Case No. C072654
Nevada County Case No. F10-159

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

The People Of The State Of California

Plaintiffs and Respondent

v.

Gregory Pellerin

Defendant and Appellant.

Appeal from the Superior Court for Nevada County
R. Michael Smith, Judge,
Denying Petition For Finding Of Factual Innocence
Pursuant to PC §851.8(c)

APPELLANTS' OPENING BRIEF

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February 12, 2013

Certificate of Interested Persons

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the following “persons” are the only known persons that qualify as “interested” persons:

Gregory Pellerin

Susan Pellerin

Thomas Benzine

John Schema

Samual Hernandez

The Nevada County Sheriffs Department

The Nevada County District Attorneys Office

_____

Patrick H. Dwyer,
Attorney for Appellants

Date: February 12, 2013

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I. Introduction

This is an appeal from the Ruling on Petition for Finding of Factual Innocence dated October 19, 2012 ("Ruling") by the Nevada County Superior Court ("Trial Court"). Clerk's Transcript on Appeal ("CT") 135-136.

This case has a long and arduous history. Twice before this Court of Appeal has had to grant Appellant's petitions for mandamus in an effort to get a fair hearing and a neutral prosecutor. Once these were obtained, the case was promptly dismissed by the Attorney General because there was no evidence to support the charges.

Now, Appellant has to appeal again to get his felony arrest record expunged so that he can clear his name and apply for the types of gainful employment for which he is qualified. The evidence of his innocence presented in the Trial Court was overwhelming and irrefutable. The Trial Court's one-sentence ruling ignored every fact and the applicable law.

To refresh this Court's recollection, Appellant was charged with felony assault, PC §245(a)(1), felony battery, PC §243(d), and misdemeanor false arrest, PC §236. Both of the felony charges were based upon purported "serious bodily injury", defined under PC §243(f)(4) as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; ***a wound requiring extensive suturing***; and serious

disfigurement."

At the evidentiary hearing on the petition for factual innocence, Appellant proved that he was the victim, not the aggressor, and that he acted in self-defense. When his assailant resisted arrest and continued to attack him, Appellant lawfully detained the attacker and called the Nevada County Sheriff Department ("NCSD"). One of the most significant pieces of evidence was the video footage that showed Appellant being jumped and knocked down by the true aggressor. This is the same video footage that Appellant had to fight to have produced by the prosecution, and when it was turned over, Appellant discovered (and proved) that this video evidence had been tampered with by the NCSD. Fortunately, enough remains of the original video to vindicate Appellant.

All of the injuries sustained by both parties when the real aggressor attacked Appellant were minor bruises and scrapes. There was one minor cut (about 1 inch long) on the aggressor's elbow that was self inflicted when the aggressor knocked Appellant to the ground. This minor cut does not, as a matter of statutory law, constitute "serious bodily injuries" under PC §243(f)(4). ***Thus, the two felony charges against the Appellant had no basis as a matter of law*** and Appellant should never have been charged with these two felonies.

However, the dark shadow of this case is very long. Appellant is once again forced to come before this Court to obtain the relief to which he is obviously entitled. The damage to Appellant's life from having been falsely charged with two

felonies has been enormous. When combined with the evidence tampering, the refusal of the prosecution to even look at the evidence, and the conflict of interest of the Nevada County District Attorneys Office, the miscarriage of justice and consequent burden upon Appellant is shocking.

Appellant sets forth below the evidence of what really happened at the alleged “incident scene” on the morning of his arrest on the very day that he was going to testify in the county’s largest real estate fraud case against the mortgage lender with which the Nevada County District Attorney had $2.5 million in undisclosed loans.

II. Statement of the Case

A. Relevant Procedural History

This case has been before this Court twice already. First, by petition for a writ of mandamus filed by Appellant in this Third District Court of Appeal on January 5, 2011, regarding an order by the Superior Court denying the Defendant an evidentiary hearing to inquire about tampering with video camera evidence (see C067033). This Court of Appeal issued a *Palma* letter on February 23, 2011, directing the Superior Court to reverse its denial of the motion for an evidentiary hearing. Promptly after receiving the *Palma* letter, the Superior Court reversed its earlier ruling and granted the Appellant an evidentiary hearing.

