORE 'saw him pull a knife'[Baxter-Jones,7]
DURING 'coming at me again with the knife' [Baxter-Jones, 8]
AFTER 'Tony had a knife in his hand' [Rambaudi, 33]
Admission of the purchase and retention in the car of three kitchen knives [Rambaudi,33]

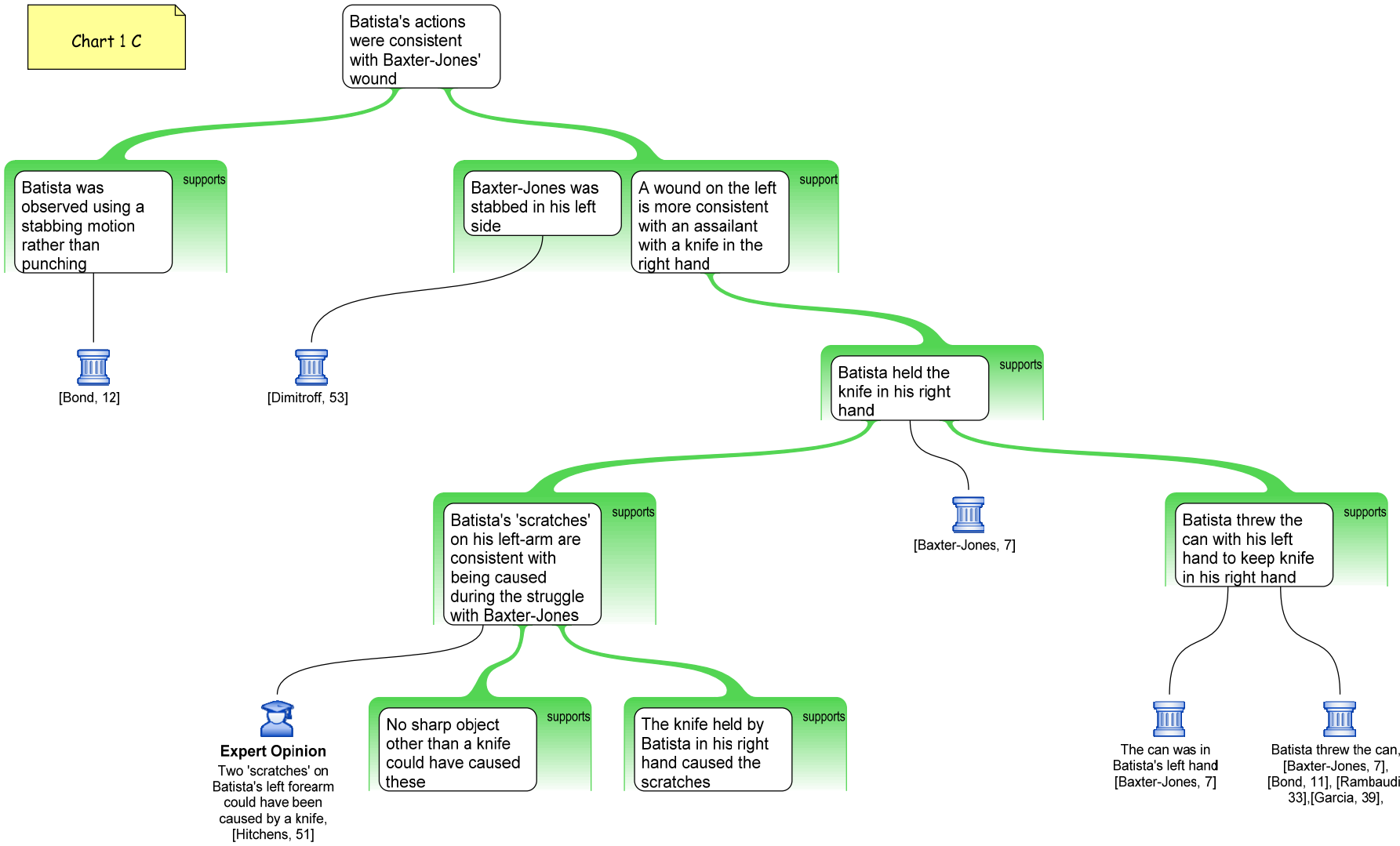
Chart 1 C
Batista's actions were consistent with Baxter-Jones' wound
Batista was observed using a stabbing motion rather than punching
supports
[Bond, 12]
Baxter-Jones was stabbed in his left side
[Dimitroff, 53]
A wound on the left is more consistent with an assailant with a knife in the right hand
support
Batista held the knife in his right hand
supports
[Baxter-Jones, 7]
Batista's 'scratches' on his left-arm are consistent with being caused during the struggle with Baxter-Jones
supports
Expert Opinion
Two 'scratches' on Batista's left forearm could have been caused by a knife, [Hitchens, 51]
No sharp object other than a knife could have caused these
supports
The knife held by Batista in his right hand caused the scratches
supports
Batista threw the can with his left hand to keep knife in his right hand
supports
The can was in Batista's left hand [Baxter-Jones, 7]
Batista threw the can, [Baxter-Jones, 7], [Bond, 11], [Rambaudi, 33],[Garcia, 39],

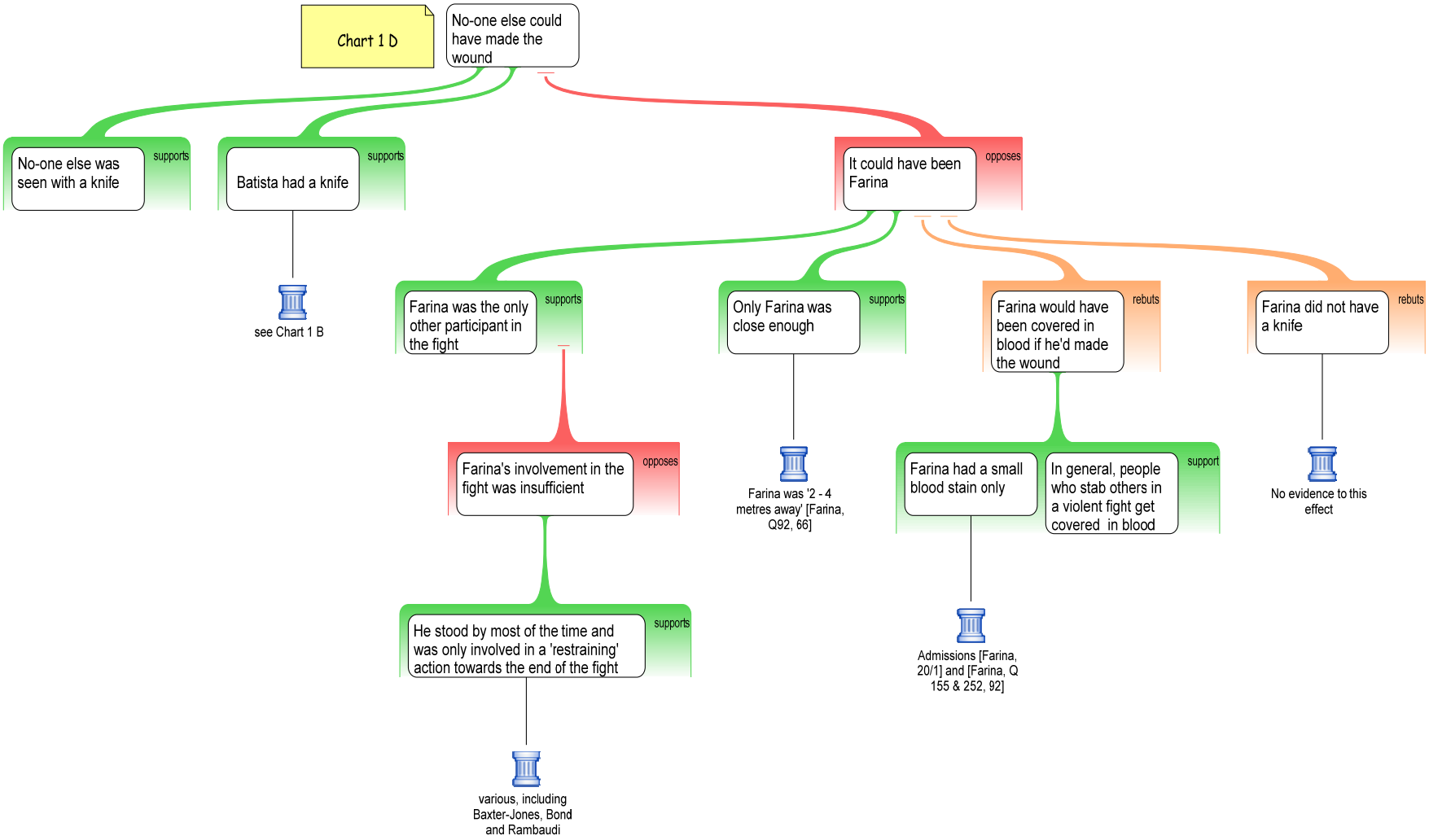
Chart 1 D
No-one else could have made the wound
No-one else was seen with a knife
supports
Batista had a knife
supports
see Chart 1 B
It could have been Farina
opposes
Farina was the only other participant in the fight
supports
