

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

SAUL MARTINEZ,
Defendant/Appellant.

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a final judgment of conviction for Attempted Murder, a first degree felony, in violation of Utah Code § 76-5-203; Possession of a Dangerous Weapon by Restricted Person, a second degree felony, in violation of Utah Code § 76-10-503(2)(A); Aggravated Assault, a third degree felony, in violation of Utah Code § 76-5-103(1); and three counts of Felony Discharge of a Firearm, third degree felonies, in violation of Utah Code § 76-10-508.1, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Richard McKelvie, presiding.

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INTRODUCTION

On July 8, 2015, a shooter rapidly fired three rounds that struck a vehicle occupied by the alleged victim, Rafael, and an off-duty police sergeant. Based on this shooting, Martinez was convicted of attempted murder, aggravated assault, possession of a firearm by a restricted person, and three counts of felony discharge of a firearm.¹

Martinez raises two issues on appeal. First, the trial court committed reversible error when it allowed Rafael to testify that “all the people from Tooele, [] were telling [him] that [Martinez] was looking for [him] ... to kill [him].” Admission of the Tooele residents’ statements violated the rule against hearsay and prejudiced Martinez. Thus, Martinez is entitled to a new trial on all counts.

Second, Martinez’s convictions for discharge of a firearm merge with attempted murder. Specifically, merger is required under subsection 76-1-

¹ The Sentence, Judgment Commitment is attached at Addendum A.

402(1)'s single criminal episode doctrine; under subsection 76-1-402(3) because the offenses share a lesser-greater relationship; and under the doctrine of common law merger. Accordingly, Martinez asks this Court to vacate his discharge convictions.

ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Whether this Court should grant Martinez a new trial where the trial court admitted prejudicial, out-of-court statements made by unidentified Tooele residents in violation of the rule against hearsay.

Standard/Preservation: Whether a statement is hearsay that is “offered for the truth of the matter asserted is a question of law,” which is reviewed for correctness. *State v. Haltom*, 2005 UT App 348, ¶8, 121 P.3d 42. This issue was preserved. R.709 (hearsay objection and trial court’s ruling).

Issue II: Whether Martinez’s convictions for discharge of a firearm should be vacated.

Standard/Preservation: “Because merger questions are legal in nature, this Court] review[s] them for correctness. *State v. Lee*, 2006 UT 5, ¶26, 128 P.3d 1179. This issue is preserved. *See* R.997-1009 (oral motion to merge at the close of the State’s case); R.336-46 (defense’s motion to vacate); R.349-54 (State’s response motion); R.1187-1210 (argument on motion to vacate); R.1210-12 (trial court’s ruling); *see also State v. Lopez*, 2004 UT App 410, ¶9, 103 P.3d 153 (“the defense can object that charges merge ‘at any time, either during trial, or following the conviction on a motion to vacate’”).

STATEMENT OF THE CASE AND FACTS

a. Procedural History

The charges stemmed from a July 8, 2015, shooting where three shots were fired at a vehicle containing two occupants. *See* R.3-4. On July 16, 2015, the State filed an Information charging Martinez with attempted murder, a first degree felony, in violation of Utah Code § 76-5-203; possession of a firearm by a restricted person, a second degree felony, in violation of Utah Code § 76-10-503(2)(a); aggravated assault, a third degree felony, in violation of Utah Code § 76-5-103(1); and three counts of felony discharge of a firearm, third degree felonies, in violation of Utah Code § 76-10-508.1. R.1-6. The felony discharge counts were based on each expended bullet. *See id.*; R.1131. Martinez was bound over on all counts. R.35-37, 553-55.

On July 19-21, 2016, the parties convened for a bifurcated three-day trial. R.279-85, 330-32. Pursuant to a pre-trial stipulation, the possession of a firearm by a restricted person count was severed, and Martinez was tried by jury on the remaining counts. R.57. Ultimately, the jury found Martinez guilty on all counts before them. R.333-34, 1154. The trial judge subsequently addressed the severed possession of a firearm count. R.1156-70. The defense stipulated that Martinez was a restricted person, R.1156, 1159, 1166, and, after determining that Martinez possessed a firearm, the trial court found Martinez guilty. R.335, 1165-70.

At the close of the State's case and in a post-verdict motion to vacate, Martinez moved the trial court to merge the felony discharge counts with

attempted murder. R.336-46; *see also* R.997-1009. After briefing and argument on the merger issue, the trial court denied Martinez's motion. R.336-46, 349-54, 1210-12. Martinez was then sentenced as follows: for attempted murder, an indeterminate prison term of 3 years to life; for possession of a firearm, an indeterminate term of 1-15 years; for aggravated assault, an indeterminate term of 0-5 years; and for each count of felony discharge, 3-5 years in prison. R.371-76. The court ordered the attempted murder and aggravated assault counts to run consecutively. *Id.* Moreover, it ordered the felony discharge counts and the possession of a firearm count to run concurrent to each other and concurrent to the term ordered for attempted murder and aggravated assault. *Id.* Martinez timely appealed, R.377-78, and his case was transferred from the Utah Supreme Court to the Utah Court of Appeals. R.387-94.

b. The Evidence

Background. Martinez and Wife shared a 16-year relationship and had a daughter together. R.661, 679-80, 886. But in the spring of 2015 their relationship took a turn for the worst. R.676-77, 683-84. Witnesses testified that Wife began a relationship with the alleged victim, Rafael, who worked alongside Martinez and Wife at a Denny's restaurant in Tooele. R.677-78, 683-84, 689, 704; *but see* R.726-27 (Rafael denying a romantic relationship).

One evening, Wife and Rafael were having dinner at a friend's house when Martinez arrived "upset." R.705-07. According to Rafael, Martinez let himself into the home, held his right-hand fingers in the form of a gun, and pointed them

at Rafael. *Id.* Martinez then left without saying anything. *Id.*

On July 5th, 2015, Martinez stopped at Denny's to look for Wife. R.665-69, 679-80. Wife had "disappeared" and had taken their daughter. R.665-69, 679-80. Rafael, who was working at the time, told one of the waitresses to call the police because Martinez had allegedly threatened to kill Rafael before. R.708.

Rafael made contact with Martinez and asked whether Martinez was looking to kill him. R.709. Rafael testified that he asked this "[b]ecause all the people from Tooele, [] were telling [him] that [Martinez] was looking for [him] ... to kill [him]." R.709. The defense objected to this statement on hearsay grounds. *Id.* The trial court overruled this objection, reasoning that "[i]t's not offered for the truth of the matter asserted." *Id.*; Addendum B (transcript of hearsay objection). Rafael then reiterated that "in Tooele[,] everybody was telling [him] that [Martinez] wanted to kill [him]." *Id.*

According to Rafael, Martinez responded that he was not going to "address[] [Rafael]" now, "but would look for [Rafael] later." R.709-10; *see also* R.668-69 (Restaurant Manager's account of the conversation). A witness to the conversation (the "Restaurant Manager") testified that Rafael taunted Martinez, but Martinez remained calm, and told Rafael that he was only looking for his wife and daughter. R.668-89, 680-81. Restaurant Manager also recorded in her police report that Martinez told Rafael he was not there for Rafael "at th[at] moment, but [he] knew where [Rafael] and [Wife] live[d], and sooner or later, [he] w[ould] kill [Rafael]." R.672-75.

On July 8, 2015, Martinez and an unidentified white male stopped at the home of Wife's brother ("Brother-in-law"). R.684-85, 695-96. Brother-in-law testified that Martinez had been drinking and appeared to be "extremely nervous." R.685. According to Brother-in-law, Martinez expressed that he recently learned that Rafael and Wife were living together. R.685. Martinez purportedly wanted "to say goodbye ... because supposedly [Martinez] already had everything prepared to be able to kill [Rafael] because [Rafael] wasn't going to steal" Wife and Daughter. *Id.*; *see also* R.686 (Brother-in-law further testifying that Martinez said "that he had to end all of this"). Additionally, Brother-in-law testified that during this visit, Martinez showed him a "big," gray or lead-colored gun and "said that that was what he had to do it." R. 686-87. Police reports documenting a subsequent interview with Brother-in-law did not mention that Brother-in-law had seen a gun. R.873-75.

Despite Martinez's comments, Brother-in-law did not believe that Martinez was the type of person to shoot somebody. R.699. Brother-in-law testified that Martinez's "way" was to "play around with people" and Martinez had jokingly talked about killing people before. R.687. Brother-in-law testified that during the July 8th visit, he initially believed that Martinez was joking about killing Rafael. R.699, 701. And in a subsequent interview with police, Brother-in-law indicated that he did not think Martinez's threats were serious. R.875-76. But Brother-in-law testified that he came to believe that Martinez "was serious" about killing Rafael based on Martinez's demeanor. R.687, 699.

The Incident. Around 10:00-10:30 p.m. on July 8th, 2015, Rafael finished work and started driving his Chevrolet truck back to the motel he was staying at. R.710-11. On the way, Rafael ran out of gas and pulled onto the shoulder. R.712-13; State's Exs. 19-22. Rafael then grabbed a gas can and walked in the dark to a gas station that was about a quarter to a half mile away. R.712-13, 723-25, 850, 978-79. At the gas station, an off-duty police sergeant ("Sergeant") was filling up his Toyota Tundra truck. R.744-47. Sergeant saw Rafael and offered him a ride back to his vehicle due to the heavy rain; "it was a downpour." R.715-16, 747, 848. Rafael accepted, put his gas can in the bed of Sergeant's truck, and got into the passenger's seat. R.715-16, 747-48. On the drive back to Rafael's truck, Sergeant briefly noticed what appeared to be a white Jeep Cherokee make a right-hand turn a distance behind them. R.756-57, 845.

When they arrived, Sergeant parked about half a car length behind Rafael's Chevrolet. R.716-17, 734-35, 750-52. The Chevrolet had its hazard lights on and Sergeant's Toyota Tundra had its hazard lights and beams on. R.735-36, 750-52, 849-50. The vehicles were parked next to an open field and the area was dark with no superficial light in the immediate area. R.751-52, 849; Def. Ex. 1. It was still raining "pretty hard." R.848, 977.

Once they parked, Rafael exited the vehicle and moved to the bed of the truck on the passenger's side to retrieve his gas can. R.735-36, 755. About the same time that Rafael was exiting, a vehicle with its beams on quickly pulled in and came to a stop about 5-8 feet behind the rear bumper of Sergeant's Toyota

Tundra. R.736, 756, 837-39. Sergeant and Rafael believed this other vehicle was a white Jeep Cherokee. R.720, 776, 834-35, 861-62.

According to Rafael, the suspect driver then opened the door, and the vehicle's interior lights turned on. R.717. Rafael alleged that he recognized the driver as Martinez; he was "100% sure" of it. R.717-19. Rafael then returned to the passenger side of Sergeant's truck and nervously told Sergeant "that the person that had just got there wanted to kill [him]." R.717-18, 737-38, 757-59, 857. Rafael did not observe a weapon. R.737, 739. Sergeant told Rafael to "get in," and Rafael entered the Toyota Tundra on the passenger side. R.718, 737-39

Sergeant also observed the suspect driver. R.759-60. According to Sergeant, the suspect got out of the driver's seat and walked to the rear bumper of the Toyota Tundra on the driver's side. R.839-41. Through the Tundra's mirrors, Sergeant was able to observe the suspect holding a gun in his left hand. R.759-60, 836-37, 839-41, 862-64. The gun was silver and large and appeared to be a semiautomatic 1911 pistol. *Id.* Sergeant then observed the suspect move to the passenger's side of the Tundra and lost sight of him. R.759-61, 839. Neither Sergeant nor Rafael observed anyone other than the suspect driver. R.737-39, 838-39.

As soon as Rafael entered the Tundra, Sergeant drove away. R.719, 761-62. "[A]lmost instantaneously with [Sergeant] pulling away," R.761-62, "three shots in a row" were fired. R.719, 739, 761-62. Sergeant and Rafael described the shots as being "[f]airly rapid, close together," "one right after the other," and with no

distinction between any particular shot from the others. R.739, 844, 953.

Sergeant told Rafael to “get down,” and drove away “really fast.” R.719, 739. Sergeant and Rafael did not engage in much dialog about the incident other than Rafael telling Sergeant that “he knew the [suspect] individual, and that [the individual] had wanted to kill him.” R.762. Sergeant called 911 as they drove away. R.762-72.

Shortly after the shooting, Rafael and Sergeant observed and followed a white Jeep Cherokee that looked like the shooter’s vehicle. R.720-21, 730. The Cherokee was stopped, and the driver was identified as someone named Joseph. R.866-67, 1014-15. Though the descriptions of Joseph varied, it was generally agreed upon that Joseph was a 48-60 year old white man. R.730-31, 777-78; *compare* R.730-31 (Rafael describing Joseph as a white, 50-60 year old bald man, probably with no facial hair); *with* R.777-78 (Sergeant describing Joseph as a “scruffy[-] face[d],” 48-50 year old white male with longer hair that fell “a bit over ear length”). Joseph’s shorts and clothing appeared “disheveled” and he looked dirty. R.777-78. Rafael looked at Joseph and said he was not the shooter. R.778-79. After learning that Rafael did not make an identification, Sergeant looked at Joseph next. *Id.* Based on Joseph’s “general appearance,” Sergeant believed that Joseph could have been the gunman. R.777, 850-51. But Sergeant “wasn’t certain,” and developed doubts about Joseph’s identity as the suspect shooter. R.772-73, 778-79.

The Investigation. Rafael told police that he believed Martinez was the suspect. R.867. Police intended to show Rafael and Sergeant a photo array lineup of the suspects, but ultimately elected not to because both witnesses had already been shown a driver's license photo of Martinez. R.855-57, 860-61, 976-77, 1012-19; *but see* R.740-41 (Rafael testifying that he was 100% certain that police did not show him a photograph of Martinez). Police ultimately determined that Joseph was not involved in the shooting. R.867-69.

Sergeant and Rafael were subsequently interviewed. R.1015. During that interview, Sergeant and investigating officers discussed how it was “odd” that the shooter would know where to locate Rafael given the unexpected breakdown and “random[]” events that followed. R.853-54, 1016-17. There was also evidence that the officers were puzzled as to why a shooter intent on killing Rafael would wait until Rafael returned with Sergeant to the scene. *Id.* Also during the interview, Sergeant posited whether it was “possible [Rafael’s ex-wife] put a hit on [Rafael].” R.836, 1017; *but see* R.729 (Rafael denying that Sergeant asked this question). Indeed, the jury heard evidence that Rafael was in the midst of a custody battle and had a court date scheduled on July 9, 2015—the morning immediately following the shooting. R.727-29, 976, 1017.