Second, by petition for a writ of mandamus filed by Appellant in this Third District Court of Appeal on August 24, 2011, regarding an order by the Superior Court denying the Appellant's Motion to Recuse the Nevada County District Attorneys Office (see C069031). This Court of Appeal issued an alternative writ of mandate on September 29, 2011, directing the Nevada County Superior Court to grant Appellant's recusal motion. The Attorney General did not oppose the alternative writ and thereafter substituted in for the People of California. After reviewing the evidence in the case, the Attorney General dismissed the charges against Appellant on January 26, 2012.

Appellant filed a Petition for a Finding of Factual Innocence under PC

§851.8(c) on April 19, 2012. CT 6-10.[1] A full evidentiary hearing on the Petition was held on July 31-August 1, 2012. Rather than present closing argument at the end of this hearing, the Trial Court requested both sides to submit written summation and argument of the evidence. Respondent filed a closing argument on August 28, 2012, CT 96-103, and Appellant filed a summation of the evidence on August 29, 2012. CT 104-118. Appellant filed a reply to Respondent's argument on September 12, 2012, CT 119-125, and Respondent filed a reply to Appellant's summation on September 14, 2012. CT 126-134.

Despite a detailed factual hearing and then extensive briefing on the facts and law, the Trial Court issued a terse Ruling on October 19, 2012, with no discussion and only a one sentence denial of the petition. CT 135-137.

B. **Relevant Factual History**

The relevant factual history of the case provides the core for the Petition for Finding of Factual Innocence. Rather than present the facts twice, they are presented as the body of the Appellant's argument in Section VI, below.

[1] Only the supporting Memo of Points and Authorities was included in the Clerk's Transcript for an unknown reason. However, the actual petition is not important to this appeal.

III. **Statement of Appealability**

On November 29, 2012, Appellant filed a Notice of Appeal, CT 138, from the Ruling. CT135-137. The Notice of Appeal was timely filed under California Rules of Court, Rule 8.308 The Appeal was made pursuant to California Penal Code §1237(b).

IV. **The Standard of Review**

The Trial Court's ruling was based upon the barest finding that "[c]onsidering all of the evidence presented at the hearing, this court concludes the Petitioner has not met this difficult burden of proof." CT 136.

The proper standard of review on appeal from the trial court's finding that Petitioner did not meet his burden of proof under PC §851.8(c) is a *de novo* review of the evidence. See *People v. Adair* (2003) 29 Cal 4th 895.

V. Preliminary Legal Argument

A. Burden Of Proof

Under Subdivision (b) of PC §851.8, a petitioner has the initial burden of proof. That burden requires a petitioner to show that no "reasonable cause" existed to believe that he committed the offenses for which the arrest was made. "Reasonable cause" was defined by the California Supreme Court in *People v. Adair* (2003) 29 Cal. 4th 895, 904, as follows: "that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."

Appellant overwhelmingly demonstrated at the evidentiary hearing that no man of ordinary care and prudence could believe that he was guilty of felony assault and battery with intent to commit serious bodily injury, both factually and as a matter of law. Having met his initial burden of proof, the burden then shifted to Respondent to prove the contrary. PC 851.8(b); see *Adair* at 905; *People v. Gerald* (2009) 174 Cal. App. 4th 781. However, Respondent did not submit a single piece of rebuttal evidence, exam a single rebuttal witnesses, or present any material challenge to Appellant's overwhelming evidence. Thus, Respondent tacitly admitted the Appellant's case.

B. Admissible Evidence

The express language of PC §851.8, subd. (b), allows the court to accept as evidence declarations, affidavits, police reports, or any other evidence submitted

by the parties which is material, relevant and reliable. Further, under *People v. Medlin*, (2009) 178 Cal App. 4th 1092, 1101-1102, the court is allowed to hear and consider evidence not known or available to the arresting officers at the incident scene, *but that was disclosed or discovered after the arrest*. This would even include suppressed evidence.

There were no significant evidentiary issues arising from the hearing on Appellant's petition.

VI. *De Novo* Review Of The Evidence Overwhelming Establishes That There Was No Reasonable Cause For The Arrest

A. The History Of Contemptuous Harassment Of Appellant

For about two years prior to the incident, Appellant was harassed by a Mr. John Schema. Mr. Schema was the defendant in a civil lawsuit filed by Appellant concerning the enforcement by Appellant of a right of first refusal to purchase real property from Mr. Schema. Mr. Schema repeatedly came to Appellant's residence to harass Appellant and his family. Appellant applied for, and received, two court orders requiring Mr. Schema to stay away from the Appellant's residence and serve all papers by mail or through a lawyer or professional process server. Despite the court order, Mr. Schema kept playing a game of driving a "friend" up to the corner of the property, just out of view of the Appellant's front door. While Schema waited in the car, the "friend" would come down to the house and serve papers in violation of the court order. On the morning of the incident, Mr. Schema once again drove a "friend" to Appellant's house. This time it was Thomas Benzine. While Schema "hid" his car at the corner of the Appellant's property, just outside of view, Benzine walked down to the front door. Reporter's Transcript On Appeal (hereafter "RT") p. 156, line 22, to p. 170, line 23; p. 172, line 3, to p. 177, line 4; Appellant's (i.e., Petitioner's) Exhibit 42 (hereafter referred to as "PE" 42 to be consistent with the designation in the Trial Court).