Farina's involvement in the fight was insufficient
opposes
He stood by most of the time and was only involved in a 'restraining' action towards the end of the fight
supports
various, including Baxter-Jones, Bond and Rambaudi
Only Farina was close enough
supports
Farina was '2 - 4 metres away' [Farina, Q92, 66]
Farina would have been covered in blood if he'd made the wound
rebuts
Farina had a small blood stain only
In general, people who stab others in a violent fight get covered in blood
support
Admissions [Farina, 20/1] and [Farina, Q 155 & 252, 92]
Farina did not have a knife
rebuts
No evidence to this effect

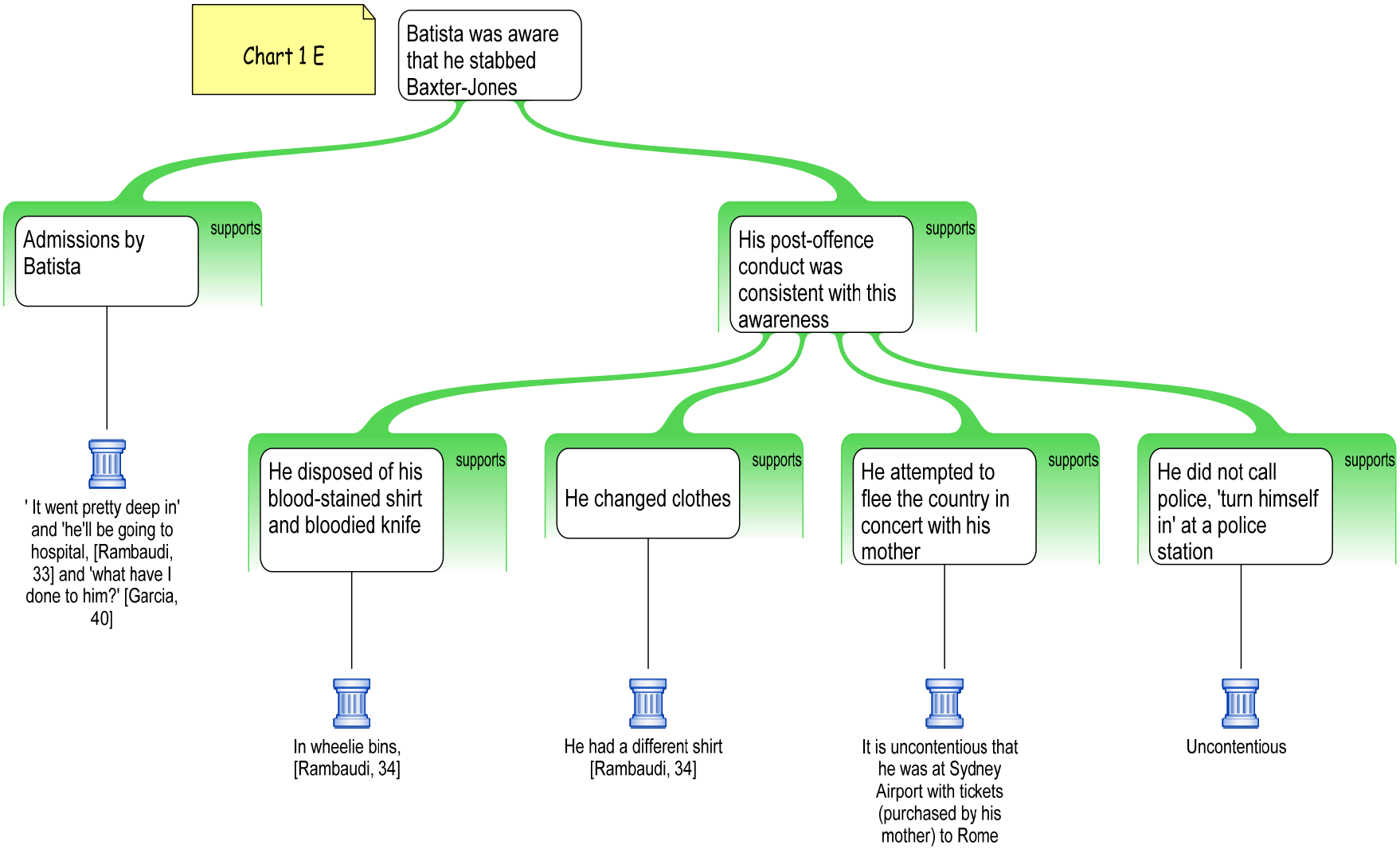
Chart 1 E
Batista was aware that he stabbed Baxter-Jones
Admissions by Batista
supports
' It went pretty deep in' and 'he'll be going to hospital, [Rambaudi, 33] and 'what have I done to him?' [Garcia, 40]
His post-offence conduct was consistent with this awareness
supports
He disposed of his blood-stained shirt and bloodied knife
supports
In wheelie bins, [Rambaudi, 34]
He changed clothes
supports
He had a different shirt [Rambaudi, 34]
He attempted to flee the country in concert with his mother
supports
It is uncontentious that he was at Sydney Airport with tickets (purchased by his mother) to Rome
He did not call police, 'turn himself in' at a police station
supports
Uncontentious

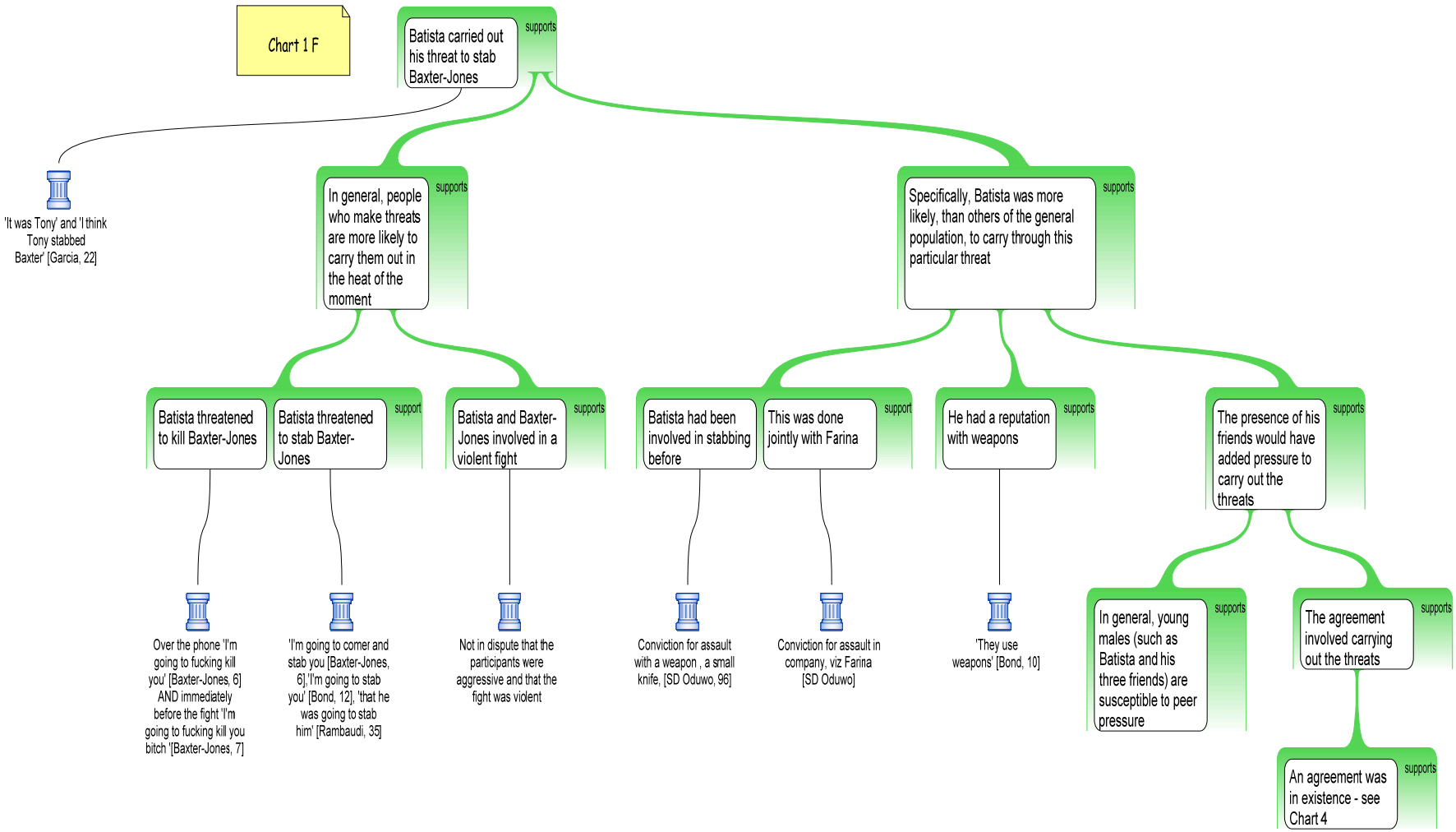
Chart 1 F
Batista carried out his threat to stab Baxter-Jones
supports
'It was Tony' and 'I think Tony stabbed Baxter' [Garcia, 22]