Police subsequently conducted an investigation of the crime scene, which revealed three spent 9mm shell casings (Ruger brand). R.870-71, 908-15; State’s Exs. 4-5, 24-29, 59-61. They could not say whether the casings came from the same firearm because laboratory test results were still pending. R.972. Nor did

police test the casings for DNA or fingerprints. R.972-73.

Moreover, police discovered three bullet holes—Holes A, B, and C—on the passenger side of Sergeant’s Toyota Tundra. R.922; State’s Exs. 43-58. Hole A appeared on the front passenger quarter panel; Hole B appeared on the top corner of the passenger window; and Hole C appeared toward the center of the B pillar (the pillar between the front and back passenger windows). R.922-31, 941; State’s Exs. 35-56; Def. Ex.17.

The State presented evidence suggesting that Holes A and B were produced by bullets that impacted at shallower angles—between 1 and 5 degrees—while Hole C was produced by a bullet that struck at an angle of approximately 60 degrees. R.925-30, 951-53, 961; State’s Exs. 7-15, 56-58; Def. Ex. 17. The State alleged that, based on these trajectory estimations, the Hole C bullet would have traveled toward the passenger seat had it not been obstructed by the B pillar. R.941-42, 970.² Meanwhile, the defense elicited testimony that Hole C had no point of exit and was created by a bullet that was lodged in the B pillar about a half inch deep. R.957-59, 969, 971. The defense expert testified that the ability to determine trajectory is limited when only an entry hole is present. R.1042-43.

² Police investigators used a Faro laser scanner and accompanying software to take pictures, collect measurements, and produce 3D models of the crime scene. R.904-06, 910, 915-16, 931-32. Investigators also conducted a separate Faro scan of the Toyota Tundra with trajectory rods inserted in the bullet holes. R.933-36, 950, 959-61, 971; State’s Exs. 56-58; Def. Exs. 9, 11. The model of the Tundra and corresponding trajectories was layered over the model of the crime scene to create the 3D pictures in State’s Exhibits 7-17 and Defense Exhibits 12-14. R.933-38, 943-44.

Additional investigation led police to Martinez's neighbor ("Neighbor"), who had let Martinez borrow her white Mazda Tribute³ on the day of the shooting. R.877-78, 881-884; State's Exs. 30-34. Neighbor understood that Martinez needed the Mazda to visit his daughter. R.884, 888. However, Martinez did not return the Mazda, and police located the car the following day in West Valley. R.882, 885, 894-95. Police did not test the Mazda for gunshot residue, fingerprints, or DNA. R.979, 983-84.

Martinez was ultimately arrested in Los Angeles, California, on November 9th, 2015. R.868. The State did not present evidence as to whether police located the shooting weapon. *See* R.870-71.

c. Merger

At the close of the State's case, Martinez argued that the "three charges of felony discharge of [a] firearm should merge into the attempted murder and relatedly the aggravated assault charge." R.997-1007 (defense counsel citing subsection 76-1-402(1) and relevant case law, and arguing that the offenses arose from the "same act"); Addendum C (transcripts of pre-verdict merger motion and ruling). The trial court denied the motion, reasoning that the issue was more appropriately addressed post-verdict. R.1008-09. It left open the possibility of vacating the discharge counts as a result of their conversation. *Id.*

After Martinez was convicted, the defense renewed its motion and asked the court to vacate the felony discharge counts. R.336-46; Addendum D (post-

³ A Mazda Tribute is a compact SUV. *See* State's Exs. 30-34.

verdict motion to vacate). He argued that the counts merged under Utah Code § 76-1-402. R.338-40 (citing subsection 76-1-402(1) and relevant case law, and arguing that the offenses arose during “a single criminal episode”); R.340-45 (citing subsection 76-1-402(3) and relevant case law, and arguing for merger because the offenses shared a greater-lesser related relationship). As another basis for merger, Martinez pointed the trial court to *State v. Finlayson*, 2000 UT 10, 994 P.2d 1243, and *State v. Lee*, 2006 UT 5, ¶31, 128 P.3d 1179, and argued that merger was warranted because the crimes were “so closely related.” R.344-45.

After argument and briefing on the issue, the trial court denied Martinez’s motion to vacate, advancing several reasons. R.1210-12; Addendum E (transcript of argument and ruling on motion to vacate). First, it indicated that it viewed the merger question as a “sentencing issue and not a conviction issue.” R.1203-06, 1210-12. That is, it appeared to believe that Martinez would not be separately punished for felony discharge if the court ran the counts concurrent to each other and concurrent to the other offenses. *See id.*

Second, the trial court found that “factually, the evidence support[ed] that [discharging a firearm was] how the defendant attempted to ... kill the intended victim.” R.1211. But it did not believe discharge merged with attempted murder because “discharge of a firearm is not a necessary element in [] attempted homicide.” R.1211. Finally, the trial court concluded that “double jeopardy [was

not] implicated, because the defendant was tried at one time for all of the charges that arose out of the same criminal episode.” *Id.*

At sentencing, the trial court ran the possession of a firearm, attempted murder, and felony discharge counts concurrently. R.1248-55.

SUMMARY OF ARGUMENT

I. The trial court committed reversible error when it allowed Rafael to testify that “all the people from Tooele, [] were telling [him] that [Martinez] was looking for [him] ... to kill [him].” The out-of-court statements of these nontestifying Tooele residents were inadmissible because they violated the rule against hearsay. Not only did the relevance of the statements depend on their truth, but the statements included unnecessary specifics relating to Martinez’s guilt. The record shows that the statements were offered for their truth and, thus, constituted inadmissible hearsay. This Court should grant Martinez a new trial on all counts because the inadmissible hearsay went to critical issues at trial (identity and intent) and were prejudicial.

II. Martinez’s convictions for discharge of a firearm merge with attempted murder. First, the discharge counts must be vacated under subsection 76-1-402(1)’s single criminal episode doctrine because the State’s overlapping theories of conviction allowed the jury to return multiple convictions based on the same act. Second, Utah’s two-tier analysis shows that discharge was a lesser included offense of attempted murder. Accordingly, merger is required pursuant to subsection 76-1-402(3). Finally, the common law merger doctrine requires that

Martinez's discharge convictions merge with attempted murder. Each of these grounds require merger. Moreover, the trial court's reasoning to the contrary was incorrect. Accordingly, Martinez's convictions for felony discharge must be vacated.

ARGUMENT

I. This Court should reverse because the trial court admitted the out-of-court statements of unidentified Tooele residents in violation of the rule against hearsay.

It was error for the trial court to permit Rafael to testify that multiple unidentified Tooele residents told him that Martinez was looking for him to kill him. Admission of the Tooele residents' statements violated the rule against hearsay and prejudiced Martinez.

At trial, the prosecutor questioned Rafael regarding his July 5th encounter with Martinez and why he asked Martinez: Are you "looking for me to kill me?" R.709. Rafael testified that he asked this "[b]ecause all the people from Tooele, [] were telling [him] that [Martinez] was looking for [him] ... to kill [him]." *Id.* Rafael reiterated that "in Tooele[,] everybody was telling [him] that [Martinez] wanted to kill [him]." *Id.* When Martinez objected on hearsay grounds, the State remained silent and did not assert a non-hearsay use for the statements. Nevertheless, the trial court admitted these statements over Martinez's hearsay objection, reasoning that they were "not offered for the truth of the matter asserted." *Id.*

The trial court should have excluded Rafael's testimony regarding what the

Tooele residents said. The Tooele residents' statements were offered for the truth of the matter asserted and constituted inadmissible hearsay. Moreover, this Court should grant Martinez a new trial on all counts because the hearsay was prejudicial.

A. The Tooele residents' statements were inadmissible hearsay offered for the truth of the matter asserted.

Hearsay is a "statement that [] the declarant does not make while testifying at the current trial" and "a party offers in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c). Under the rules of evidence, hearsay is "not admissible except as provided by law or by [the rules]." Utah R. Evid. 802. However, where ""an out-of-court statement is offered simply to prove it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule."" *State v. McNeil*, 2013 UT App 134, ¶48, 302 P.3d 844, *aff'd*, 2016 UT 3, 365 P.3d 699.⁴

Various considerations have guided Utah courts in determining whether statements are admissible as non-hearsay on grounds independent from their truth. First, this Court considers the relevance of the alleged non-hearsay purpose to the issues at trial. *Stratford v. Morgan*, 689 P.2d 360, 364 (Utah 1984); *Brown v. State*, 707 So.2d 849, 850 (Fla. Ct. App. 1998). A statement is hearsay if its relevance depends on its truth. *McNeil*, 2013 UT App 134, ¶49; *Francis v. Nat'l DME*, 2015 UT App 119, ¶55, 350 P.3d 615. Additionally, this Court may

⁴ The following rules are attached at Addendum F: Utah R. Evid. 801, 802.

consider whether the challenged testimony includes unnecessary specifics relating to a defendant's guilt. *State v. Davis*, 2007 UT App 13, ¶24, 155 P.3d 909.

For instance, in *Stratford*, the Utah Supreme Court determined that out-of-court testimony was offered for its truth. 689 P.2d at 364. In that case, an action to quiet title based on boundary by acquiescence, the plaintiffs sought to introduce out-of-court statements to show the state of mind of the plaintiffs' predecessors in interest. *Id.* at 361. In assessing admissibility, the supreme court explained that the "[m]ental state of the [predecessors in interest] was not at issue in th[e] case," and "[n]o element of boundary by acquiescence could be proved by evidence as to state of mind." *Id.* at 364. Accordingly, "since state of mind was not an issue, the only effect the challenged evidence could have had was its supposed truth value." *Id.* The supreme court therefore held "that the evidence was unquestionably hearsay and thus inadmissible." *Id.* *Accord McNeil*, 2013 UT App 134, ¶¶48-49.

Likewise in *Brown*, the Florida Court of Appeals held that "[i]t was error for the trial judge to permit the victim to testify that there was 'talk amongst the people in [the] neighborhood' that defendant intended to kill him." 707 So.2d at 849. In that case, the defendant shot the victim and claimed self-defense. *Id.* at 849-50. The State argued that the statements regarding the neighborhood rumors "were not hearsay because they were offered to prove why [the victim] went to talk to [defendant] and not to prove the truth of the matter asserted." *Id.* at 850. The *Brown* court rejected the State's argument, explaining that "'an out-

of-court statement which is offered for a purpose other than proving the truth of its contents is admissible only when the purpose for which the statement is being offered is a material issue in the case.” *Id.* The court concluded that the statements were inadmissible hearsay where “[the victim’s] reason for confronting [defendant] [wa]s irrelevant to [defendant’s] shooting of [the victim]” and “did not go to any material issue.” *Id.*

Finally, the inclusion of unnecessary details relating to a defendant’s guilt indicates that a statement is offered for its truth. *See Davis*, 2007 UT App 13, ¶24. For instance, in *Davis*, this Court offered guidance on the extent to which an informant’s tip is admissible as non-hearsay to explain law enforcement action. *Id.* (reversing on a separate issue but addressing defendant’s hearsay claim to offer guidance on remand). In doing so, it pointed to the distinction between an “officer... explain[ing] his going to the scene of the crime or his interview with the defendant... by stating that he did so ‘upon information received.’” *Id.* “[T]his of course will not be objectionable as hearsay.” *Id.* However, if the officer “becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of that fact asserted that it should be excluded as hearsay.” *Id.*

Here, the principles of *Stratford*, *Brown*, and *Davis* suggest that the Tooele residents’ statements constituted inadmissible hearsay. First, as in *Stratford* and *Brown*, any non-truth purpose was irrelevant to the elements and the issues at trial. The State did not identify a purpose for the statements other

than proving the truth of the matter asserted; the trial court independently determined that the statements were not offered for their truth. R.709. In context, however, it appears that the trial court admitted the statement to explain why Rafael asked Martinez, “are you looking for me to kill me.” *See id.* But Rafael’s reason for asking this question was irrelevant to the issues at trial. “No element” of the offenses charged “could be proved by evidence” explaining why Rafael asked this question. *Stratford*, 689 P.2d at 364. *Cf. State v. Carlsen*, 638 P.2d 512, 514 (Utah 1981) (in a prosecution for witness tampering, the statement “You go through this court tomorrow and you are dead. We’ll kill you” was not hearsay because the words themselves amounted to a violation of the statute).

Moreover, similar to *Brown*—where the victim’s reason for confronting the defendant was “irrelevant” to the pertinent shooting—the reason for Rafael’s inquiries was not a fact of consequence that was at issue at trial. 707 So.2d at 850. The prosecutor elicited the hearsay during the direct-examination of Rafael. R.709. And the defense did not otherwise suggest that Rafael lacked a reason to ask such a question. Indeed, Rafael’s question made sense in light of the existing narrative and without resort to impermissible hearsay about what everybody in Tooele was saying. *See, e.g.*, R.705-08. The offering of an explanation for Rafael’s inquiries was of no consequence as it was irrelevant to the trial issues and unnecessary to fill in any narrative gaps. Thus, the only probative value and “effect the challenged evidence could have had was its supposed truth value.” *Stratford*, 689 P.2d at 364.

Second, the inclusion of unnecessary details suggests that the statement was hearsay. *Davis*, 2007 UT App 13, ¶24. This was not a case where a witness testified that he was prompted to act or ask something based “upon information received.” *Id.* Rather, Rafael repeated the “definite” allegations of others. *Id.* These allegations included a claim that “[Martinez] was looking for [Rafael]” as well as the inculpatory claim that “[Martinez] wanted to kill [Rafael].” R.709. The challenged testimony put forth additional details regarding where the declarants lived and the large number of declarants who made these mutually-corroborative allegations. *Id.* Moreover, it informed the jury that the declarants took the initiative to directly communicate the statements to Rafael. *Id.*

Even assuming the relevance of an explanation for why Rafael asked Martinez, “are you looking for me to kill me,” any such explanation could have been presented without reference to incriminating details and the hearsay statements of multiple Tooele residents. Indeed, Rafael’s testimony alleged a *personal* experience during which Martinez had threatened to kill him. R.708. It is unclear why—if not for the truth of the matter asserted—the State would need to rely on evidence that non-testifying Tooele residents likewise told Rafael that Martinez wanted to kill him. *See* R.708-09.