At the hearing, Appellant introduced the two court orders prohibiting Mr.

John Schema from coming to the Petitioner's residence ("Property") to serve legal papers concerning the lawsuit between them. PE 28 and 29. Appellant testified that he and his family had been harassed by Mr. Schema several times, which is why he sought and obtained these court stay away orders. Further, Appellant testified that at least six times after these two orders (PE 28-29) were obtained, Mr. Schema violated these orders by coming to the Property himself and/or bringing a Mr. Sam Hernandez with him to the Appellant's residence and then having Hernandez actually come to the Appellant's door. RT p. 163, line 23, to p. 165, line 27.

Appellant then testified that he had contacted the NCSD on April 18, 2010 (two days before the incident) to complain about the violations of the court order by Mr. Schema. Appellant asked the NCSD what could be done about the matter. Appellant testified that he was advised by a NCSD deputy that Appellant could make a citizen's arrest for violation of the court orders. RT p. 166, lines 22-28. Appellant further testified that the same NCSD deputy contacted both Mr. Schema and Mr. Hernandez and told them to stay away from Appellant's residence. RT p. 167, lines 1-11. Appellant further testified that he had an exchange of emails with Mr. Schema between April 18, 2010, and the morning of April 20, 2010. Appellant testified that he was in the process of writing Mr. Schema another email warning him to stay away when Mr. Benzine arrived at his door at about 9:00 am on April 20th. RT p. 167, line 12, to p. 168, line 5; RT p. 178, lines 11-28.

Finally, Appellant testified that subsequent to the Incident on April 20, 2010, he filed an action for contempt against Mr. Schema for violation of the two court stay away orders (PE 28-29). Appellant testified that he received a judgment of contempt against Mr. Schema by the Honorable Thomas Anderson of the Nevada County Superior Court on August 16, 2010, and that although this judgment was for only one count of contempt, the court made a finding of fact that Mr. Schema had been in violation of the court orders on numerous dates, including April 20, 2010. RT p. 168, line 10, to p. 169, line 4. The decision of Judge Anderson in the contempt proceeding was accepted into evidence as PE 42. RT p. 177, lines 2-4.

Appellant then established that Benzine was not an authorized process server as required by the court orders and was on the Property in violation of those orders. Appellant testified that when he opened his front door he saw Benzine and asked him who he was. Benzine refused to identify himself or state why he was there. When Benzine turned and started to go back out the driveway, Appellant realized that Benzine was brought there by Mr. Schema in violation of the court orders. RT p. 178, line 20, to p. 181, line 28.

Having demonstrated the: (a) history of the contemptuous behavior of Mr. Schema in repeatedly coming to the Property and bringing along a third part to serve papers; and (b) the opinion of the NCSD that Appellant could make a citizens arrest for such contemptuous behavior, Appellant established the rightful basis for his actions at the incident scene on April 20, 2010, to: (a) determine

whether Mr. Benzine was wrongfully on the Property; and (b) whether Mr. Schema had brought Benzine to the Property in Schema's pattern of violating the court stay away orders.

B. Appellant Was Assaulted and Battered By Benzine Multiple Times And Rightfully Placed Benzine Under Citizens's Arrest

After the initial contact with Benzine at the front door, Appellant proceeded to go out his driveway to locate Schema where he had observed him on previous occasions. As Appellant was doing this, Benzine assaulted and battered him by butting Appellant with his shoulder, almost knocking him over. RT p. 182, lines 1-10. After Benzine's assault and battery, Appellant rightfully placed Benzene under citizen's arrest[2] and told Benzine that if he touched Appellant again he would physically detain Benzine. RT p. 182, lines 11-16. This first assault was reported to Deputy King at the Incident scene, but was ignored. RT p. 209, lines 17-24; PE 26, Deputy King Supplement, pg. 2; PE 33A, p. 1 (statement of Pellerin at middle of page).