In general, people who make threats are more likely to carry them out in the heat of the moment
supports
Specifically, Batista was more likely, than others of the general population, to carry through this particular threat
supports
Batista threatened to kill Baxter-Jones
Batista threatened to stab Baxter-Jones
support
Batista and Baxter-Jones involved in a violent fight
supports
Batista had been involved in stabbing before
This was done jointly with Farina
support
He had a reputation with weapons
supports
The presence of his friends would have added pressure to carry out the threats
supports
Over the phone 'I'm going to fucking kill you' [Baxter-Jones, 6] AND immediately before the fight 'I'm going to fucking kill you bitch '[Baxter-Jones, 7]
'I'm going to comer and stab you [Baxter-Jones, 6],'I'm going to stab you' [Bond, 12], 'that he was going to stab him' [Rambaudi, 35]
Not in dispute that the participants were aggressive and that the fight was violent
Conviction for assault with a weapon , a small knife, [SD Oduwo, 96]
Conviction for assault in company, viz Farina [SD Oduwo]
'They use weapons' [Bond, 10]
In general, young males (such as Batista and his three friends) are susceptible to peer pressure
supports
The agreement involved carrying out the threats
supports
An agreement was in existence - see Chart 4
supports

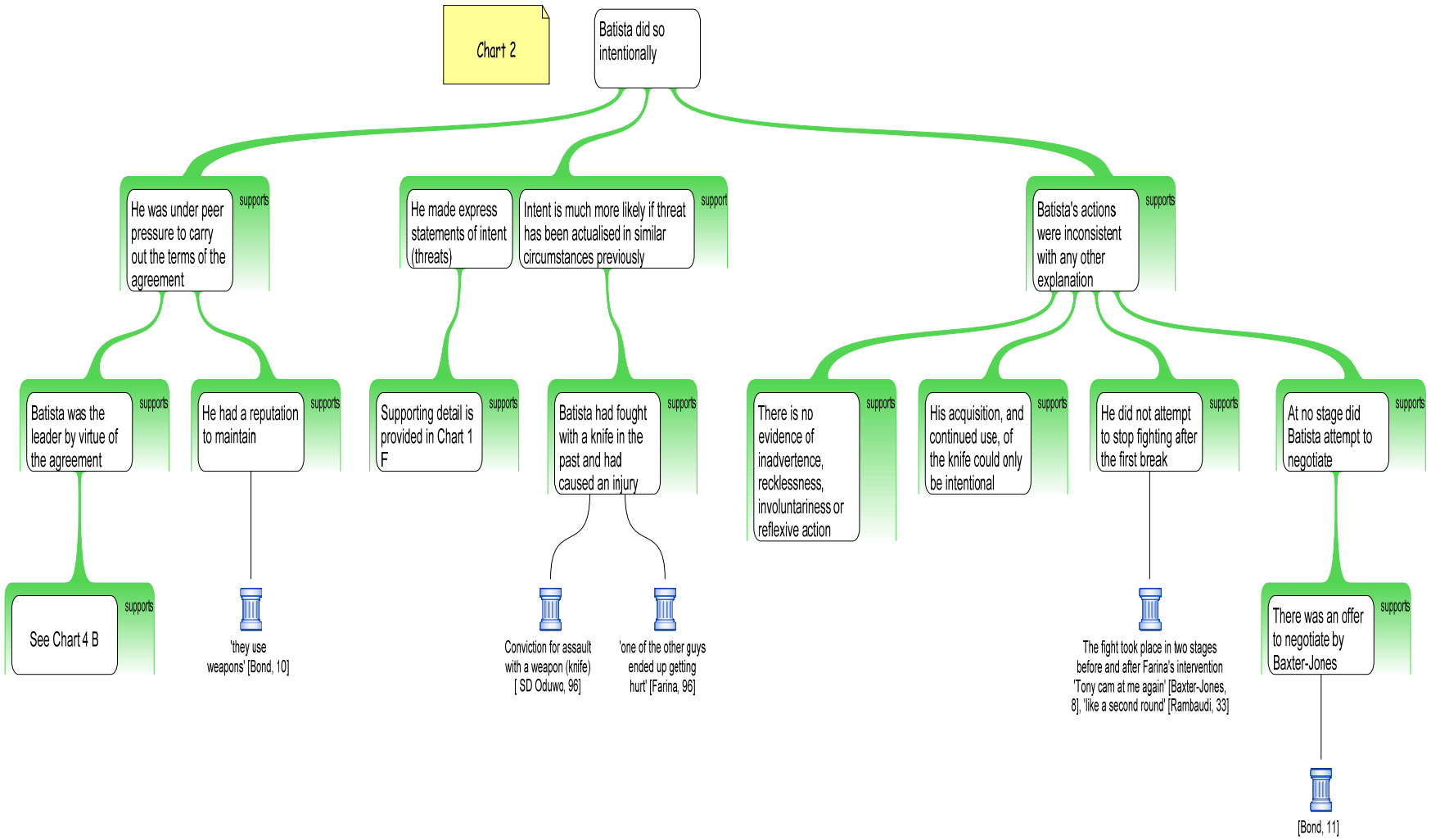
Chart 2
Batista did so intentionally
He was under peer pressure to carry out the terms of the agreement
supports