In short, any non-truth use for the unnecessarily detailed out-of-court statements was irrelevant to the trial issues. The record shows that the Tooele residents’ statements were offered for their truth. Moreover, the State did not advance an applicable exception to the hearsay rule that would justify

admissibility. Accordingly, the statements constituted inadmissible hearsay.

B. Prejudice.

This Court will reverse a conviction based on admission of improper evidence “if, absent the error, there is a reasonable likelihood that there would have been a more favorable result for the defendant.” *State v. Kohl*, 2000 UT 35, ¶17, 999 P.2d 7 (internal quotations omitted). “A reasonable likelihood of a more favorable outcome exists when the appellate court's confidence in the verdict actually reached is undermined.” *Id.* When examining prejudice, this Court considers whether the error’s effect on the trial is “pervasive” rather than “isolated” and “trivial,” *State v. Hales*, 2007 UT 14, ¶86, 152 P.3d 321, and whether the error pertains to a “central factual issue.” *State v. Craft*, 2017 UT App 87, ¶26, 397 P.3d 889.

Here, there was a reasonable likelihood of a different result but for the hearsay. At the outset, Martinez notes that his convictions were the result of both a jury trial and bench trial. *See* R.333-35, 1154-70. The jury found Martinez guilty of attempted murder, aggravated assault, and the 3 counts of discharge of a firearm whereas the trial judge found Martinez guilty of possession of a firearm by a restricted person. *Id.* In reaching its verdict, the trial judge conducted an “independent[] evaluat[ion] [of] the evidence notwithstanding the verdict that the jury came up with.” R.1165. Thus, for purposes of this prejudice analysis, it is appropriate to address the jury trial counts and the bench trial counts separately.

Jury Trial Counts: The hearsay had a pervasive effect because it went to

the issues of identity (with respect to all counts) and the intent to kill (with respect to attempted murder). *Hales*, 2007 UT 14, ¶86; *Craft*, 2017 UT App 87, ¶26. There is a reasonable likelihood that but for the hearsay, the jury would have doubted that Martinez was the shooter or that he acted with the intent to kill Rafael.

First, the hearsay evidence that “all the people from Tooele” were saying that Martinez was looking for Rafael to kill him made it more likely that Martinez was present at the crime scene. *See* R.709. Indeed, the hearsay told the jury that Martinez had not only mentioned killing Rafael, but had taken steps to “look[] for [Rafael].” *See id.* It also suggested to the jury that it was the planned pursuit of Rafael that led Martinez to the crime scene; the crime was not the product of a chance encounter involving a random shooter. The hearsay thus not only implicated Martinez as the shooter on scene, but undermined the defense’s otherwise credible claim that it would be difficult for Martinez to know where to locate Rafael given the “random[]” breakdown and series of events. R.853-54, 1016-17, 1138.

Meanwhile, the State’s evidence of identity was not “overwhelming.” *Craft*, 2017 UT App 87, ¶¶30, 32. Rafael provided the only direct evidence that Martinez was present at the crime scene. *See* R.717-19; *see also* R.1136. But the jury had reason to doubt Rafael’s claim. Rafael had a motive to fabricate and inculcate Martinez so as to remove Martinez from the picture and clear the way for a relationship with Martinez’s wife. *See* R.677-78, 683-84, 689, 70. Moreover, the

reliability of Rafael's on-scene identification was undermined by the then-existing conditions, including the heavy rain, dark crime scene, and the activated hazard lights and beams of the various vehicles. R.715-16, 735-36, 747, 750-52, 848-50, 977. The defense also highlighted evidence showing that Rafael was "not [] honest" and had a tendency to exaggerate his certainty of events. See R.1136-37; *also compare* R.855-57, 860-61, 976-77, 1012-19 (testimony of multiple officers establishing that Rafael was shown a driver's license photo of Martinez); *with* R.740-41 (Rafael testifying that he was 100% certain that police did not show him a photograph of Martinez).

There was also evidence upon which the jury could have doubted that Martinez was the shooter. Sergeant, a veteran police officer trained to pay attention to detail, did not positively identify Martinez as the gunman. *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977) (explaining that in the context of an eyewitness identification, an "experienced officer ... could be expected to pay scrupulous attention to detail"); R.744. The jury also heard evidence regarding other potential suspects. See R.777, 850-51 (evidence that Sergeant believed that Joseph could have been the gunman); R.727-29, 836, 976, 1017 (evidence that Rafael was in the midst of a custody battle and Sergeant positing whether it was "possible [Rafael's ex-wife] put a hit on [Rafael]"). Additionally, the description of the shooter's vehicle did not fully match the vehicle that Martinez possessed on the night of the incident. See R.720, 776, 834-35, 861-62, 877-78, 881-884; State's Exs. 30-34. Nor did police recover a weapon or present forensic evidence

connecting Martinez to the shooting. *See* R.972-73, 979, 983-84.

The hearsay not only went to the identity of the shooter, but also to the disputed, intent-to-kill element of attempted murder. *See* R.1139-40. The hearsay included the highly inculpatory claim that “[Martinez] wanted to kill [Rafael].” R.709. This supported the notion that Martinez’s purpose in firing the shots was not to threaten or intimidate, but to actually kill Rafael.

Martinez acknowledges that the State’s in-court witnesses, including Brother-in-law, Restaurant Manager, and Rafael, also testified that Martinez had threatened to kill Rafael. *See* R.668-69, 686-87, 672-75, 708. However, the hearsay stood out. Not only did it carry indicia of credibility, but it strongly undermined evidence suggesting that the threats were not serious.

Various details bolstered the credibility of the hearsay. The hearsay was attributed to specific (though unidentified) declarants. *See* R.709. Moreover, it told the jury that the unidentified declarants lived in Tooele, which—given that Martinez also lived in Tooele—suggested that the statements were the likely product of personal interactions with Martinez. *See id*; *see also* R.877-79. These people also were not connected to the offense in anyway, so their statements were neutral and believable.

The hearsay allegations were further legitimized by details commenting on the large number of people who made like-allegations. *See* R.709. Indeed, Rafael testified that “all the people from Tooele” and “everybody” in Tooele had communicated the incriminating allegations. *Id*. Through the hearsay, the jury

also learned that the Tooele residents took the time to “tell[]” Rafael about the alleged kill threats. *Id.* The resultant inference was that a large number of people believed the threats were serious—so serious that they felt the need to warn Rafael.

While other witnesses testified that Martinez expressed a desire to kill Rafael, the jury had reason to doubt that Martinez was serious in these claims. Brother-in-law testified that Martinez’s “way” was to “play around with people” and Martinez had jokingly talked about killing people before. R.687. Moreover, Brother-in-law told police that he did not think Martinez’s threats against Rafael were serious. R.875-76. Nor did Brother-in-law believe the threats were serious enough to alert the police. R.700. There was also evidence that Rafael confronted and taunted Martinez during an exchange. R.680. Accordingly, the jury could believe that Martinez’s threats were off-the-cuff remarks made by someone who had been provoked.

In a case where the jury had reason to doubt the seriousness of Martinez’s threats, it was prejudicial to permit hearsay suggesting that large number of Tooele citizens thought otherwise. The hearsay pertained to the important issues of identity and intent, and, in its absence, it was reasonably likely that the jury would have doubted the State’s case on these issues.

Bench Trial Count: The trial judge was tasked with deciding whether Martinez possessed a firearm. R.1169-70. Its analysis of possession “concentrate[d] primarily on the event of the shooting”—the “real issue” being

“whether ... [Martinez] was the individual who perpetrated this act.” R.1166-67.

Thus, as with the other counts, Martinez’s guilt for possession of a firearm turned on identity.

For the reasons above, there is a reasonable likelihood that but for the hearsay, the trial judge (like the jury) would have doubted that Martinez was the shooter. *See supra* discussion at pages 22-25. The hearsay evidence was compelling because it made it more likely that Martinez was the person present at the crime scene. *See supra* discussion at page 22. Meanwhile, as discussed, the State’s evidence of identity was not overwhelming. *See id.* at pages 22-24. Rafael provided the only direct evidence that Martinez was present at the crime scene, and there was reason to doubt the credibility of his identification. *See id.*

There was also evidence upon which the judge could have doubted that Martinez was the shooter. *See id.* This included evidence of other potential suspects. *See* R.777, 850-51 (evidence that Sergeant believed that Joseph could have been the gunman); R.727-29, 836, 976, 1017 (evidence that Rafael was in the midst of a custody battle and Sergeant positing whether it was “possible [Rafael’s ex-wife] put a hit on [Rafael]”). In light of the evidence of other suspects, the trial judge had a basis to believe that Rafael was referring to *someone else* when he said, “this person is here to kill me.” *See* R.1168 (trial judge, in concluding that Martinez was the shooter, “rel[ying] ... primarily” on Rafael’s statement to Sergeant: “this man is here to kill me.”). Yet, the hearsay undermined this evidence and suggested that *it was Martinez* who was there “to

kill [him].” *See id.*; *see also* R.709. Finally, as argued above, there was reason to believe that Martinez’s other threats to kill were not serious enough to implicate him as the shooter. *See supra* discussion at pages 24-25.

In short, the “possession” element of possession of a firearm turned on Martinez’s identity as the shooter. The hearsay went to the identity question, and otherwise, there was a basis to believe that Martinez was not the shooter. Thus, it is reasonably likely that but for the hearsay, the trial judge would have doubted that Martinez possessed a firearm.

II. Martinez’s discharge of a firearm convictions must be vacated.

“Merger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute.” *State v. Diaz*, 2002 UT App 288, ¶17, 55 P.3d 1131. Utah’s merger doctrine, codified in part at Utah Code § 76-1-402, is interpreted “to comply with the underlying constitutional guarantees against double jeopardy.” *State v. Ross*, 951 P.2d 236, 241 (Utah Ct. App. 1997); *State v. Lopez*, 2004 UT App 410, ¶8, 103 P.3d 153.

In this case, Martinez’s convictions for discharge of a firearm merge with attempted murder. As discussed below, Martinez’s discharge convictions must be vacated under subsection 76-1-402(1)’s single criminal episode doctrine, *see infra* Part II.A.1; under subsection 76-1-402(3) as a lesser included offense of attempted murder, *see infra* Part II.A.2; and under the doctrine of common law

merger, *see infra* Part II.A.3. Additionally, the trial court’s reasons for declining merger were incorrect. *See infra* Part II.B.⁵

A. Martinez’s felony discharge convictions must be vacated under subsection 76-1-402(1), subsection 76-1-402(3), and the doctrine of common law merger.

Both statutory and common law doctrines provide a basis for vacating Martinez’s discharge convictions. Each of the following grounds require merger.

1. *Subsection 76-1-402(1)’s single criminal episode doctrine.*

The discharge counts must be vacated under subsection 76-1-402(1) because the State’s overlapping theories of conviction allowed the jury to return multiple convictions based on the same act. Subsection 76-1-402(1) states that:

A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

Utah Code § 76-1-402(1).

“The clear intent of this section is that ‘[a] defendant may not be punished twice for [the same] act.’” *State v. Casey*, 2001 UT App 205, ¶16, 29 P.3d 25 (alterations in original). At the same time, however, the provision is also advantageous to the State; it recognizes that “the same act of a defendant ... [may] establish offenses which may be” punishable under different statutory

⁵ The following provisions are attached at Addendum F: Utah Code § 76-1-401; 76-1-402.

provisions, and it allows the State to “prosecute[] in a single criminal action [] all separate offenses arising out of a single criminal episode.” Utah Code § 76-1-402(1). This grants the State the flexibility to present different theories of conviction and put before the jury “any offense which [the defendant’s] act satisfied the requirements thereof.” *State v. Huntsman*, 204 P.2d 448, 451 (Utah 1949).

While subsection 76-1-402(1) offers the State considerable flexibility to pursue different theories of convictions, it does not guarantee the State a windfall. Convictions must be vacated if the State presents overlapping theories of conviction that allow the jury to return multiple convictions based on the “same act.” See Utah Code § 76-1-402(1); *State v. Irvin*, 2007 UT App 319, ¶¶21, 35, 169 P.3d 798.

In this case, the State’s presentation of overlapping theories allowed the jury to find Martinez guilty of attempted murder, aggravated assault, and felony discharge based on the same act. The remedy for the State’s choice to do so is to vacate Martinez’s discharge convictions. *See id.*

In closing, for instance, the prosecutor argued that Martinez should be found guilty of attempted murder, emphasizing that all three shots struck the “side of Sergeant Garcia’s truck, right where [] Rafael [wa]s sitting.” R.1150-51. Likewise, it supported its case for aggravated assault by arguing that “any one of [the shots] could have had an effect on [Sergeant] if it struck him.” R.1131. Just as each shot was sufficient to give rise to attempted murder and aggravated assault,

the prosecutor also argued that each shot was sufficient to give rise to felony discharge. Specifically, the prosecutor explained that “each count [of felony discharge] is for each shot fired by Saul Martinez. Each shot fired at [] Rafael. Each shot fired that went in the same passenger cab, in the same direction as [Sergeant].” *Id.*

At bottom, what occurred here is that the State presented two alternate overlapping theories of conviction (i.e., Martinez committed attempted murder and aggravated assault, or, if not, he alternatively committed felony discharge by discharging his gun three times in the direction of Sergeant’s truck). This is evidenced by the different ways the State framed the scope of the criminal “act.” On the one hand, the State alleged that Martinez was guilty of the more serious offenses of attempted murder and aggravated assault for shooting at a vehicle occupied by two individuals. *See e.g.* R.1131, 1150-51. Under this theory, the criminal act was the shooting act as a whole, giving rise to attempted murder and aggravated assault convictions.

Under the second theory, the State alleged that Martinez was guilty of three counts of felony discharge for firing three rounds in the direction of Sergeant’s vehicle. *See* R.1131. This theory of conviction was premised on the notion that each of the three shots fired constituted a separate “act” that gave rise to three separate discharge convictions. *See State v. Rasabout*, 2015 UT 72, ¶27, 356 P.3d 1258 (holding that under felony discharge statute, the allowable unit of

prosecution is each discrete shot).⁶ Ultimately, the effect of the State’s presentation of these overlapping theories was this: the jury was allowed to return multiple convictions for Martinez’s act of shooting as a whole as well as for each time Martinez pulled the trigger.