Appellant and Benzine then proceeded to jog down and out of the driveway towards where Mr. Schema was hiding. When they neared the top of the

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[2] As noted in Petitioner's Hearing Brief, CT 83-84, a citizen may make an arrest for any offense committed in that citizen's presence, both misdemeanors and felonies. PC §837; *People v. Sjosten* (1968) 262 Cal. App. 2d 539, 543. Moreover, a citizen may use such force and restraint as is reasonable for making the arrest. PC §835; *People v. Garcia* (1969) 274 Cal. App. 2d 100 *,105; People v. Harris* (1967) 256 Cal. App. 2d 455, 459 (disapproved on other grounds); *People v. Foster* (1963) 223 Cal. App. 2d 275, 277; *People v. Score* (1941) 48 Cal. App. 2d 495, 498-499.

driveway where it met Emerald Lane (see PE 30), Benzine moved ahead of Appellant, turned towards him, and swung at Appellant with his left arm/hand. Appellant put his arms up in the air and moved his hips back to avoid the blow. Then, Benzine wrapped his arms around Appellant's waist and tackled Appellant to the ground. RT p. 183, line 2, to p. 197, line 24.

This part of the incident was recorded by Appellant's wife (Mrs. Pellerin) using a Flip video camera. The video showing this second assault and battery is labeled Vid. #15, which is contained on Respondent's (hereafter referred to as "DE" to be consistent with the designation in the Trial Court) Exhibit B. Appellant also made a sequence of still photographs from Vid. File #15 on DE B showing the assault and battery by Benzine in detail. This sequence of still photographs was admitted into evidence as PE 11 to 25. ***These exhibits (DE B, Vid. File #15, and PE 11-25) corroborate Appellant's testimony and prove on their face that Benzine, not Appellant, was the aggressor, and that Benzine violently assaulted and battered the Appellant.***

Further corroborating evidence is contained in DE B, Vid. File #16. At the end of this video clip the dirt and moisture marks on Appellant's back and left side are clearly shown. Appellant testified that these dirt and moisture marks on his clothing came from his being knocked down by Benzine. RT p. 215, line 15, to p. 216, line 9.

Appellant then testified that after falling to the ground, he rolled Benzine over and put him into an arm lock. The purpose of the arm lock was to protect himself from further attack by Benzine and to make sure he could not hurt Appellant's wife.[3] RT p. 199, lines 7-19. Appellant then informed Benzine a second time that he was under citizen's arrest for the two assaults and the violation of the court orders. Appellant further told Benzine that he needed to stop fighting until the sheriff came.[4] RT p. 199, line 20, to p, 200, line 9.

Appellant next testified about how he tried to release pressure on the arm lock several times, but that Benzine continued to try and escape and kept trying to attack him. Thus, Appellant had to continue to hold the arm lock until the NCSD arrived. RT p. 201, line 27, to p. 207, line 1. Appellant allowed Benzine to use his cell phone to call the NCSD. RT p. 204 lines 12-22. Further, Appellant testified that he never tried to harm Benzine, but just detain him. RT p. 204, line 23, to p. 205, line 4. As admitted by Respondent, Appellant's use of an arm lock to detain

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[3] Acts of self defense are not a battery. To establish an act of self defense, there must be an honest and reasonable belief that bodily injury is about to be inflicted upon one's person, and one does not have to wait until they have been battered or injured. *People v. Minifree* (1996) 13 Cal. 4th 1055; *People v. Humphrey* (1996) 13 Cal. 4th 1073, 1082-1083.

A battery must be the result of an intentional act, not the result of negligence or even criminal negligence. *People v. Lara* (1996) 44 Cal. App. 4th 102, 105. If Appellant was mistaken about his right to make a citizens' arrest, then his subsequent use of modest, reasonable force to detain Benzine was a mistake of fact that nullified the intent to commit a battery.

[4] The law requires that the arrestee may not use force to resist or flee, but is required to remain passive. *People v. Garcia*.

Benzine was the method least likely to cause Benzine injury. RT p. 58 line 21, to p. 60, line17.

C. There Was No Serious Bodily Injury To Benzine

Appellant was arrested and charged by the NCSD for violation of PC §243(d).[5] This is a felony battery that requires proof of a serious bodily injury inflicted on the victim. Serious bodily injury is defined under PC §243(f)(4) as: "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." See also *People v. Belton* (2009) 168 Cal. App. 4th 432, 440.