He made express statements of intent (threats)
Intent is much more likely if threat has been actualised in similar circumstances previously
support
Batista's actions were inconsistent with any other explanation
supports
Batista was the leader by virtue of the agreement
supports
He had a reputation to maintain
supports
Supporting detail is provided in Chart 1 F
supports
Batista had fought with a knife in the past and had caused an injury
supports
There is no evidence of inadvertence, recklessness, involuntariness or reflexive action
supports
His acquisition, and continued use, of the knife could only be intentional
supports
He did not attempt to stop fighting after the first break
supports
At no stage did Batista attempt to negotiate
supports
See Chart 4 B
supports
'they use weapons' [Bond, 10]
Conviction for assault with a weapon (knife) [SD Oduwo, 96]
'one of the other guys ended up getting hurt' [Farina, 96]
The fight took place in two stages before and after Farina's intervention 'Tony cam at me again' [Baxter-Jones, 8], 'like a second round' [Rambaudi, 33]
There was an offer to negotiate by Baxter-Jones
supports
[Bond, 11]

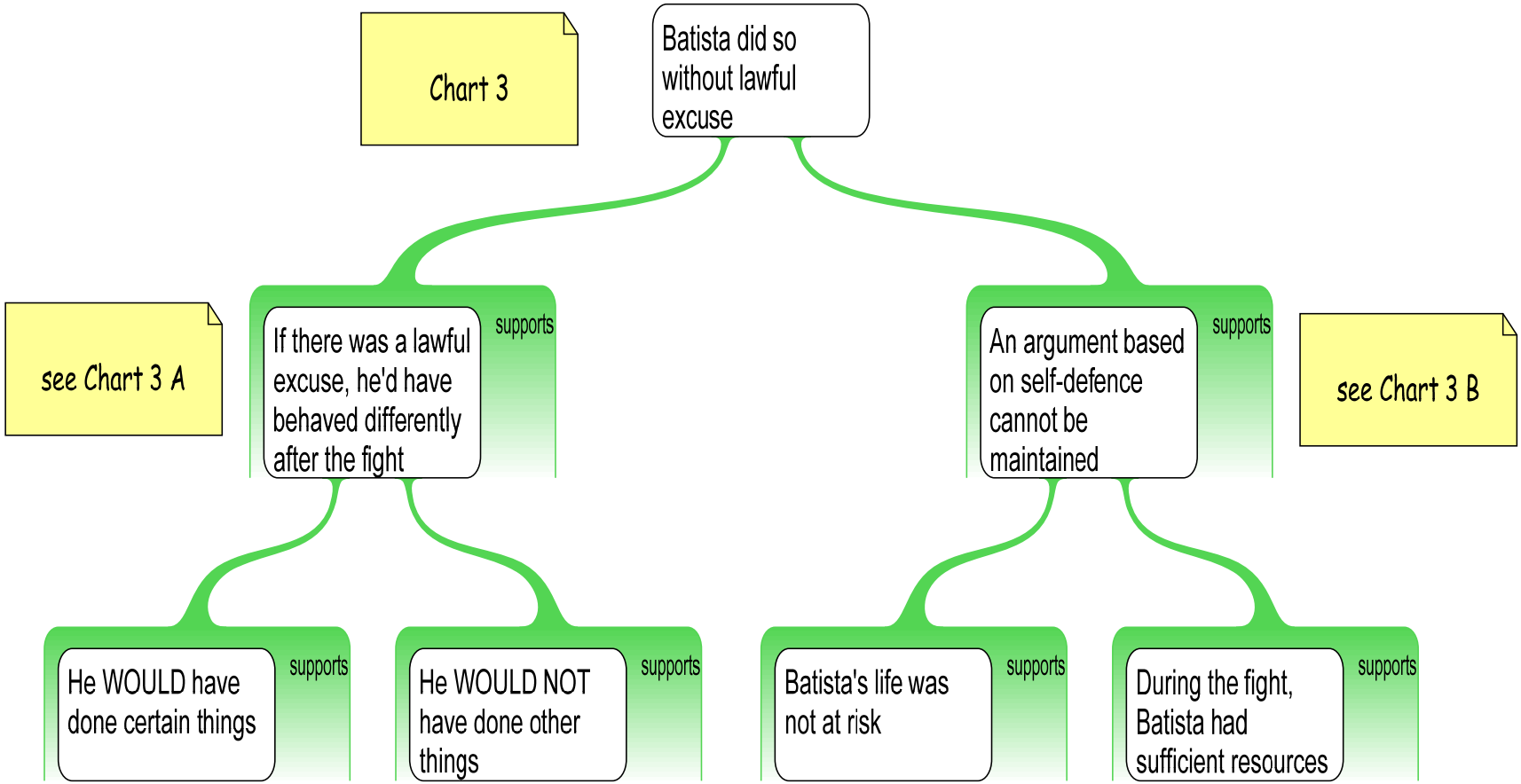
Chart 3
Batista did so without lawful excuse
see Chart 3 A
If there was a lawful excuse, he'd have behaved differently after the fight
supports
An argument based on self-defence cannot be maintained
supports
see Chart 3 B
He WOULD have done certain things
supports
He WOULD NOT have done other things
supports
Batista's life was not at risk