Thus, it is evident on this record that the State presented multiple theories of conviction, and in doing so, invited the jury to return convictions for attempted murder, aggravated assault, and felony discharge based on the same act. *See Irvin*, 2007 UT App 319, ¶¶19-20 (relying on the “facts and circumstances of th[e] case to conclude that only “one act” occurred); *State v. Chukes*, 2003 UT App 155, ¶¶20-23, 28, 71 P.3d 624. Of course, there were strategic reasons for presenting the case as the State did. Arguing that Martinez could be guilty of attempted murder and aggravated assault based on *any* of the shots during the shooting maximized the State’s chance of obtaining convictions under these more serious counts. But, as noted, subsection 76-1-402(1) does not allow the State to receive a windfall. Once the State reaped the benefit of that argument by obtaining attempted murder and aggravated assault convictions, subsection 76-1-402(1)’s remedial “one-act, one-punishment” protections kicked in. *See* Utah Code § 76-1-

⁶ Subsection 76-1-401(1) was not applicable to the holding in *Rasabout* because *Rasabout* presented a case “involv[ing] multiple charges under the *same* provision.” *State v. Rasabout*, 2013 UT App 71, 299 P.3d 625, *aff’d*, 2015 UT 72, 356 P.3d 1258 (emphasis added). Subsection 76-1-401(1), however, pertains to cases—like this one—involving multiple charges brought under “*different provisions*” of the Utah Code. Utah Code § 76-1-402(1) (emphasis added). And under subsection 76-1-402(1), each discrete shot cannot give rise to multiple convictions under different statutory provisions. *See id.*

402(1). And those remedial protections require that the felony discharge counts be vacated. *See id.*

First, all the convictions arose under a single criminal episode. *See* Utah Code § 76-1-402(1) (conduct punishable under only one provision where it is based on “the same act of a defendant” that arises “*under a single criminal episode*”); Utah Code § 76-1-401 (“‘single criminal episode’ means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective”). The shots giving rise to the counts were described as being “[f]airly rapid, close together,” “one right after the other,” and with no distinction between any particular shot from the others. R.739, 844, 953. Moreover, the underlying objective of the shots, according to the State’s theory, was to kill Rafael. *E.g.*, R.1211.

Additionally, the attempted murder, aggravated assault, and felony discharge counts were all based on the “same act” within this single criminal episode. Utah Code § 76-1-402(1). As noted, the State framed the scope of the criminal act differently between the theories—in one, the act was the shooting, and in the other, the act was each discrete shot. For purposes of analysis, however, the scope of the act must be defined in some way. And it makes sense to apply the formulation advanced under the theory that allowed the State to obtain the greater, more serious attempted murder conviction. *State v. Shaffer*, 725 P.2d

1301, 1313 (Utah 1986) (“If the greater crime is proven, then the lesser crime merges into it”). Accordingly, the “act” was the shooting as a whole.⁷

This shooting act gave rise to multiple convictions: attempted murder, aggravated assault, and three counts of felony discharge. But Martinez’s “same [shooting] act” could only be punishable under “one [] provision,” Utah Code § 76-1-402(1), or, rather, two provisions given the presence of two identified victims (Sergeant and Rafael). *See State v. Mane*, 783 P.2d 61, 63-65 (Utah Ct. App. 1989). That is, the shooting was only punishable under the attempted murder and aggravated assault statutes. The rapid series of gunshots was merely the “means” by which Martinez committed attempted murder and aggravated assault. *See Chukes*, 2003 UT App 155, ¶¶21-22. Because the overlapping theories permitted conviction based on the “same act”, Martinez’s convictions for felony discharge must be vacated.

2. Subsection 76-1-402(3).

Merger is also required under subsection 76-1-402(3). Subsection 76-1-402(3) provides that “[a] defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense.” Utah Code § 76-1-402(3). “An offense is a lesser included

⁷ For ease of analysis, Martinez frames the “act” as the shooting as a whole. However, even if the “act” is framed in terms of each discrete shot, the State presented its case such that any one of the shots was sufficient to give rise to attempted murder, aggravated assault, and felony discharge of a firearm. *See R.1131*, 1150-51. Regardless of how the scope of the act is framed, the problem with multiple punishments based on one act remains.

offense when ‘[i]t is established by proof of the same or less than all the facts required to establish the commission of [another] offense.’” *Chukes*, 2003 UT App 155, ¶9.

“Utah courts apply a two-tiered analysis to identify lesser-included offenses.” *Ross*, 951 P.2d at 241. Under this test, courts first compare the statutory elements of each offense, and “[i]f the two crimes are such that the greater cannot be committed without necessarily having committed the lesser, then the lesser offense merges into the greater crime and the State cannot convict and punish the defendant for both offenses.” *Id.* (internal quotations omitted). “In most cases, comparison of the statutory elements will suffice to determine whether a greater-lesser relationship exists.” *Id.* Where the crimes have multiple variations, however, the court will proceed to the second step and “‘consider the evidence[, arguments, and jury instructions] to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial.’” *Chukes*, 2003 UT App 155, ¶10. Utah courts focus on the State’s theory when applying the second part of the test. *See State v. Hill*, 674 P.2d 96, 98 (Utah 1983); *Chukes*, 2003 UT App 155, ¶22-27.

In this case, application of this two-part test shows that discharge was a lesser included offense of attempted murder, and the discharge counts should have been merged. Regarding the first prong, examination of the statutes demonstrate that discharge can be a lesser of attempted murder. *Ross*, 951 P.2d at 241. The discharge statute makes it a crime to discharge a firearm in one of

three ways: (a) “. . . in the direction of any person or persons, knowing or having reason to believe that any person may be endangered by the discharge of the firearm;” (b) “in the direction of any person or habitable structure” “with intent to intimidate or harass another or with intent to damage a habitable structure;” or (c) in the direction of any vehicle” “with intent to intimidate or harass another.” Utah Code § 76-10-508.1(1). To commit attempted murder, a person must have attempted to intentionally or knowingly cause the death of another. Utah Code § 76-5-203. Moreover, a defendant is guilty of an attempt when he “engages in conduct constituting a substantial step toward commission of the crime.” Utah Code § 76-4-101.

Subsection (a) of the discharge statute requires firing a gun in the direction of a person with knowledge or having reason to believe a person is endangered. Utah Code § 76-10-508.1(1). This is also a manner in which a knowing or intentional attempted homicide could be committed. The State could thus prove subsection (a)’s requisite mental state (knowledge that a person is endangered by the defendant’s conduct) by proving the mental state required to commit attempted murder (intent to cause death or knowledge that the nature of the defendant’s conduct would likely result in death). *See id.*

The actus reus of the variation of discharge under subsection (a)—to “discharge a firearm in the direction of any person”—is an act that can be proven by the “substantial step” element of attempted murder. *Id.* That is, when attempted murder is predicated on a shooting, the “substantial step” is the

discharge of a firearm at a person. *Id.* Thus, under the elements of attempted murder and discharge, there is a variation (subsection (a)) where “the greater cannot be committed without necessarily having committed the lesser.” *Hill*, 674 P.2d at 97.

Because there are multiple variations of discharge, the analysis must continue to the second step. Under step two, the Court looks to the evidence and the State’s theory “to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial.” *Id.* The record demonstrates that once the State proved attempted murder, the jury did not need to find an additional element to convict Martinez of discharge. *See State v. Bradley*, 752 P.2d 874 (Utah 1988); *Chukes*, 2003 UT App 155.

The evidence shows that three bullets were fired, each of which struck the passenger side of Sergeant’s truck. R.922; State’s Exs. 43-58. The shots were described as being “[f]airly rapid, close together,” “one right after the other,” and with no distinction between any particular shot from the others. R.739, 844, 953. Moreover, the State presented evidence that the trajectories were such that the bullets could have struck Rafael. R.1150-51. However, with each shot, he missed. *Id.* Moreover, the State’s theory was that Martinez’s purpose in firing these shots was to kill Rafael. *E.g.*, R.1211. This same evidence was used to prove both felony discharge and attempted murder. R.1150-51 (prosecutor supporting case for attempted murder with evidence that all three shots struck the “side of Sergeant[’s] [] truck, right where [] Rafael [wa]s sitting”); R.1131 (prosecutor

supporting case for discharge with evidence of “[e]ach shot fired at [] Rafael”).

Under the theories of conviction presented, Martinez could not have committed the attempted murder without committing the discharge. Discharge of a firearm constituted the “substantial step” toward the commission of murder; it was the attempt in attempted murder. Indeed, even the trial court found that “factually, the evidence support[ed] that [discharging a firearm was] how the defendant attempted to ... kill the intended victim.” R.1211. The State presented no theory of the elements that disentangled discharge from the elements of attempted murder. Although the jury instructions for discharge included the alternatives set forth in sections 76-10-508.1(1)(a) and (c), the State did not theorize and argue that Martinez intended to harass or intimidate with the shooting. Hence, the variation of section 76-10-508.1 actually proved could only be subsection (a).

While discharge is not always a lesser of attempted murder, it was in this case. Indeed, subsection (a) of discharge was “established by proof of the same or less than all the facts required to establish the commission of the [attempted murder].” *Id.* Thus, merger is required under Subsection 76-1-402(3).

3. *Common law merger doctrine.*

Even if merger is not required under subsections 76-1-402(1) and 76-1-402(3), the common law merger doctrine requires that Martinez’s discharge convictions merge with attempted murder. *See Lee*, 2006 UT 5, ¶30.

“The doctrine of common law merger exists to prevent a criminal

defendant from being ‘punished twice for conduct that amounts to only one offense, a result contrary to protections against double jeopardy.’” *Met v. State*, 2016 UT 51, ¶100, 388 P.3d 44. Under this doctrine “some ‘crimes may be so related that they must merge even though neither is a lesser included offense of the other’” and merger is not required under section 76-1-402. *Id.* “Where two crimes are defined narrowly enough that proof of one does not constitute proof of the other, but broadly enough that both may arise from the same facts, merger may be appropriate.” *Lee*, 2006 UT 5, ¶31.

The classic “example of this principle” arises when “‘deal[ing] with the issue of when a kidnaping may merge into a sexual assault crime.’” *Id.* ¶30. The Utah Supreme Court has discussed the double jeopardy problems that may arise in this context. *Id.* It “noted that ‘[b]y definition, every rape and forcible sodomy is committed against the will of the victim and therefore involves a necessary detention, which is, of course, required by the kidnaping statutes.’” *Id.* “‘Thus, absent a clear distinction, virtually every rape and robbery would automatically be a kidnaping as well.’” *Id.*

In *State v. Finlayson*, the Utah Supreme Court “adopted a test to determine when a conviction based on a detention ‘incidental to’ another crime should be merged with the related crime.” *Met*, 2016 UT 51, ¶100 (citing *Finlayson*, 2000 UT 10, ¶23, 994 P.2d 1243). That test—which requires consideration of various factors (a.k.a. “the Finlayson factors”)—states:

[I]f a taking or confinement is alleged to have been done to facilitate

the commission of another crime, to be kidnaping the resulting movement or confinement:

- (a) Must not be slight, inconsequential and merely incidental to the other crime;
- (b) Must not be of the kind inherent in the nature of the other crime; and
- (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Finlayson, 2000 UT 10, ¶ 23 (alteration in original).

True, the common law merger doctrine and the *Finlayson* test have typically been applied in cases involving charges of kidnaping and other crimes where an unlawful detention is inherent. *See, e.g., Lee*, 2006 UT 5, ¶¶25-35; *Met*, 2016 UT 51, ¶¶99-109. However, language in *Lee* and *Met* make clear that the doctrine applies to all “crimes” and not just a narrow subset of crimes. *Lee*, 2006 UT 5, ¶¶31-32; *Met*, 2016 UT 51, ¶100. *Lee* also suggests that the *Finlayson* factors have application outside of the kidnaping context. *Lee*, 2006 UT 5, ¶32. In that case, the supreme court explained that a “proper merger analysis requires consideration of both section 76-1-402 and the *Finlayson* factors.... If [merger is not required under section 76-1-402], the *Finlayson* factors must be assessed to determine whether merger is appropriate.” *Id.* The broad application of these principles to *all crimes* is also consistent with the purpose of the common law merger doctrine: protecting a defendant’s double jeopardy rights. *See Met*, 2016 UT 51, ¶100. In short, the common law merger doctrine and the *Finlayson* test apply to the merger of all crimes, including the crimes in this case.

Here, the common law merger doctrine requires that Martinez's discharge convictions merge with attempted murder. Application of the *Finlayson* factors necessitates such a result. First, discharge of a firearm was "merely incidental" to attempted murder. *Finlayson*, 2000 UT 10, ¶23. Discharging a firearm was the means by which attempted murder was committed; discharge was the substantial step towards murder. See R.1211 (trial court finding that "the evidence support[ed] that [discharging a firearm was] how the defendant attempted to ... kill the intended victim").

Second, discharge was "inherent in the nature" of attempted murder. *Finlayson*, 2000 UT 10, ¶23. The discharge of a firearm is inherent and necessary to any attempted murder in which firing a weapon is the actus reus or "substantial step." The State's case for attempted murder centered on Martinez firing a gun at Sergeant's truck with the purpose to kill Rafael. See R.1211. Under these facts, discharge was inherent and necessary to the commission of attempted murder.

Finally, the discharge had no "significance independent of" attempted murder. *Finlayson*, 2000 UT 10, ¶23. It did not make the actus reus of attempted murder "easier [to] commi[t]" or "lessen[] the risk of detection." *Id.* Rather, discharge was the actus reus; it was means by which Martinez committed attempted murder. See R.1211. Nor did the State argue that Martinez fired the shots for some other purpose, such as to intimidate or harass. Instead, the underlying objective of the shots, according to the State's theory, was to kill

Rafael. *See id.*

Application of the *Finlayson* factors suggests that merger is appropriate. Accordingly, pursuant to the common law merger doctrine, Martinez's discharge convictions must merge with attempted murder.

B. The trial court incorrectly denied Martinez's motion to vacate his felony discharge convictions.

The record suggests that the trial court denied Martinez's motion to vacate on several grounds. First, the trial court indicated that it viewed the merger question as a "sentencing issue and not a conviction issue." R.1203-06, 1210-12. It appeared to believe that any problem with multiple punishments could be cured at sentencing by running the discharge counts concurrently with each other and concurrently with his other convictions. *See id.* While the trial court was correct that subsection 76-1-402(1) speaks in terms of prohibiting multiple "punish[ments]," simply running the counts concurrently does not satisfy our statutory and double jeopardy protections.