The medical evidence presented at the hearing proved that there was no serious bodily injury to Mr. Benzine. His only injuries were some abrasions and a small cut on his elbow. There were none of the types of injury listed in the statute. *In particular, it must be noted that the statute says that only a "wound requiring extensive suturing" would qualify as a serious bodily injury*. Benzine had a small, 1" cut on his elbow as shown in PE 5; RT p. 41, lines, 13-14. The medical report submitted by Respondent as DE "C" only shows that Mr. Benzine had minor

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[5] Petitioner was not charged with PC §245(a)(1) by the NCSD. This was added by the NCDA on May 7th, 2010. However, the PC §245(a)(1) charge clearly flowed from the original arrest for PC §243(d), and thus, if there was no reasonable cause for that arrest, then there could be no reasonable cause for the PC §245(a)(1) charge.

sutures to his elbow for which the charges were $308. There was no “extensive suturing” as required by the statute. The remaining testimony showed some minor abrasions. See PE’s 3-4; Testimony of Deputy La Cosse, RT p. 41, lines 3-12. There was nominal bleeding and pain. Testimony of Deputy La Cosse, RT p. 42, line 4, to p. 45, line 15.

In fact, Deputy La Cosse testified that, apart from the small cut on Benzine’s elbow, there were no other injuries that he was aware of that constituted “serious bodily injury”. RT p. 60, line 24, to p. 61, line 24. Deputy La Cosse further testified that there was not any significant bleeding when he saw the wound, but only that there was some blood around the elbow. RT p. 65 lines 9-13.

Faced with these facts about the injury sustained by Benzine, ***no man of ordinary care and prudence could possibly conclude that the minor abrasions and the 1" cut constituted “serious bodily injury”***. Consequently, there was no reasonable cause for the NCSD to arrest and charge Appellant with violating PC §243(d).

In reality, the evidence proved that the injuries sustained by Benzine were the result of his attacking Appellant and resisting a valid citizen’s arrest. Deputy La Cosse testified that the cut on Benzine’s elbow was likely “caused by striking the ground” and not the result of any weapon. RT p. 79, lines 10-21. As demonstrated above, Appellant showed with testimony and a video of the second battery by Benzine that the injury to Benzine’s elbow was most likely the result of

Benzine's elbow striking the ground when he had his arms around Appellant and tacked him to the ground. See also Vid. File #15 (on DE "B") and PE's 11-25 which speak for themselves as to the most likely time when Benzine received the injury to his elbow.

D. The NCSD Failed To Evaluate The Evidence At The Incident Scene

There was extensive evidence in the possession of the NCSD officers at the incident scene prior to the arrest that exonerated Appellant. Inexplicably, the NCSD ignored this evidence and charged Appellant.[6] The evidence at the scene included the following:

1. The two stay away orders (PE's 28-29);

2. The statement at the incident scene made by Benzine that he had been driven to the Appellant's residence that morning by John Schema to serve papers on the Appellant even though he knew that Schema was not supposed to go to the Appellant's residence (PE 26, Deputy Rimoldi Supplement, pg. 1);

3. The statement at the incident scene made by John Schema that he had driven benzine to the Appellant's residence that morning to serve papers on the Appellant even though he knew that he was not supposed to go to the Appellant's

[6] As set out in Apellant's prior petition for mandamus regarding the motion to recuse (see C069031), Appellant was scheduled to testify on the day of his arrest about the loan he had with Olympic Mortgage. Olympic Mortgage had made loans to Nevada County District Attorney Clifford Newell totaling about $2.5 million. Because of the charges against, Appellant never got the chance to testify.

residence. (PE 26, Deputy Rimoldi Supplement, pg. 2);

4. The video tape made by Mrs. Pellerin (wife of Appellant) of the incident between the Appellant and Benzine on April 20, 2010 (DE "B" Vid. Files #15 and #16) that clearly shows Benzine tackling Appellant to the ground;

5. The statement to Officer King by Appellant which explained that Benzine assaulted and battered Appellant first, near the house, in an effort to prevent Appellant from going up the driveway and finding Schema (PE 33A);

6. The corroborating statement of Mrs. Pellerin that Benzine attacked Appellant and that Appellant had to restrain Benzine (PE 26, Deputy King Supplement, pg. 2);

7. The minor injuries sustained by Benzine consisting of some abrasions (about the same as those sustained by Appellant) (See PE's 3-4; RT p. 41, lines, 3-12; RT p. 42, line 4 through p. 45, line 15; RT p. 60, line 24 though p. 61, line 24; RT p. 65, lines 9-13); and

8. The obvious physical injuries to Appellant that were sustained when he had been knocked to the ground by Benzine (PE's 6-8; DE B, Vid. File #15; PE's 11-25; DE B, Vid. File #16; RT p. 215, line 15 to p. 216, line 9.