supports
During the fight, Batista had sufficient resources
supports

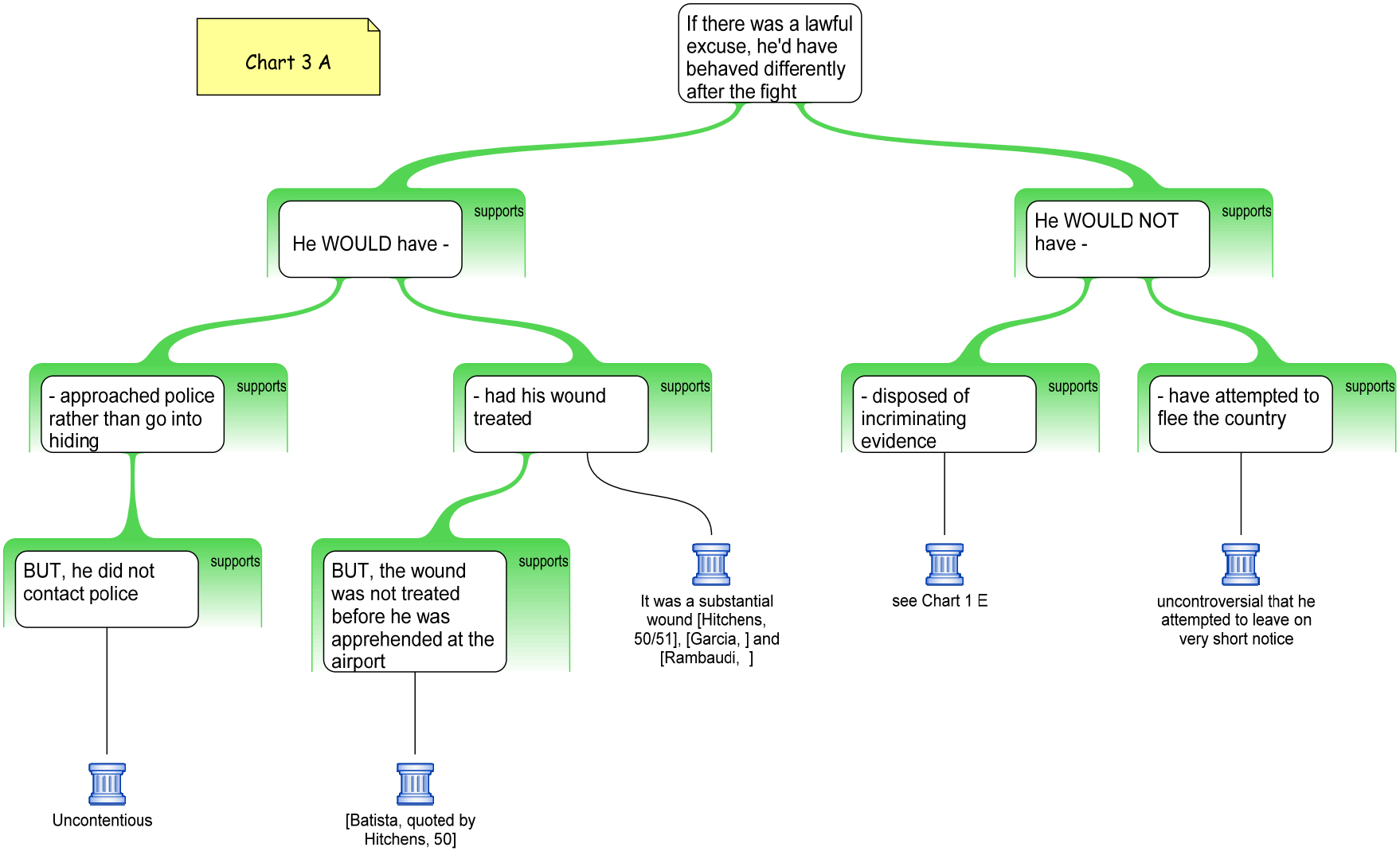
Chart 3 A
If there was a lawful excuse, he'd have behaved differently after the fight
He WOULD have -
supports
He WOULD NOT have -
supports
- approached police rather than go into hiding
supports
- had his wound treated
supports
- disposed of incriminating evidence
supports
- have attempted to flee the country
supports
BUT, he did not contact police
supports
BUT, the wound was not treated before he was apprehended at the airport
supports
It was a substantial wound [Hitchens, 50/51], [Garcia,] and [Rambaudi,]
see Chart 1 E
uncontroversial that he attempted to leave on very short notice
Uncontentious
[Batista, quoted by Hitchens, 50]

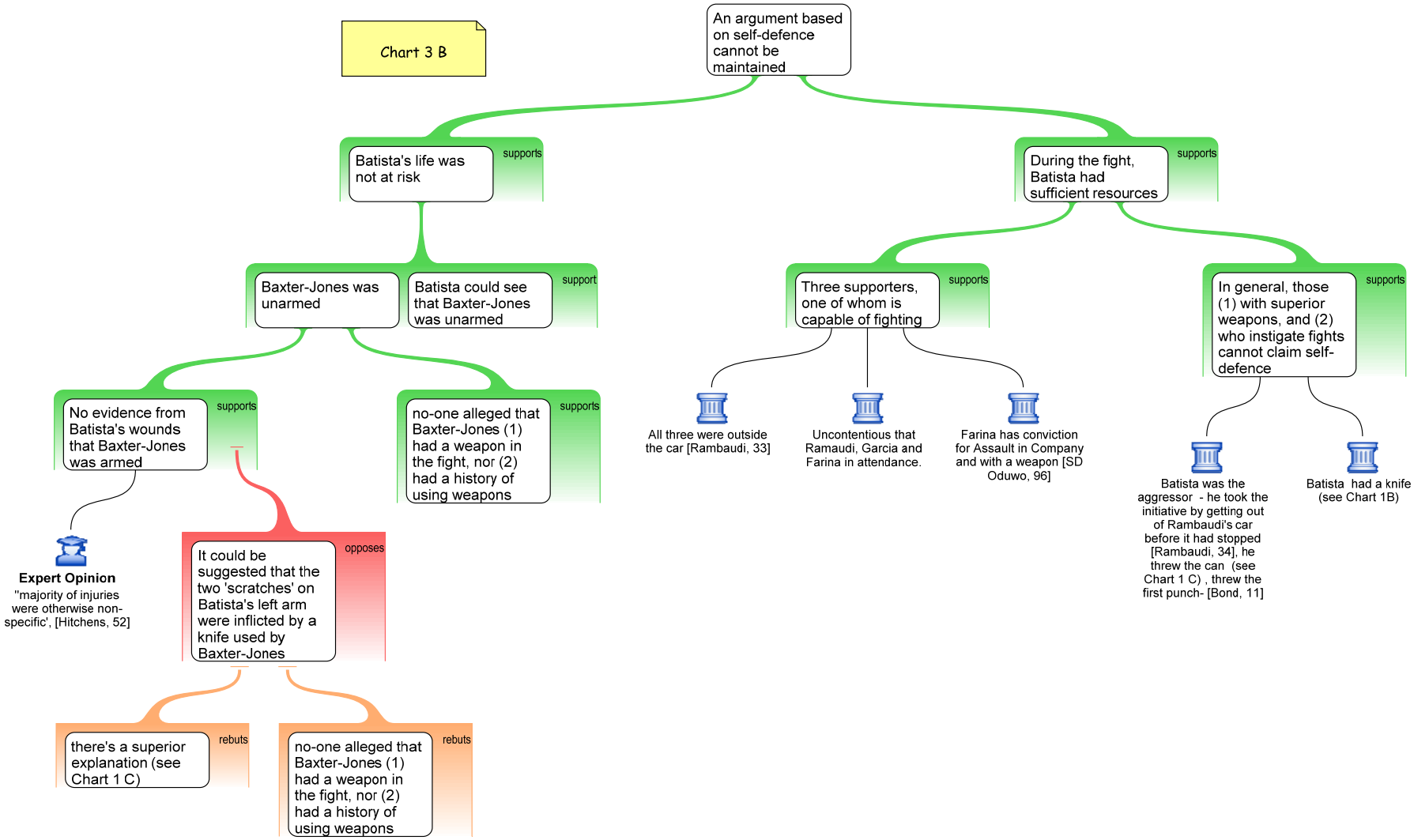
Chart 3 B
An argument based on self-defence cannot be maintained
Batista's life was not at risk
supports
During the fight, Batista had sufficient resources
supports
Baxter-Jones was unarmed
Batista could see that Baxter-Jones was unarmed
support
Three supporters, one of whom is capable of fighting
supports
In general, those (1) with superior weapons, and (2) who instigate fights cannot claim self-defence
supports
No evidence from Batista's wounds that Baxter-Jones was armed
supports
no-one alleged that Baxter-Jones (1) had a weapon in the fight, nor (2) had a history of using weapons
supports
All three were outside the car [Rambaudi, 33]
Uncontentious that Ramaudi, Garcia and Farina in attendance.