Under Utah's sentencing guidelines, the existence of a conviction—even if ordered to run concurrently—may result in a defendant being punished with a lengthier prison sentence. *See Utah Sentencing Commission, Adult Sentencing & Release Guidelines* 17 (2016) ("If multiple convictions are ordered to run concurrently, the guidelines add 10% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence."); *see also* R.1204, 1249; *Finlayson*, 2000 UT 10, ¶25. But perhaps more importantly, the imposition of concurrent sentences does not remedy the collateral and long-

term consequences that accompany convictions; a conviction “punishes” simply because it exists on the defendant’s record. *See State v. Legg*, 2016 UT App 168, ¶21, 380 P.3d 360, *cert. granted*, 390 P.3d 719 (Utah 2017) (“convictions nearly always carry continuing consequences”); *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981). Indeed, this Court’s case law recognizes that vacating convictions is the proper remedy when the defendant is subject to multiple convictions. *See, e.g., Irvin*, 2007 UT App 319, ¶¶21, 35. Thus, the trial court was wrong to conclude that the merger of the discharge counts was a “sentencing issue and not a conviction issue.” R.1203-06, 1210-12.

Second, the trial court articulated that discharge’s actus reus—discharging a firearm—was an additional element that attempted murder did not require. R.1211. This reasoning was incorrect. As explained, the discharge actus reus was not an extra element under the State’s theory; rather the discharging of a firearm constituted the “substantial step” element required to commit attempted murder. *See supra* Part II.A.2.

Even if the presence of an extra element precluded merger under subsection 76-1-402(3), merger is still required under the single criminal episode and common law merger doctrines. *See supra* Parts II.A.1 & 3. The doctrine of common law merger applies notwithstanding subsection 76-1-402(3) and the presence of an additional element. *See Lee*, 2006 UT 5, ¶¶29-30 (“[s]ection 76–1–402 ... is not the only basis for finding that one set of facts may give rise to a merger of two or more separate crimes so as to preclude a multitude of

convictions for essentially the same conduct”); *supra* Part II.A.3.

The same is true under subsection 76-1-402(1)’s single criminal episode doctrine, which requires merger of all counts arising from the same act. *See supra* Part II.A.1. While multiple offenses predicated on “*separate acts* requiring proof of different elements” are not subject to merger, *State v. Smith*, 2003 UT App 179, ¶20, 72 P.3d 692 (emphasis added), multiple offenses predicated on the “*same act*” are. Utah Code § 76-1-402(1) (emphasis added). Pursuant to subsection 76-1-402(1)’s plain, “same act” language, this Court should vacate Martinez’s multiple alternative convictions for felony discharge. *See id; supra* Part II.A.1. This result follows regardless of whether felony discharge required proof of an additional element. *Id.*

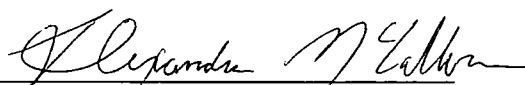
Finally, the trial court concluded that “double jeopardy [was not] implicated, because the defendant was tried at one time for all of the charges that arose out of the same criminal episode.” R.1211. But double jeopardy concerns did not dissipate simply because the State prosecuted all the offenses in the same criminal action. On the contrary, double jeopardy concerns arose because Martinez was subject to multiple punishments based on the same act or offense—a result contrary to the plain language of subsection 76-1-402(1) and the protections against double jeopardy. *See* Utah Code § 76-1-402(1); *Lee*, 2006 UT 5, ¶32; *supra* Part II.A.1.

In short, the trial court’s reasons for denying Martinez’s merger motion were incorrect. The discharge counts should be vacated.

CONCLUSION

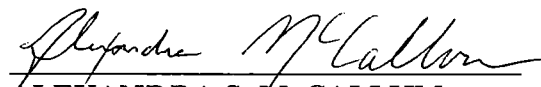
For the foregoing reasons, Martinez respectfully asks this Court to reverse his convictions and remand for a new trial. Alternatively, he asks this Court to vacate his convictions for felony discharge of a firearm.

SUBMITTED this 17th day of January 2018.


ALEXANDRA S. McCALLUM
WOJCIECH NITECKI
LACEY COLE SINGLETON
Attorneys for Appellant

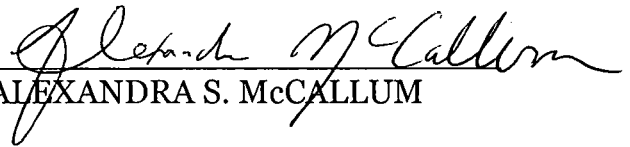
CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 10,961 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.


ALEXANDRA S. McCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 17th day of January 2018.


ALEXANDRA S. McCALLUM

DELIVERED this _____ day of January 2018.

ADDENDUM A

The Order of the Court is stated below:

Dated: November 08, 2016
12:13:35 PM

At the direction of:
/s/ Richard McKelvie
District Court Judge

by

/s/ MCKAE MARRIOT
District Court Clerk



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151907946 FS
SAUL MARTINEZ,	:	Judge: RICHARD MCKELVIE
Defendant.	:	Date: November 7, 2016

PRESENT

Clerk: mckaem

Prosecutor: GRAF, TONY F

Defendant

Defendant's Attorney(s): WOJCIECH S NITECKI

LACEY C SINGLETON

Interpreter: Miguel Medina (Spanish)

DEFENDANT INFORMATION

Language: Spanish

Date of birth: June 20, 1982

Sheriff Office#: 389756

Audio

Tape Number: W46 Tape Count: 3:27-3:46

CHARGES

1. ATTEMPTED MURDER - 1st Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

2. POSSESSION OF A DNGR WEAP BY RESTRICTED - 2nd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

3. AGGRAVATED ASSAULT - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

4. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

5. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

6. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

00371

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than three years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of FELONY DISCHARGE OF A FIREARM a 3rd Degree Felony, the defendant is sentenced to 3 to 5 years in the Utah State Prison.

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Based on the defendant's conviction of FELONY DISCHARGE OF A FIREARM a 3rd Degree Felony, the defendant is sentenced to 3 to 5 years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Counts 1 and 3 are consecutive to each other and consecutive to any other commitments defendant may have. Counts 2,4,5,6 are concurrent to each other and concurrent to counts 1 and 3

ALSO KNOWN AS (AKA) NOTE

MIGUEL MUNOZ

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

End Of Order - Signature at the Top of the First Page

The Order of the Court is stated below:

Dated: November 08, 2016
02:05:13 PM

At the direction of:
/s/ Richard McKelvie
District Court Judge

by

/s/ MCKAE MARRIOT
District Court Clerk



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151907946 FS
SAUL MARTINEZ,	:	Judge: RICHARD MCKELVIE
Defendant.	:	Date: November 7, 2016

PRESENT

Clerk: mckaem

Prosecutor: GRAF, TONY F

Defendant

Defendant's Attorney(s): WOJCIECH S NITECKI
LACEY C SINGLETON

Interpreter: Miguel Medina (Spanish)

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Plea: Not Guilty - Disposition: 07/21/2016 Guilty

3. AGGRAVATED ASSAULT - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

4. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

5. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

6. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 07/21/2016 Guilty

00374

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than three years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of FELONY DISCHARGE OF A FIREARM a 3rd Degree Felony, the defendant is sentenced to 3 to 5 years in the Utah State Prison.

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Counts 1 and 3 are consecutive to each other and consecutive to any other commitments defendant may have. Counts 2,4,5,6 are concurrent to each other and concurrent to counts 1 and 3

ALSO KNOWN AS (AKA) NOTE

MIGUEL MUNOZ

SENTENCE ENHANCEMENT NOTE

Defendant found guilty of attempted murder. Stipulation of counsel

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

End Of Order - Signature at the Top of the First Page

ADDENDUM B

THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

VS.

SAUL MARTINEZ,

DEFENDANT.

)
)
)
)
) Case No. 151907946
)
) Transcript of:
)
) JURY TRIAL
) Volume I
)
)

BEFORE THE HONORABLE RICHARD MCKELVIE

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

JULY 19, 2016

REPORTED BY: Susan S. Sprouse, RPR, CSR

1 **Q.** From the witness stand?

2 **A.** Yes.

3 **Q.** Well, let me take you to Sunday, July 5th, 2015.

4 Were you working in the early morning hours?

5 **A.** Yes.

6 **Q.** And did you see Saul that day?

7 **A.** Yes, when I get off about 4, 3:30 or 4.

8 **Q.** And what happened?

9 **A.** When I got out, he was talking to Marta outside of

10 the restaurant, and I ask him if he was looking for me to kill

11 me.

12 **Q.** Why did you ask Saul if he was going to kill you?

13 **A.** Because all the people from Tooele, they were telling

14 me that he was looking for me --

15 **MR. NITECKI:** I'm going to object. Hearsay.

16 **A.** -- to kill me.

17 **THE COURT:** Overruled. It's not offered for the

18 truth of the matter asserted.

19 **Q. (BY MR. GRAF)** I'm sorry. Could you repeat that? Let

20 me start again. Let me ask the question again. Why did you

21 ask Saul if he was going to kill you?

22 **A.** Because in Tooele everybody was telling me that he

23 wanted to kill me.

24 **Q.** What did Saul tell you when you stated that?

25 **A.** That he was not addressing me, but that he would look

ADDENDUM C

IN THE THIRD JUDICIAL DISTRICT COURT - SALT LAKE

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff,)	Case No. 151907946
)	
vs.)	Transcript of:
)	
SAUL MARTINEZ,)	JURY TRIAL
)	VOLUME II
Defendant.)	

BEFORE THE HONORABLE RICHARD MCKELVIE

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

JULY 20, 2016

REPORTED BY: BRAD YOUNG and KATIE HARMON
NOTEWORTHY REPORTING 801.634.5549

1 heard today, the trajectory of that shot would have
2 carried -- would have, but for the C Pillar of the truck,
3 which, apparently, is a pretty sturdy piece of steel, the
4 bullet was of a trajectory that likely would have hit the
5 victim at the head or upper chest level, certainly sufficient
6 to establish evidence of an intent to kill the victim.

7 For that reason, that motion for directed verdict
8 will be denied.

9 MS. SINGLETON: Thank you, Your Honor.

10 THE COURT: Mr. Singleton, you said you have another.

11 MS. SINGLETON: Thank you. I do.

12 Given the court's ruling in -- in that, our second
13 argument, Your Honor, is that -- is that based the facts in
14 this case, it's our position that the three charges of felony
15 discharge of firearm should merge into the attempted murder and
16 relatedly the aggravated assault charges. For this reason, the
17 Utah Code 76-1-402, states that a defendant may be prosecuted
18 in a single criminal action for all separate offenses arising
19 out of a single criminal episode; however, when the same act of
20 a defendant under a single criminal episode shall establish
21 offenses which may be punished in different ways under
22 different provisions of the code, the act shall be punished
23 only -- under only one such provision. Merger is a judicially
24 crafted doctrine to prevent defendants from being twice
25 punished for committing a single act that may violate more than

1 one criminal statute.

2 And the case law in this, Your Honor, makes clear
3 that merger is -- is -- is not appropriate when there is
4 separate evidence to support each charge independently of, I
5 mean, essentially separate acts supporting each charge. And I
6 can -- I have case law to present to the court and to counsel,
7 specifically, *State v. Smith*, which is 122P 3rd 615; *State v.*
8 *Yanez*, 42 P3rd 1248; and *State v. Casey*, 29 P3rd 25.

9 If I could approach the court.

10 THE COURT: Yes, you may.

11 MS. SINGLETON: I have copies for you too, Tony.

12 MR. GRAF: I appreciate that.

13 MS. SINGLETON: And if I -- so, Your Honor, these
14 cases, I think, help to distinct -- help to eliminate why in
15 this case I believe that the -- there -- that the felony
16 discharge of a firearm ought to merge the -- those three
17 charges ought to merge.

18 In -- for example, in *State v. Casey*, the court in
19 that case concluded that the -- that the aggravated assault
20 charge and attempted murd -- merger, that -- I mean, the
21 defendant was arguing that the -- that the aggravated assault
22 should merge into the attempted murder. But the court
23 concluded on page -- in that case there was essentially facts
24 in which the defendant had a gun and -- and at one point
25 pointed it at the victim in a threatening manner, but then

1 subsequently she had gotten out of the car and then had come
2 back, and then there was another point which he fired the
3 shots. And in that case, basically the court held that
4 the -- they would not merge because they were sufficiently
5 separated by time, place and intervening circumstances, in that
6 the aggravated assault took place when he pointed the gun,
7 whereas the attempted murder took place when he actually fired,
8 pulled the trigger.

9 That same sort of rationale was held in *State v.*
10 *Yanez*, in which the -- the defendant was challenging the -- the
11 trial courts failure to merge the offenses of witness tampering
12 and discharge of a firearm. And in that case it was because
13 there were numerous other instances in which the victim had
14 felt threatened by the defendant, separate from the discharge
15 of a firearm, which was the obstruction of justice -- there
16 were two separate acts, essentially, to support the two
17 different charges.

18 Whereas in this case, Your Honor, there are simply no
19 distinction between the shots that were fired and the
20 attempt -- the act -- I mean, essentially what the State's
21 allegation is, is that Mr. Martinez, assuming, in fact, again,
22 that he was the shooter, fired three shots at this vehicle and
23 that that is the -- what the -- that is the act that
24 constitutes attempted murder and aggravated assault. It's --
25 it's attempted murder, I believe, with respect to Raphael

1 Cabrera. It's aggravated assault vis-a-vis Sergeant Garcia.

2 But the -- the acts in and of themselves, there's no
3 distinction between the felony discharge of a firearm and the
4 attempted murder and -- or I mean, there's no distinction
5 between the conduct that supports the charge, a felony
6 discharge of a firearm, versus the conduct that supports the
7 attempted murder. It's all the same act.

8 THE COURT: But do we look at the conduct or do we
9 look at the elements of the offenses?

10 MS. SINGLETON: Well, I think you look -- I mean, I
11 think the court initially looks at both. And that's, I mean,
12 if one offense is established by proof of the same or -- I
13 mean, that's kind -- I mean, lesser included offense is sort of
14 a related doctrine. I mean, it's -- it's if one offense is
15 established by proof of the same or less than all the facts
16 required to establish the commission of the other offense, then
17 they would -- then it's lesser included and they could merge.

18 In this case I think the -- fact of the --

19 THE COURT: Regardless of the facts in this
20 particular case, you would certainly concede that it's possible
21 to attempt to kill someone without discharging a firearm?

22 MS. SINGLETON: That's true, but it is -- but -- yes.
23 However, but, I mean, I think -- but it's in those cases that
24 where the court does look to the actual facts of the case to
25 establish that there -- whether there is a -- a separate act

1 that supports that charge as opposed to the other one.