The foregoing evidence *is more than sufficient to show that there was no "reasonable cause" to arrest Appellant*. If the NCSD had simply conducted a professional investigation that included looking at the witness statements, the documentary evidence, and the video footage showing who the real aggressor

was, the NCSD would have arrested Benzine, not Appellant. It is simply beyond credulity that "that state of facts" known to the NCSD at the time of the arrest "would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that … [Appellant was] guilty of a crime."

E. Other Corroborating Evidence

In addition to the evidence available to the NCSD at the Incident scene, Appellant submitted significant corroborating evidence of his innocence, including the following:

1. The subsequent conviction of John Schema for Contempt of Court for violation of the court orders shown to the arresting officers, including a finding of fact by Judge Anderson that Mr. Schema had violated the court stay away orders on April 20, 2010 (PE 42);

2. The history of calls and complaints by Appellant to the NCSD about Schema's continuing violation of the court order, including a complaint made just two days before the incident on April 18, 2010, to the NCSD about John Schema's intent to once again violate the court stay away order (RT p. 166, lines 22-28; RT p. 167, lines 1-11); and

3. The medical history of Mr. Benzine's injuries that show that he had minor abrasions and a minor cut that needed a couple of sutures (DE "C").

This additional evidence establishes the state of mind of Appellant on the morning of the incident and the reasons why he ignored Benzine and attempted to

go directly to the location at which that he knew John Schema was hiding. This caused Benzine to panic and to attack Appellant twice in an attempt to stop him from finding Schema. Appellant rightfully employed physical force in a proper and measured manner necessary to detain Benzine, but not to harm him, after placing him under citizen's arrest.

Most importantly, this evidence proves that the nature of Benzine's injuries were so minor that, as a matter of law, they cannot be construed to be "serious bodily injury" under the PC §243(d).

VII. Conclusion

Appellant has shown that the NCSD officers ignored all of the evidence in their possession at the incident scene, especially the video showing Benzine tackling Appellant.

Appellant has proven with un-rebutted testimony that Benzine trespassed and violated two court orders (misdemeanors under PC §166(a)(4)), then assaulted and battered Appellant twice, and unlawfully continued to resist arrest and continued to attack Appellant while he was being legally detained.

Appellant proved that Benzine's only injuries were minor abrasions and a small cut on his elbow. As a matter of law, these injuries do not constitute "serious bodily injuries" as required for arrest under PC §243(d) or the later added charge of violating PC §245(a)(1).

Appellant had every right to effect a citizen's arrest and when Benzine resisted, the force used by Appellant was the minimal necessary to detain Benzine without injury until the NCSD arrived. There was no grounds for arrest for false imprisonment under PC §236.

The Attorney General, representing the People, failed to put into evidence anything that contradicted Appellant's proof.

Simply put, the evidence at the hearing overwhelmingly demonstrated that no man of ordinary care and prudence could believe that Appellant was guilty of the crimes for which he was charged. Accordingly, Appellant's application for a finding of innocence must be granted.

Respectfully Submitted,

Date: February 12, 2013

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Patrick H. Dwyer, counsel for Appellant

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this Appellant's Opening Brief is approximately 4,720.

_____
Patrick H. Dwyer,
Attorney for Appellants

Date: February 12, 2013

PROOF OF SERVICE

I hereby certify under penalty of perjury that I am over the age of 18 years, that I reside at P.O. Box 1705, 17318 Piper Lane, Penn Valley, CA 95946, and that I served the Appellants's Opening Brief in Appeal No. **Case No. C072654**, Case No. F10-159, by United States first class mail, addressed as follows:

1. Barton Bowers, Deputy Attorney General, 1300 I Street, Suite 1101, P.O. Box 944255, Sacramento, CA 94244-2550;
2. The Superior Court for the County of Nevada, 201 Church Street, Nevada City, California 95959 (one copy); and
3. The California Supreme Court, 350 McAllister Street, San Francisco, California 94102 (four copies)

By personal delivery upon:

4. The Court of Appeal, Third Appellate District, 621 Capitol Mall, 10th floor, Sacramento, California 95814-4719 (original and four copies).

_____
Signature

_____
Print Name

Date: February 12, 2013