Farina has conviction for Assault in Company and with a weapon [SD Oduwo, 96]
Batista was the aggressor - he took the initiative by getting out of Rambaudi's car before it had stopped [Rambaudi, 34], he threw the can (see Chart 1 C) , threw the first punch- [Bond, 11]
Batista had a knife (see Chart 1B)
Expert Opinion
"majority of injuries were otherwise non-specific', [Hitchens, 52]
It could be suggested that the two 'scratches' on Batista's left arm were inflicted by a knife used by Baxter-Jones
opposes
there's a superior explanation (see Chart 1 C)
rebuts
no-one alleged that Baxter-Jones (1) had a weapon in the fight, nor (2) had a history of using weapons
rebuts

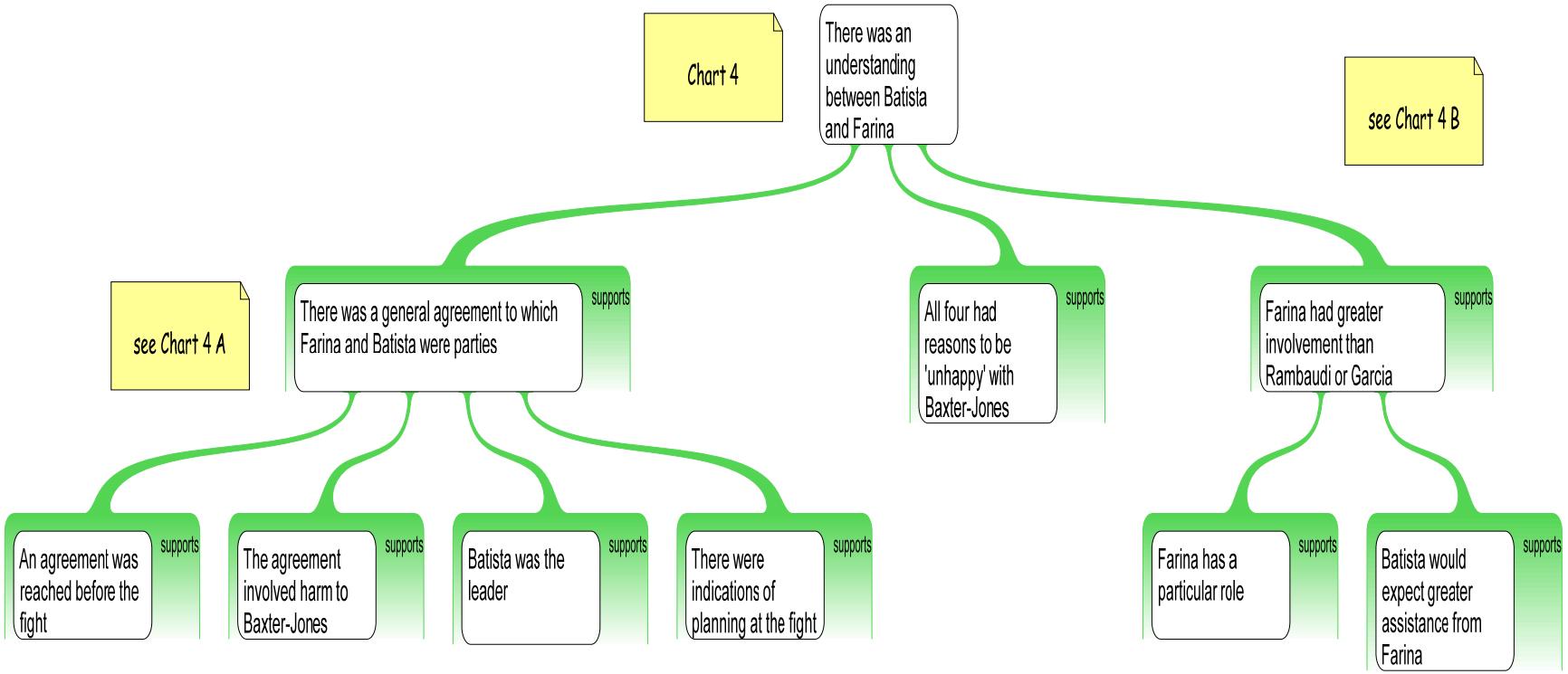
Chart 4
There was an understanding between Batista and Farina
see Chart 4 B
see Chart 4 A
There was a general agreement to which Farina and Batista were parties
supports
All four had reasons to be 'unhappy' with Baxter-Jones
supports
Farina had greater involvement than Rambaudi or Garcia
supports
An agreement was reached before the fight
supports
The agreement involved harm to Baxter-Jones
supports
Batista was the leader
supports
There were indications of planning at the fight
supports
Farina has a particular role
supports
Batista would expect greater assistance from Farina
supports

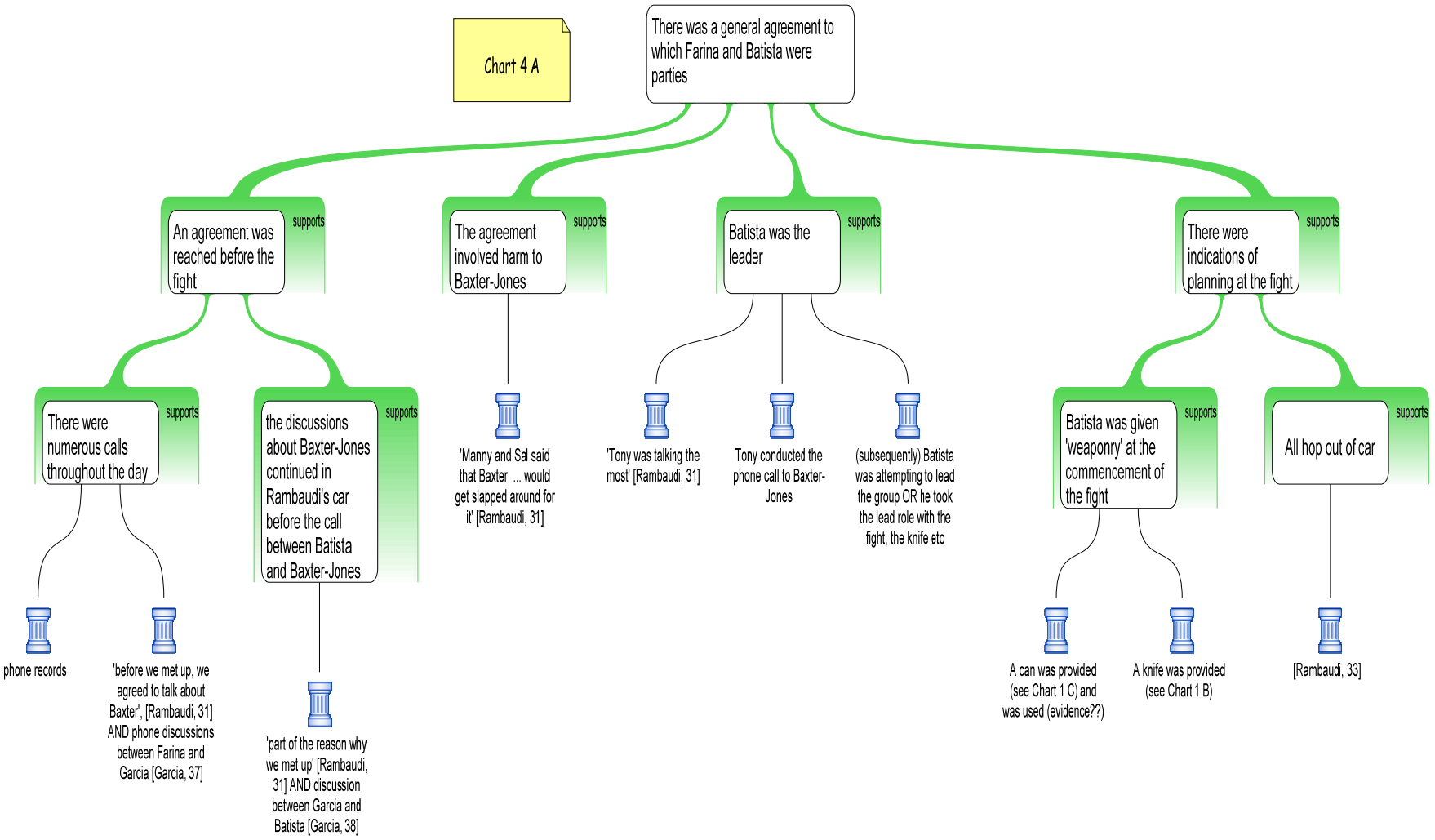
Chart 4 A
There was a general agreement to which Farina and Batista were parties
An agreement was reached before the fight
supports
The agreement involved harm to Baxter-Jones
supports
Batista was the leader
supports
There were indications of planning at the fight
supports
There were numerous calls throughout the day
supports
the discussions about Baxter-Jones continued in Rambaudi's car before the call between Batista and Baxter-Jones
supports
'Manny and Sal said that Baxter ... would get slapped around for it' [Rambaudi, 31]
'Tony was talking the most' [Rambaudi, 31]
Tony conducted the phone call to Baxter-Jones
(subsequently) Batista was attempting to lead the group OR he took the lead role with the fight, the knife etc
Batista was given 'weaponry' at the commencement of the fight
supports
All hop out of car
supports
phone records
'before we met up, we agreed to talk about Baxter', [Rambaudi, 31] AND phone discussions between Farina and Garcia [Garcia, 37]
'part of the reason why we met up' [Rambaudi, 31] AND discussion between Garcia and Batista [Garcia, 38]
A can was provided (see Chart 1 C) and was used (evidence??)