2 And so, I mean, it's sort of along the same lines, I
3 mean, if we talk about attempted -- aggravated assault, for
4 example, and -- which we have here, and felony discharge of a
5 firearm, by definition, I mean, felony discharge of a firearm
6 says that you -- a defendant knowing or having reason to
7 believe that any person may be in danger by the discharge of a
8 firearm, discharges a firearm in the direction of any person or
9 persons.

10 If someone does that, if someone knowingly discharges
11 a firearm in the direction of a person or persons having reason
12 to believe that they could be in danger by that, they have by
13 definition committed aggravated assault. And, in fact, I mean,
14 because aggravated assault could even be a reckless standard,
15 for instance. So you have by definition also committed that
16 offense.

17 Whereas attempted murder, there is an intent element,
18 so that's even higher. So I think that the felony discharge, a
19 knowing discharge of a firearm in the direction of a person,
20 effectively is -- is -- I mean, if you were intending to kill
21 somebody by -- by discharging a firearm in the direction of a
22 person, then you have committed felony discharge of a firearm,
23 too. So I think that --

24 THE COURT: Just because one act might be a violation
25 of two or more criminal offenses, doesn't necessarily mean that

1 they would merge if the elements standing alone would -- are --
2 are different, correct. Let -- let me give you a hypothetical
3 that, obviously, doesn't fit here, but might flesh out this
4 point.

5 You indicate that a discharge a firearm under the
6 conditions of the statute is by definition aggravated assault,
7 correct? And -- and you can't --

8 MS. SINGLETON: Well --

9 THE COURT: -- you can't discern a situation in which
10 that would not be the case.

11 MS. SINGLETON: That's not exactly what I'm saying,
12 Your Honor. What I'm saying is: I mean, I think that it's in
13 these circumstances that you have to look to the actual facts
14 of the case. And I think one of these cases that I submitted
15 to the court does kind of go into that analysis a little bit in
16 that, you know -- you know, so it's actually it's -- it's *State*
17 *v. Casey* in paragraph 16.

18 And it's -- so in that case defendant was arguing
19 that aggravated assault and attempted murder should not have
20 been charged as two separate offenses because they were -- they
21 were one offense in the same criminal episode and because
22 aggravated assault was a lesser included offense.

23 The court basically recommends that the clear intent
24 of the section, basically 76-1-402, is that a defendant may not
25 be punished twice for the same act. Thus, we must determine if

1 the conduct supporting the aggravated assault and attempted
2 murder were the same act. That's what the analysis was in that
3 case and that -- in that case it's where the court determined
4 that they were separate acts that would independently support
5 -- I mean, that -- that there was an independent act that
6 constituted aggravated assault that did not constitute
7 attempted murder, for instance, because he only pointed the gun
8 at the -- at the victim, did not pull the trigger.

9 The distinction would -- the later conduct was that
10 he actually pulled the trigger and that's why there
11 were -- there was evidence and conduct, two separate acts
12 sufficient to support both charges. In this case, there is no
13 such distinction. We have -- we have -- the only conduct that,
14 allegedly, if Mr. Martinez engaged in that -- was firing three
15 shots. Those three shots are what constitutes the attempted
16 murder, and that's what constitutes the aggravated assault.
17 There's nothing distinct about him -- it's not like he fired
18 a -- he fired a shot off into the -- as a threat, off into the
19 distance and then turned and pointed at him, no. It was:
20 Boom, boom, boom.

21 Same -- same criminal episode, not separated by time
22 or place and it all constitutes the same -- it's the same act,
23 same conduct. And he can't be punished twice under two
24 different criminal codes for that conduct.

25 THE COURT: Okay. That brings me to the next

1 question. You say that he cannot be punished twice. Is it the
2 merger doctrine more properly raised as a sentencing issue
3 rather has a trial issue?

4 MS. SINGLETON: Well, I think it comes down to
5 whether or not Mr. Martinez should be convicted. I mean, I
6 think -- I mean -- and whether this should even go to the jury
7 as -- [inaudible] being a conviction, because, I mean, I think
8 -- because punishment is -- constitutes a lot of different
9 things and I -- and I think the number of conviction that one
10 has and the way that the court can order them to run in a way
11 that they may stack up on a matrix --

12 THE COURT: But that's a sentencing -- but that's a
13 sentencing issue.

14 MS. SINGLETON: But -- true, but it -- but -- but
15 there shouldn't even be --

16 THE COURT: Would you -- would you concede the
17 possibility that this jury could find the defendant not guilty
18 of attempted homicide or any of the lesser included offenses to
19 attempted homicide and still find him guilty of unlawful
20 discharge of a firearm?

21 MS. SINGLETON: I think that -- I think that in order
22 to find Mr. Martinez not guilty of attempted murder, it would
23 have to -- they would have to -- well --

24 THE COURT: Well, you're asking for lesser included
25 offenses.

1 MS. SINGLETON: Sure.

2 THE COURT: So there must be some theory that you
3 have there to support the idea that -- that the jury could --

4 MS. SINGLETON: Yeah.

5 THE COURT: -- could acquit the defendant of
6 attempted homicide. And so what I'm asking you is, is if
7 that's the case, can -- can't you envision a scenario in which
8 they could acquit him altogether of attempted homicide,
9 aggravated assault as it relates to Mr. Cabrera and still find
10 him guilty of unlawful discharge of a firearm?

11 MS. SINGLETON: I -- well, I suppose possibly at
12 least with respect to the attempted murder charge because I
13 think that that is where the intent to kill aspect comes into
14 play. But, I mean, I -- I mean, possibly, but I -- I think
15 that I -- I still think that -- that there's no -- in this
16 particular case, there's just no distinction between the
17 conduct that supports -- well...

18 THE COURT: My understanding of the case law and I'm
19 more than willing to be corrected is that the court is not to
20 look at the conduct, but to look to the elements of the
21 offense. And if there's an element of one offense that does
22 not exist or is not an element of the other offense, then it's
23 not a -- a lesser included offense, No. 1.

24 And No. 2, it's not subject to the incorporation that
25 you're talking about, other than it might relate to the

1 sentencing. And -- and I'll tell you, and this, obviously, is
2 an issue that we may not reach because we don't know what this
3 jury is going to do, but -- and I haven't heard from Mr. Graf.
4 And so this isn't set in stone, but my supposition is that with
5 respect to sentencing issues, you're probably correct that any
6 sentence that would be imposed as a result of either the
7 aggravated assault against Sergeant Garcia or the attempted
8 homicide or any lesser included offenses as it relates to
9 Mr. Cabrera, would be merged with the discharge of the firearm
10 because from a factual standpoint there is no distinction.

11 The act of the discharge of the firearm constituted
12 the acts of aggravated assault and attempted homicide. And I
13 think for sentencing purposes that they -- they would merge.
14 But I also think that the State is entitled to present to this
15 jury a theory of their case that would allow the jury to
16 conclude, "We don't think this guy intended to kill
17 Mr. Cabrera. We don't think that he even attempted to assault
18 him. We think that he was just trying to scare him. And
19 because of that, we feel that a conviction of unlawful
20 discharge of a firearm is the only appropriate charge here."

21 And -- and for -- for the court to disallow that at
22 the this point is to rob the State of one of their theories of
23 prosecution.

24 MS. SINGLETON: Well, I -- I can see the court's
25 point in that. I would just note that I think that there is a

1 distinction with respect to looking at the elements of the
2 offense and whether or not, one, I mean, they are, you know, by
3 virtue of proving one you're proving another. And that's, I
4 think, is specifically with respect to lesser included offenses
5 and merger is somewhat of a different animal. And I direct the
6 court's attention to *State v. Yanez* in that case, because, I
7 mean, in that case they were considering the merger of witness
8 tampering and obstruction of justice. Which, I mean -- I'm
9 sorry, witness tampering and discharge of a firearm. Clearly
10 of which the elements are very different.

11 So, you know, and in that case, again, they -- they
12 concluded that -- that they should not have been merged, but
13 again, that was due to the underlying evidence in that case
14 which was separate -- which established separate acts. So I
15 think just at least with respect to merger, it can't -- it
16 doesn't necessarily rest upon the specific elements of
17 the -- of the offenses. I think it's based more on the
18 conduct. So, with that I'll -- I guess I'll submit.

19 THE COURT: Mr. Graf, you want to be heard on this
20 argument?

21 MR. GRAF: Briefly, Your Honor. I'm just -- I'm
22 looking at this briefly. These are all post convictions.
23 Every case that she presented is post conviction. And -- and I
24 could be wrong, but [inaudible] I don't see any holding where
25 the court eludes to talking about this -- this distinction

1 could be made prior to the conviction. Again, I have not read
2 this thoroughly, but from what I've gleaned, I don't see that.
3 I feel it -- it might be appropriate later, but at -- at this
4 time it's not ripe to address.

5 And I believe the State is entitled to present it's
6 theory and the elements are different. And at this point I
7 feel that if the jury makes a finding of guilty, then it can
8 addressed, but at this point we're -- I don't feel we're there
9 yet. Thank you.

10 THE COURT: And that's the ruling that the court will
11 make. I think that the -- the merger doctrine may be an
12 appropriate issue in this case, but if it is, it's a sentencing
13 issue, rather than a -- an issue of fact. And -- and by saying
14 that, I don't preclude the possibility that that sentencing
15 issue might even include vacating a conviction of unlawful
16 discharge of a firearm, if it appears that even the mere
17 conviction as -- as Ms. Singleton argues, is in and of itself
18 a -- a separate punishment even if sentences are run
19 concurrently or even if, indeed, the court doesn't enter a
20 sentence as to that offense at all.

21 But I think that to rule on that at this point would
22 be, as I indicated, to -- to rob the State of a potential
23 conviction because the jury, obviously, is entitled to make a
24 determination that the defendant is guilty of unlawful
25 discharge of a firearm without finding him guilty on any of the

1 other counts. And because of that, I'll deny the motion, but I
2 want to make clear that I deny it at this stage without
3 prejudice to it being raised either as a sentencing issue or
4 even, indeed, as to having a conviction on those counts vacated
5 as -- as a result of what we -- the conversation we had today.
6 Okay.

7 MS. SINGLETON: Thank you, Your Honor.

8 THE COURT: Okay. Mr. Nitecki, where are -- where
9 are we now?

10 MR. NITECKI: I have a proposal in that we have two
11 witnesses, which I don't believe will take particularly long.
12 I'm proposing that we present the defense case today and after
13 we rest, we excuse the jury and we return -- we -- if the court
14 asks the jury to perhaps return tomorrow at 10:00.

15 THE COURT: Okay.

16 MR. NITECKI: And we could meet here at 8:30, if it
17 pleases the court, and go over the jury instructions. We can
18 do some preliminary things. I think I can work on -- type up
19 whatever I need to type up maybe tonight, eliminate some of the
20 theories that were eliminated in -- in the original
21 information. And, I mean, it seems to make sense to return
22 tomorrow, have the jury come a little later and we can put the
23 instructions together.

24 THE COURT: You anticipate you're witnesses won't be
25 very long?

ADDENDUM D

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IN THE THIRD DISTRICT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

THE STATE OF UTAH

Plaintiff,

v.

SAUL MARTINEZ,

Defendant.

**DEFENDANT’S MOTION TO
VACATE THREE COUNTS OF
FELONY DISCHARGE OF A
FIREARM**

Case no. 151907946

Honorable Richard McKelvie

Saul Martinez, by and through counsel, Wojciech Nitecki and Lacey Singleton, moves this Court to vacate his convictions on three counts of felony discharge of a firearm, on the grounds that the convictions on those counts are based on the events which occurred in the course of a single criminal episode. Martinez’s motion is supported by the following memorandum.

FACTS

The Jury convicted Martinez of all five counts charged in the Information after the first phase of the trial. Prelim. Hrg. Tr. Vol. 3, 51(hereinafter “T3”). In support of its theory of the

case, the State offered the testimony of Rafael Cabrera who told the jury that on July 8, 2015, Sgt. Geno Garcia gave him a ride to his stranded vehicle. T1. 141-46. After Cabrera exited Garcia's truck to retrieve a gas can from the back, he saw another vehicle pull up. T1. 146-47. When the driver opened the door, Cabrera recognized him as Saul Martinez. T1. 147. Cabrera knew that Martinez has previously threatened to kill him, so he ran back to Garcia's vehicle, told Garcia that the man was there to kill him, and got back into Garcia's truck on the front passenger side. T1. 147-48, 187-88. As the vehicle began to pull away, Garcia and Cabrera heard three shots in quick succession. T1. 149, 192-93; T2. 31. Garcia heard at least one of the shots hit the vehicle. T1. 193.

Later that morning, Trooper Jensen inspected Garcia's truck and discovered three bullet holes on the passenger side; one in the top corner of the window, one in the front passenger quarter panel, and one in the column between the front and back rows. T2. 109-10. Jensen concluded that two of the bullets hit Garcia's vehicle at 5 to 10 degree angles, while the bullet which impacted between the front and back rows did so at about 60 degrees. T2. 138-40. Three spent 9 millimeter shell casings were found at the scene. T2. 100-01.

ARGUMENT

I. THE DEFENDANT'S THREE CONVICTIONS FOR FELONY DISCHARGE OF A FIREARM SHOULD MERGE WITH THE CONVICTION FOR ATTEMPTED MURDER.

This Court should vacate the Defendant's convictions on three counts of felony discharge of a firearm because the convictions merge with the conviction for attempted murder. This is because all convictions stem from a single criminal episode and all felony discharge counts were necessarily proven by the evidence used to prove attempted murder. "Merger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for

committing a single act that may violate more than one criminal statute.” *State v. Diaz*, 2002 UT App 288, ¶17, 55 P.3d 1131. “The protection against double jeopardy is guaranteed in both the federal and Utah state constitutions.” *State v. Trafny*, 799 P.2d 704, 709 (Utah 1990) (citing U.S. Const. amend. V; Utah Const. art. I, § 12). To this end, the federal constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The analogous clause of the Utah constitution reads “[t]he accused shall not be . . . twice put in jeopardy for the same offense.” Utah Const. art. I, § 12.

Utah’s merger doctrine, codified in part at Utah Code § 76-1-402, is interpreted “to comply with the underlying constitutional guarantees against double jeopardy.” *State v. Ross*, 951 P.2d 236, 241 (Utah Ct. App. 1997); *State v. Lopez*, 2004 UT App 410, ¶8, 103 P.3d 153, 155. “[W]hen the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and any sentence under any such provision bars a prosecution under any other such provision.” Utah Code Ann. § 76-1-402(1).