A knife was provided (see Chart 1 B)
[Rambaudi, 33]

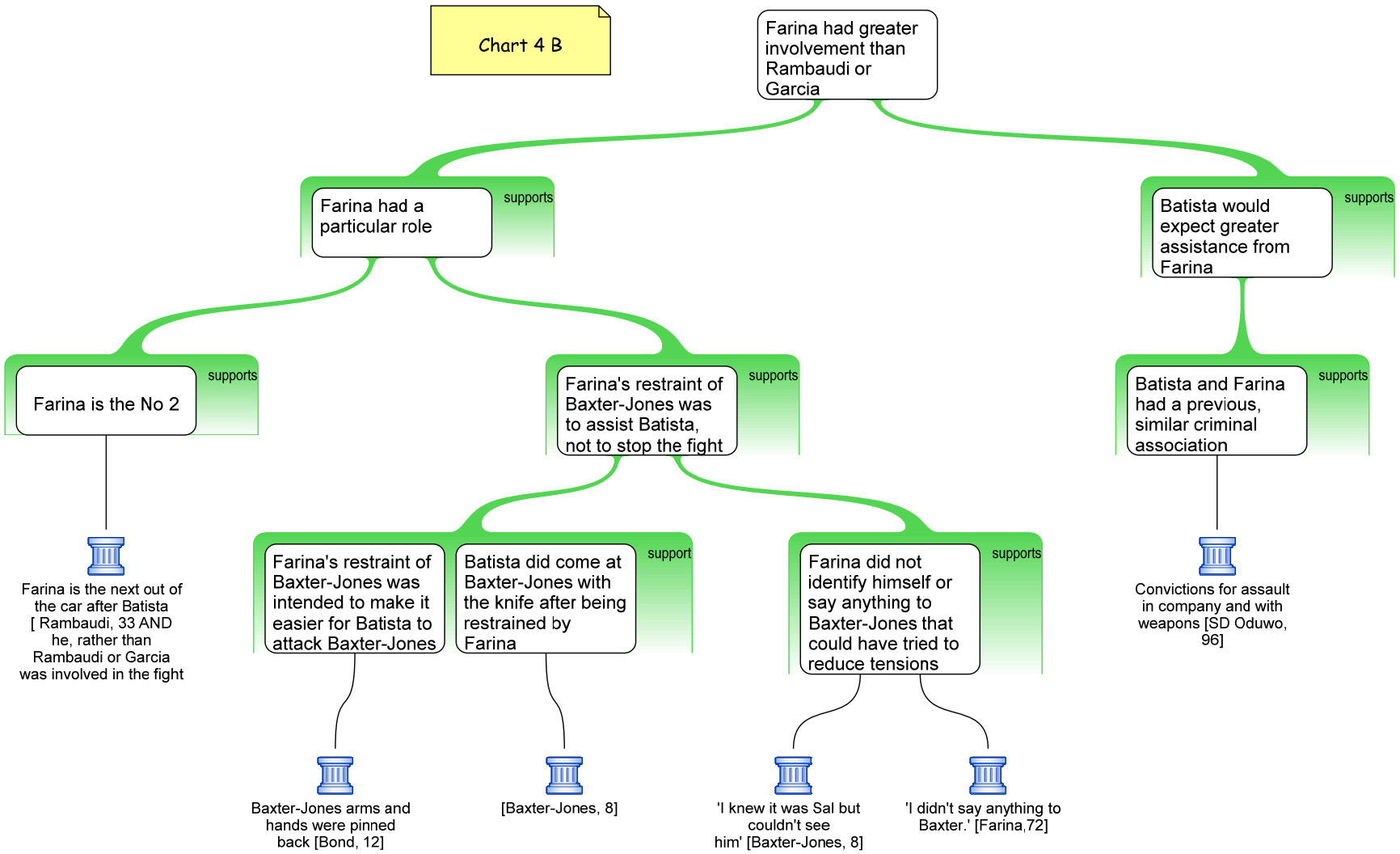
Chart 4 B
Farina had greater involvement than Rambaudi or Garcia
Farina had a particular role
supports
Batista would expect greater assistance from Farina
supports
Farina is the No 2
supports
Farina's restraint of Baxter-Jones was to assist Batista, not to stop the fight
supports
Batista and Farina had a previous, similar criminal association
supports
Farina is the next out of the car after Batista [Rambaudi, 33 AND he, rather than Rambaudi or Garcia was involved in the fight
Farina's restraint of Baxter-Jones was intended to make it easier for Batista to attack Baxter-Jones
Batista did come at Baxter-Jones with the knife after being restrained by Farina
support
Farina did not identify himself or say anything to Baxter-Jones that could have tried to reduce tensions
supports
Convictions for assault in company and with weapons [SD Oduwo, 96]
Baxter-Jones arms and hands were pinned back [Bond, 12]
[Baxter-Jones, 8]
'I knew it was Sal but couldn't see him' [Baxter-Jones, 8]
'I didn't say anything to Baxter.' [Farina,72]

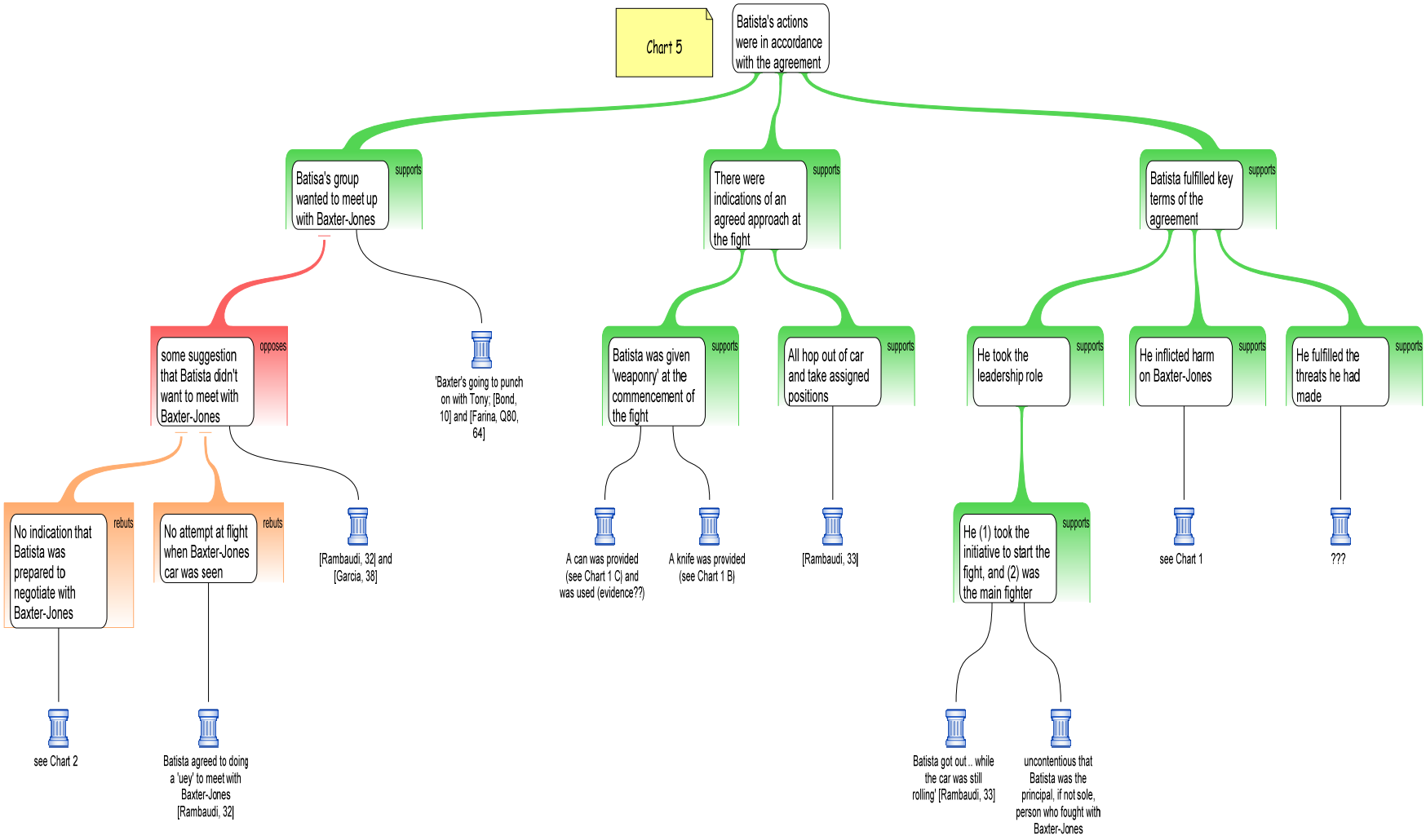
Chart 5
Batista's actions were in accordance with the agreement
Batisa's group wanted to meet up with Baxter-Jones
supports
There were indications of an agreed approach at the fight
supports
Batista fulfilled key terms of the agreement
supports
some suggestion that Batista didn't want to meet with Baxter-Jones
opposes
'Baxter's going to punch on with Tony; [Bond, 10] and [Farina, Q80, 64]
Batista was given 'weaponry' at the commencement of the fight
supports
All hop out of car and take assigned positions
supports
He took the leadership role
supports
He inflicted harm on Baxter-Jones
supports
He fulfilled the threats he had made
supports
No indication that Batista was prepared to negotiate with Baxter-Jones
rebuts
No attempt at flight when Baxter-Jones car was seen
rebuts
[Rambaudi, 32] and [Garcia, 38]
A can was provided (see Chart 1 C) and was used (evidence??)