A. Felony discharges of a firearm and attempted murder occurred in a single criminal episode.

As used in § 76-1-402, “[t]he term “‘single criminal episode’ means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.” *State v. Irvin*, 2007 UT App 319, ¶18, 169 P.3d 798 (citing Utah Code Ann. §76-1-401 (2003)). As Utah Court of Appeals noted:

[T]he general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. The particular facts and circumstances of each case determine the question. If there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense.

Irvin, 2007 UT App 319 at ¶18 (citing State v. Crosby, 927 P.2d 638, 645 (Utah 1996) (citation omitted)).

To illustrate, in Irvin, the defendant was convicted of two counts of aggravated robbery after a jury trial and the Court of Appeals later concluded “that only one act of aggravated robbery occurred.” Irvin, 2007 UT App 319 at ¶19. In that case, the defendant robbed a store clerk at knifepoint, after which he took the clerk’s car keys and fled in her vehicle. Id. The Irvin court decided that the taking of the keys “was part of ‘one intention, one general impulse, and one plan,’ and Defendant committed only one aggravated robbery.” Id. (internal citation omitted). To that end, the defendant took cash from the register and the clerk’s keys “within a matter of seconds.” Id. The court added that “[t]he entire encounter lasted only a few minutes, and the taking of [the] keys was likely done to facilitate Defendant’s escape with the stolen cash.” Id.

Similar to *Irvin*, in determining whether convictions are a part of single criminal episode, other jurisdictions assess whether the evidence used to prove the commission of one crime was used to prove the commission of another. *See Owens v. United States*, 497 A.2d 1086 (D.C. 1985) (“[t]he fact a criminal episode of assault involves several blows or wounds, and different methods of administration, does not convert it into a case of multiple crimes”); *State v. Watkins*, 236 P.3d 770 (Or.Ct.App. 2010) (multiple counts of assault arising from single criminal episode merged); *Brown v. State*, 539 S.E.2d 545 (Ga.Ct.App. 2000) (aggravated assault and aggravated battery merged where defendant’s “actions were the result of a ‘single act of firing a series of shots in quick succession at the victim’” (citation omitted)); *Grace v. State*, 425 S.E.2d 865 (Ga. 1993)(aggravated battery and aggravated assault did not merge where defendant shot victim

twice, but “[t]he evidence used to prove the commission of the aggravated assault was not used at all in proving the commission of the aggravated battery.”).

Like in *Irvin*, the conduct in this case lasted mere seconds, and supports only one general intention or plan by the perpetrator. The State’s theory of the case was that the three shots have been fired with intent to kill Cabrera. There is no way to determine the sequence of the shots, or if one or another was fired for a different purpose. The underlying objective of the shots, according to the State’s theory, was to kill rather than merely intimidate Cabrera.

B. Felony discharge of a firearm can be a lesser included offense of attempted murder.

Consistently with the “one general intent” theory, “[a] defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense.” Utah Code §76-1-402(3). “An offense is a lesser included offense when ‘[i]t is established by proof of the same or less than all the facts required to establish the commission of [another] offense.’” *State v. Chukes*, 2003 UT App 155, ¶9, 71 P.3d 624.

“Utah courts apply a two-tier analysis to identify lesser-included offenses.” *Ross*, 951 P.2d at 241. In applying this test, this Court should first compare the statutory elements of each offense, and “[i]f the two crimes are such that the greater cannot be committed without necessarily having committed the lesser, then the lesser offense merges into the greater crime and the State cannot convict and punish the defendant for both offenses.” *Id.* “In most cases, comparison of the statutory elements will suffice to determine whether a greater-lesser relationship exists.” *Id.*

Where the crimes have multiple variations, however, the court will proceed to the second step and “consider the evidence[, arguments, and jury instructions] to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at

trial....” *Chukes*, 2003 UT App 155, ¶10. Utah courts focus on the State’s theory when applying the second part of the test. *See State v. Hill*, 674 P.2d 96, 98 (Utah 1983) (considering the variation of aggravated robbery presented to the jury when deciding whether theft was a lesser included offense); *Chukes*, 2003 UT App 155, ¶ 22-27 (focusing on state’s theory). A conviction for a lesser offense cannot be upheld “merely because the jury could have found an additional element.” *Id.* Instead, a conviction for a lesser must be reversed “unless the jury was ‘required to find’ the additional element.” *Id.*

Application of this two-part test shows that each count of felony discharge of a firearm was a lesser included offense of attempted murder in this case, and therefore each discharge count should merge into the attempted murder conviction.

Under the first step of Utah’s test, examination of the statutes demonstrates that discharge of a firearm can be a lesser included offense of attempted murder. *Ross*, 951 P.2d at 241. The discharge statute makes it a crime to discharge a firearm in one of three ways: (a) “. . . in the direction of any person or persons, knowing or having reason to believe that any person may be endangered by the discharge of the firearm;” (b) “in the direction of any person or habitable structure” “with intent to intimidate or harass another or with intent to damage a habitable structure;” or (c) in the direction of any vehicle” “with intent to intimidate or harass another.” Utah Code §76-10-508.1(1). In order to commit the offense of attempted murder, a person must have attempted to intentionally or knowingly cause the death of another. Utah Code §76-5-203.

The first variation of discharge of a firearm requires firing a gun in the direction of a person with knowledge or having reason to believe a person is endangered. Utah Code §76-10-508.1(1). This is also a manner in which a knowing or intentional attempted homicide could be committed. In fact, any intentional or knowing attempt to kill by firing a gun at a person would

include all of the elements for discharge in the direction of a person with knowledge or having a reason to believe the person is endangered.

The State could prove the defendant had the knowledge that an act presented a danger to a person's physical safety by showing he acted with the intent to cause death or knowledge that the nature of his conduct would likely result in death. If the State presented evidence by which a jury could find that the defendant fired a gun in the direction of another person, with the intent to or with knowledge that the action could cause death or serious bodily injury, then each individual discharge would be established by "proof of the same or less than all the facts" required to prove both attempted murder. *Ross*, 951 P.2d at 242. The actus reus of the offense of discharge of a firearm under subsection (a), namely, to "discharge a firearm in the direction of any person," is an act proven by evidence of the bullet flying from the firearm and striking an object, such a vehicle, in which a person is sitting. Further, the requirement that the defendant acted "knowing or having reason to believe that any person may be endangered by the discharge of the firearm" is encompassed by proof of the intentional or knowing mental state required by attempted murder. Utah Code §76-10-508.1(1).

Under the elements of attempted murder and discharge of a firearm, therefore, there is a variation, subsection (a), where "the greater cannot be committed without necessarily having committed the lesser," such that the lesser crimes merge into the greater. *Hill*, 674 P.2d at 97. While discharge of a firearm is not necessarily always a lesser included offense of attempted murder, it may, in at least one variation, be "established by proof of the same or less than all the facts required to establish the commission of the [attempted murder]." *Id.* (quotation omitted).

The difference between the circumstances here and those where the convictions do not merge also demonstrates that the Defendant's convictions should merge in this case. Cases where

convictions did not merge involved different acts or circumstances where the elements of one crime were not necessarily included in the elements of another. For example, discharge of a firearm was not a lesser included offense of witness tampering because “there was evidence other than the discharge of the firearm upon which the jury could base Defendant's conviction for witness tampering.” *State v. Yanez*, 2002 UT App 50, ¶ 22, 42 P.3d 1248, 1252; *State v. Suarez*, 736 P.2d 1040, 1042 (Utah Ct. App. 1987).

The circumstances here ultimately differ from these non-merger cases because all of the elements for discharge of a firearm in the direction of a person, knowing that a person would be endangered, are included in the elements for attempted murder; therefore, merger is required.

C. The evidence presented at trial and the State’s theory of the case demonstrates that the greater-lesser relationship existed between the specific variations of the offenses actually proved at trial.

Because there are multiple variations of the offense of discharge of a firearm, the second part of the test requires a consideration of the evidence and the State’s theory “to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial.” *Hill*, 674 P.2d at 97. The evidence, arguments, and jury instructions demonstrate that once the State proved attempted murder, the jury did not need to find an additional element to convict the Defendant of felony discharge of a firearm. *See State v. Bradley*, 752 P.2d 874 (Utah 1988); *Chukes*, 2003 UT App 155. In this case, three bullets were fired at Geno Garcia’s truck. The gunshots came in rapid succession, each one striking the vehicle on the passenger side. This same evidence, indicating that the Defendant pointed a gun in the direction of Rafael Cabrera and fired three times was used to prove each count of discharge of a firearm, as well as the offense of attempted murder.

Under the State's theory, therefore, the Defendant could not have committed attempted murder without committing the offense of discharge of a firearm. That offense was merely the means by which the Defendant committed the other two offenses. *See id.* ¶¶22-27. The State presented no argument for how the jury could convict the Defendant of discharge of a firearm, other than that the elements of that offense were present within the elements of both attempted murder and aggravated assault. Although the jury instructions for discharge of a firearm included the three alternatives in section 76-10-508.1(1)(a)-(c), the State presented no evidence or argument that the Defendant only intended to harass or intimidate Cabrera with the shooting. Hence, the only variation of section 76-10-508.1 actually proved was subsection (a).

Further, the Utah Supreme Court's recognition that some crimes are so related as to be appropriate for merger even though they do not meet the section 76-1-402 test further supports the Defendant's argument that the discharge counts should merge with the attempted murder conviction. *See Finlayson*, 2000 UT 10; *State v. Lee*, 2006 UT 5, ¶31, 128 P.3d 1179. Discharge of a firearm in the direction of a person with the requisite knowledge is so closely related to intentional or knowing attempted homicide that discharge convictions should merge with attempted murder under this rationale. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

Case law from other jurisdictions further supports the Defendant's claim. For example, a defendant could not be convicted in New Mexico for both homicide and causing great bodily harm where both convictions were premised on the unitary act of firing seven gunshots at a vehicle driven by the victim. *State v. Montoya*, 306 P.3d 426 (N.M. 2013); *see also People v. Tallwhiteman*, 124 P.3d 827, 836-37 (Colo. App. 2005), *as modified on denial of reh'g* (holding reckless endangerment is a lesser included offense of assault with intent to cause serious bodily injury because all of the elements are established by "the establishment of every element of first

degree assault with intent to cause serious bodily injury”); *Alston v. State*, 643 A.2d 468 (Md.Ct.App. 1994) (holding that reckless endangerment is a lesser-included offense of murder, where the defendant engaged in a shootout, killing bystander); *Montes v. State*, 421 S.E.2d 710 (Ga. 1992) (holding the assault convictions merged with the murder conviction where the evidence used to prove aggravated assault—that the defendant fired a deadly weapon and wounded the deceased victim—was also used to prove that defendant had committed murder).

In this case, the attempted murder and felony discharge counts were factually indistinguishable. Put another way, the attempted murder was committed by way of felony discharge of a firearm. And because this greater-lesser relationship existed between the counts, the Defendant’s convictions should merge.

II. IF MERGED, THE CONVICTIONS MUST BE VACATED.

Once a jury returns convictions on multiple charges, the merger issues become ripe for adjudication. *State v. Ellis*, 2014 UT App 185, ¶12, 336 P.3d 26 (citing *State v. Lopez*, 2004 UT App 410, ¶¶8-9, 103 P.3d 153)(further citations omitted). Since a criminal defendant may not be sentenced on more than one of the merged crimes, the trial court has to vacate all merged convictions. See id. For instance, in *Irvin, supra*, the court ultimately vacated one of the defendant’s convictions for aggravated robbery. *Irvin*, 2007 UT App 319 at ¶36. Similarly, in *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, our Supreme Court vacated the defendant’s conviction for aggravated kidnapping because the charge was used as an aggravator in an aggravated murder conviction and, accordingly, was a lesser-included charge of the aggravated murder. *Nielsen*, 2014 UT 10 at ¶¶55-56.

It follows from this that, if this Court concludes that the felony discharge convictions merge with the attempted murder conviction, the Court should vacate the felony discharge convictions.

CONCLUSION

Where there was but one general intent by the Defendant, and proof of the attempted murder necessarily proved felony discharge, and, after convicting the Defendant of attempted murder, the jury did not have to find an additional element to convict him of felony discharge of a firearm, this Court should find that the convictions for felony discharge merge with the attempted murder and vacate the convictions.

Respectfully submitted this 18th day of July, 2016

By /s/ Wojciech Nitecki
Wojciech Nitecki
Lacey Singleton
Attorneys for Defendant

Mailed/Delivered via the Court's electronic filing system a copy of the foregoing to the Salt Lake District Attorney's Office, 111 East Broadway, Suite 400, Salt Lake City, Utah 84111, on this 18th day of July, 2016.

/s/ Wojciech Nitecki

ADDENDUM E

IN THE THIRD JUDICIAL DISTRICT COURT - SALT LAKE
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff,)	CASE NO. 151907946
)	
vs.)	TRANSCRIPT OF:
)	
SAUL MARTINEZ,)	ARGUMENT ON MERGER MOTION
)	
Defendant.)	

BEFORE THE HONORABLE RICHARD MCKELVIE

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

SEPTEMBER 26, 2016

TRANSCRIBED BY: BRAD YOUNG
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1 September 26, 2016

3:17 p.m.

2
3 P R O C E E D I N G S
4

5 **THE COURT:** All right, we are going to go ahead with
6 State vs. Saul Martinez. It's here on the defendant's motion
7 to vacate three counts of felony discharge of a firearm.
8 Mr. Nitecki and Ms. Singleton are here for the defendant.
9 Mr. Graf is here for the State. The defendant is present and
10 being assisted by a court-appointed interpreter.

11 Who is going to argue this? Ms. Singleton? All
12 right. Come on up.

13 **MS. SINGLETON:** Thank you, your Honor. I think I
14 would first just ask if the Court has questions before
15 reiterating some of the points I made in my --

16 **THE COURT:** I guess the primary question I have after
17 reading both of the -- your memorandum and the State's reply
18 memorandum is how does the concept of single criminal episode
19 tie into a merger of counts? Doesn't -- doesn't that concept
20 only deal with the -- the necessity of making sure that all
21 charges that arise from a single criminal episode are charged
22 in the same -- charged and tried in the same criminal
23 prosecution?