A knife was provided (see Chart 1 B)
[Rambaudi, 33]
He (1) took the initiative to start the fight, and (2) was the main fighter
supports
see Chart 1
???
see Chart 2
Batista agreed to doing a 'uey' to meet with Baxter-Jones [Rambaudi, 32]
Batista got out .. while the car was still rolling' [Rambaudi, 33]
uncontentious that Batista was the principal, if not sole, person who fought with Baxter-Jones

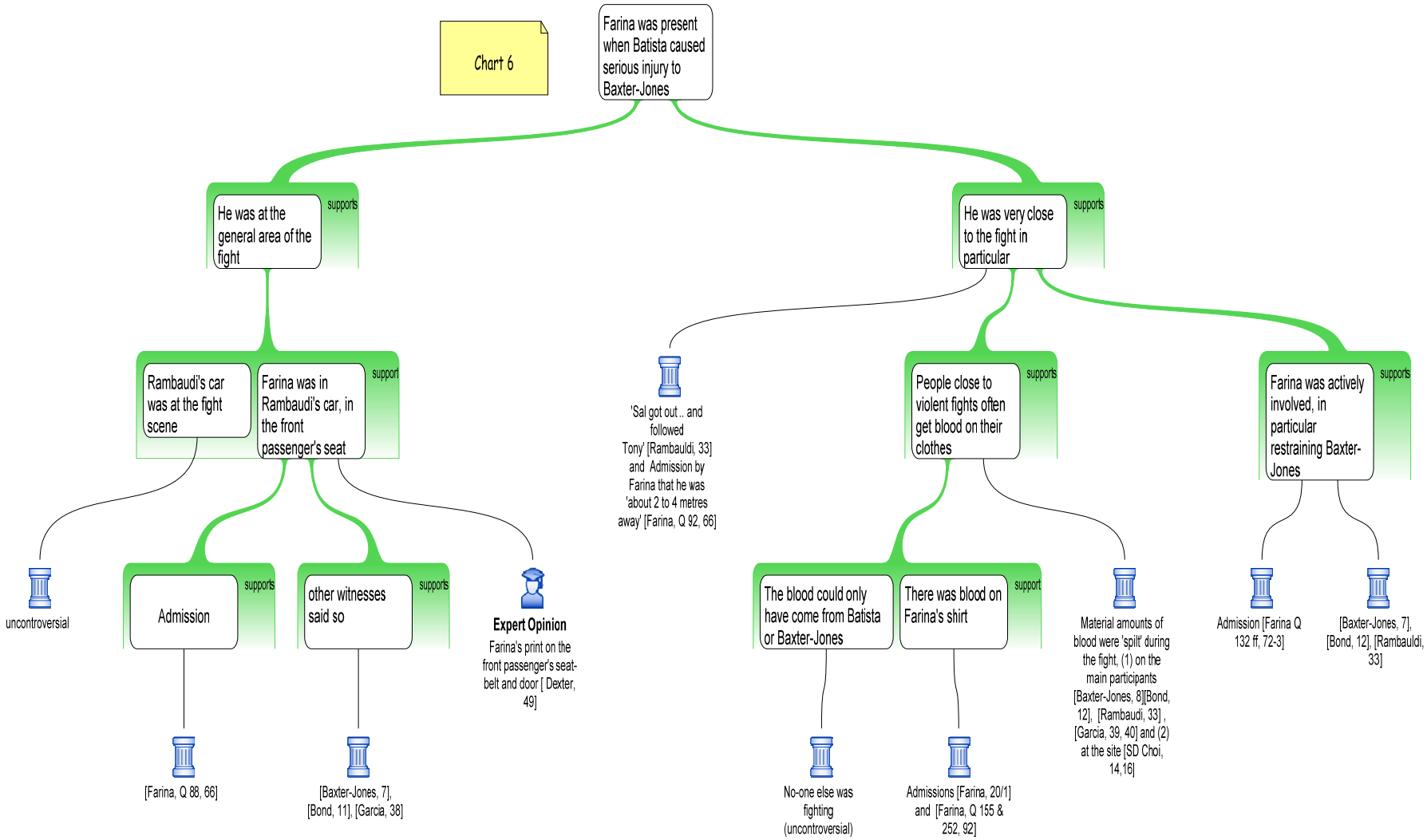
Chart 6
Farina was present when Batista caused serious injury to Baxter-Jones
He was at the general area of the fight
supports
He was very close to the fight in particular
supports
Rambaudi's car was at the fight scene
Farina was in Rambaudi's car, in the front passenger's seat
support
'Sal got out .. and followed Tony' [Rambauldi, 33] and Admission by Farina that he was 'about 2 to 4 metres away' [Farina, Q 92, 66]
People close to violent fights often get blood on their clothes
supports
Farina was actively involved, in particular restraining Baxter-Jones
supports
uncontroversial
Admission
supports
other witnesses said so
supports
Expert Opinion
Farina's print on the front passenger's seat-belt and door [Dexter, 49]
The blood could only have come from Batista or Baxter-Jones
There was blood on Farina's shirt
support
Material amounts of blood were 'spilt' during the fight, (1) on the main participants [Baxter-Jones, 8][Bond, 12], [Rambaudi, 33] , [Garcia, 39, 40] and (2) at the site [SD Choi, 14,16]
Admission [Farina Q 132 ff, 72-3]
[Baxter-Jones, 7], [Bond, 12], [Rambauldi, 33]
[Farina, Q 88, 66]
[Baxter-Jones, 7], [Bond, 11], [Garcia, 38]
No-one else was fighting (uncontroversial)
Admissions [Farina, 20/1] and [Farina, Q 155 & 252, 92]