24 **MS. SINGLETON:** Your Honor, I think that -- um, I
25 mean the -- the point of merger is that -- is that somebody

1 would not be punished twice for the same conduct. And I think
2 that when the -- the single criminal episode is -- um, the test
3 about that, as far as whether there is one offense or two
4 separate offenses, um, is that what -- is about the intent
5 involved. And so --

6 **THE COURT:** But you are talking about one offense or
7 two offenses, and maybe -- maybe I'm misunderstanding the
8 consent of single criminal episode. But -- but my
9 understanding of it is that any number of charges could be
10 filed that all occur within the same criminal episode.

11 **MS. SINGLETON:** Sure.

12 **THE COURT:** And the idea is that we can't -- if we
13 have somebody who breaks into a house and then steals something
14 from the house and then rapes a -- an occupant of the house and
15 then murders another occupant of the house we can't charge
16 those in four different cases and try them at four different
17 times.

18 **MS. SINGLETON:** Sure.

19 **THE COURT:** We have to charge them all together and
20 we have to trial them in one trial.

21 **MS. SINGLETON:** Sure.

22 **THE COURT:** But it doesn't mean that if we convict
23 the person of the murder of one person that then we can't
24 somehow convict him of the rape of the other individual.

25 **MS. SINGLETON:** Well, I think the distinction here,

1 your Honor, is that if, hypothetically speaking, the State had
2 elected to charge Mr. Martinez with -- I mean the same -- it's
3 the same fact, underlying facts that -- they all -- they do
4 occur in the same criminal episode but it's the same underlying
5 facts that go to support the charge. And so if -- if -- if --
6 if we are talking about, to use your Honor's example, I mean,
7 yes, you would have to charge those all -- you could charge
8 those as one separate count but there is -- there are different
9 facts going to each of those charges.

10 **THE COURT:** But don't we have different facts here as
11 well?

12 **MS. SINGLETON:** I don't believe we do, your Honor.

13 **THE COURT:** I mean if you -- if you really break it
14 down in a minuscule way isn't -- isn't each discharge of the
15 firearm a separate act, especially when there is more than one
16 victim involved?

17 **MS. SINGLETON:** Well, I think maybe that would mean
18 that -- the separate acts, I think, your Honor, is where we get
19 into the single criminal episode where all three of those,
20 boom, boom, boom is the -- is the cadence. And the problem
21 that we have here is there is no way to distinguish between
22 those rapid-fire shots which one, you know, a difference
23 between which one was an attempted murder versus which one was
24 an aggravated assault versus which one was just a felony
25 discharge of a firearm. They are all -- they all together

1 constitute the offense for which the State charged Martinez
2 under the attempted murder.

3 I mean that's where you get into the -- I mean -- I
4 guess the point is the felony discharge of the firearm is
5 merely the means by which Mr. Martinez committed the offense of
6 attempted murder. That's where the State's -- the two-part
7 test that the Utah courts use, specifically in cases like this
8 where there are multiple variations of an offense, in this case
9 we have the three different prongs of felony discharge, all of
10 which were submitted to the jury in this case, but I think
11 what -- when -- when there are, um, different variations, for
12 the court to look at the State's theory of the case and the
13 evidence that would support that, and in this case, um, under
14 the elements of attempted murder and discharge of a firearm,
15 the subsection A, which is that direct firing and discharge of
16 a firearm in the direction of a person with knowledge or having
17 reason to believe a person is in danger, that same evidence is
18 what supports -- which is what the conviction for attempted
19 murder was based upon.

20 It's the same -- there is no distinction between --
21 by -- by having proven that, by having proven that Mr. Martinez
22 did discharge a firearm with the intent to essentially to kill
23 and by -- by the -- by pointing the gun and discharging it in
24 the direction of a person and not only having a reason to
25 believe the person is in danger he has therefore committed the

1 offense, the underlying offense and shouldn't be punished twice
2 for both of those things.

3 And I think that the importance with respect to the,
4 um, the timing is that there is no distinction between -- there
5 is -- there is no way to distinguish, um, you know, which --
6 which shot was -- was -- was, you know, the attempted murder
7 versus -- versus aggravated assault. I mean those -- those
8 three shots, boom, boom, boom, that's the evidence under which
9 the State -- that the State is relying on to prove that
10 Mr. Martinez committed attempted murder.

11 **THE COURT:** Isn't -- isn't the reasonable supposition
12 that all three shots were attempts at murder or at least the
13 argument could be made that they were, and simultaneously be
14 aggravated assault against the intended victim? In other
15 words, as I am standing here, and I can see Mr. Graf over your
16 shoulder, if I decide to take a shot at Mr. Graf, intending to
17 kill him, and you are right there, and the bullet passes right
18 by you in order to kill him, have I simultaneously attempted to
19 kill him and committed aggravated assault with respect to you?

20 **MS. SINGLETON:** Yes.

21 **THE COURT:** So we have one -- one act, one discharge
22 of a firearm. And are you suggesting at that point that I
23 would only be triable for one of those three acts or that I
24 could only be convicted of one of the three?

25 **MS. SINGLETON:** Well, your Honor, I think that the --

1 **THE COURT:** I'm not going to do that, by the way,
2 Mr. Graf.

3 **MR. GRAF:** Thank you, your Honor. I appreciate that.

4 **MS. SINGLETON:** Your Honor, I think that -- that the
5 distinction here is that -- I mean, what we are arguing, we
6 are -- we are arguing that, um, simply the convictions for the
7 discharge -- the three discharge of a firearm should be vacated
8 not the aggravated assault.

9 **THE COURT:** And I understand that. But so -- so by
10 my act did I not -- can I not be convicted, then, of both the
11 attempted homicide, aggravated assault and the discharge of a
12 firearm?

13 **MS. SINGLETON:** I don't think the discharge of a
14 firearm. I mean I think that's where double jeopardy comes
15 into play, that the -- because the acts support -- the case law
16 where merger was not appropriate because of -- of -- was where
17 there was a factual distinction between what evidence went to
18 support the different charges.

19 For instance, in Yanez [phonetic] it was when there
20 was a -- the -- the element on appeal was that the witness
21 tampering and the assault charges should have merged because
22 under the defendant's theory or argument in that case the
23 pointing of a gun at the victim was an aggravated assault and
24 also witness tampering. But in that case the distinction is
25 that there was another fact in evidence at issue that came out

1 in the trial that was a threat, a separate threat, a verbal
2 threat, not involving a gun, and that went to support the
3 witness tampering.

4 So there are -- there were two separate -- there were
5 two facts that supported the underlying charge, whereas in this
6 case that's not -- that's not the case. It's a single criminal
7 episode of -- of -- of three shots, all of which happened in
8 rapid succession, and it was firing the gun in the direction of
9 a vehicle, which was both attempted murder as to Mr. Cabrera
10 but also aggravated assault as to Mr. Garcia.

11 But -- but I think that -- that where -- you know,
12 it's -- it's the same -- I mean I think the main issue here,
13 your Honor, is it's the same -- it's whether the same evidence,
14 um -- whether there is any separate and distinct evidence to
15 support felony discharge of a firearm that did not also support
16 the attempted murder or the aggravated assault. I mean I think
17 in order for the -- those charges not to merge, there would
18 have to be some evidence in that -- in this case separate from
19 the evidence used to prove attempted murder and aggravated
20 assault.

21 **THE COURT:** But -- but don't -- don't we look not
22 just at the evidence but at the elements of the offenses?

23 **MS. SINGLETON:** That's where -- yes, your Honor, but
24 that's where in the second part of the test you are -- when
25 there are variations under -- of a -- of a -- of a charge, such

1 as felony discharge of a firearm, that's where the -- the Court
2 is to look at the State's theory of the case and the evidence.
3 And in this case the State's theory was that Mr. Martinez
4 attempted to kill Mr. Cabrera, and vis-a-vis the shots also
5 committed aggravated assault --

6 **THE COURT:** By discharging the firearm.

7 **THE WITNESS:** -- in the direction of that vehicle,
8 which is subsection A.

9 **THE COURT:** And is that the State's only theory?

10 **MS. SINGLETON:** I -- I believe -- yes, I believe so,
11 because I don't think that there was any other evidence to
12 support a -- to support the other prongs.

13 **THE COURT:** And are those specific statutory elements
14 to some subdivision of the attempted homicide statute?

15 **MS. SINGLETON:** I'm sorry?

16 **THE COURT:** Are -- are those -- are those facts, the
17 discharge of a firearm with the intent to kill someone, is that
18 a separate body of elements of the offense of attempted
19 homicide, or is it merely a means by which factually someone
20 can do that?

21 **MS. SINGLETON:** I think it's a means by which -- I
22 mean I think that's -- that's the issue is that --

23 **THE COURT:** In other words, there is no language in
24 the statute that says if you try to kill somebody by firing a
25 gun at them it's attempted homicide as opposed to by throwing a

1 knife at them or pushing them down the stairs or any other act
2 that might facilitate their death?

3 **MS. SINGLETON:** Well, I think it is -- it is
4 basically an act with the intent to commit, with knowledge --
5 with either intent to kill or with knowledge that it would
6 result in death. And I think that that's where the prong of
7 felony discharge that is -- you know, discharging a firearm in
8 the direction of any -- you necessarily establish the same
9 intent. And I -- I don't think that it's -- I mean I -- I --
10 I -- I want to make sure I'm understanding your Honor's
11 questions.

12 **THE COURT:** Well, maybe -- maybe I don't understand
13 it as well or can't articulate it as well as I -- as I think I
14 should be able to. What I am getting at is that we talk about
15 not only factual distinctions, and I will acknowledge that,
16 certainly, the discharge of the firearm in this instance was
17 also by virtue of the facts surrounding the case, an attempt to
18 commit murder. But it would not be a necessary act in order to
19 attempt to commit murder.

20 In other words, if -- if Mr. Martinez had rammed the
21 victim's car with his own, in an intent -- with an intent to
22 carry that act out, or tried to hit him while he was outside of
23 the truck, as the facts support, that -- that he stepped
24 outside of the truck to get his gas can, and it was at that
25 time that the defendant pulled up, um, those acts might

1 separately -- and I know that's not the facts that we have --
2 but if he attempted to run him over at that point those facts
3 would separately support a verdict of attempted homicide,
4 assuming that the jury inferred the appropriate intent,
5 correct?

6 **MS. SINGLETON:** Yes.

7 **THE COURT:** So -- so the discharge of the firearm
8 is -- is a factual basis for the attempted homicide but it's
9 not elementally necessary. In other words, the statute doesn't
10 say you have to try to kill somebody by discharging a firearm.

11 **MS. SINGLETON:** No, but -- no, but, your Honor, what
12 I think, um, what the whole point of the lesser-included
13 offense is, is that -- well, let's look it at a lesser-
14 included. I mean by its -- its -- when you by establishing the
15 elements of the greater offense you necessarily will have
16 established the elements of the -- of the lesser and --

17 **THE COURT:** Assuming that there is no additional
18 elements that are -- that are considered or required by the
19 lesser than -- than the greater, right?

20 **MS. SINGLETON:** Right. But I don't think --

21 **THE COURT:** Doesn't the discharge of a firearm, the
22 actual act of discharging the firearm, isn't that an element
23 that is -- that is required in that crime, discharge of a
24 firearm, that's not required in the attempted homicide?
25 Setting aside the fact that that's factually what happened,

1 what I am talking about here is just the statutory elements of
2 the offense.

3 **MS. SINGLETON:** Well, I mean I would -- I would agree
4 with your Honor that -- that discharging a firearm is not -- is
5 not an element of the attempted murder statute, certainly. But
6 I don't think that that precludes, um, merger in this case. I
7 don't -- because, again, it goes to what we are forced to look
8 at, and that's where, you know -- I mean, it's essentially
9 whether -- I mean courts are -- courts are directed to look at
10 whether the evidence use -- used to prove the commission of one
11 crime was used to prove the commission of the other. So in
12 this particular case there was no other evidence used to
13 support, used to prove attempted murder other than the
14 discharge of the firearm in the direction of Mr. Cabrera.

15 **THE COURT:** Other than the evidence of intent.

16 **MS. SINGLETON:** Well, I think -- but I -- but that's
17 the thing with the discharge of the firearm is that you have
18 the knowledge that somebody could be endangered, and so there
19 is there the -- you know, or killed or -- you know, and I think
20 that's the -- you by -- by establishing the intent to kill that
21 the jury found with the attempted murder they necessarily have
22 established the knowledge of the -- under the discharge
23 statute. Um, I mean, I think, you know --

24 **THE COURT:** Because one requires more specific
25 knowledge or intent than the other?

1 **MS. SINGLETON:** Correct. And, um -- and -- if I
2 could have just one moment, your Honor.

3 **THE COURT:** Sure.

4 (A pause in the proceedings.)

5 **MS. SINGLETON:** Um, just a couple of more -- more
6 points, your Honor. Um, going back to, um, your Honor's
7 hypothetical regarding, you know, multiple acts in one single
8 criminal episode that could be prosecuted, you know, in one
9 case, I mean if -- if, hypothetically, one were to kill
10 somebody by commission of felony discharge, that's not --
11 that's just murder. That's not felony murder. That's --
12 that's simply murder.

13 **THE COURT:** Sure.

14 **MS. SINGLETON:** And so in this instance the attempted
15 murder was committed via a discharge of a firearm, and it is
16 the same facts used to support that. And we also have evidence
17 in this case that from one of the witnesses that I think your
18 Honor recalls that if Mr. Martinez had wanted to kill
19 Mr. Cabrera he -- he could have, he would have, he had plenty
20 of time. Therefore, the attempted murder is only with respect
21 to the discharge of a firearm when he did it. I mean it's
22 all -- it's all in one -- that one instance of boom, boom, boom
23 succession.

24 **THE COURT:** Is your argument, then, that one act
25 cannot simultaneously successfully violate more than one

1 statute?

2 **MS. SINGLETON:** I think that the, um -- I'm not
3 saying that it cannot, but I think that's where we have the
4 merger doctrine. And -- and -- and the question is whether or
5 not, um, you know, in -- I mean the -- a person should not be
6 punished twice for the same act, um, you know, unless, you
7 know, in situations such as a felony murder doctrine where
8 there was a murder and incident to that there was -- there was
9 other -- other events. But I mean there is separate evidence
10 as to those things.

11 The problem we have in this case is that the only
12 evidence -- the only evidence to support the conviction for
13 attempted murder was firing the gun in the direction of the
14 vehicle, which is exactly what the discharging the firearm
15 statute --

16 **THE COURT:** Now, you -- you are talking -- you
17 mentioned a lot the double jeopardy clause, which indicates
18 that no individual can be twice punished for the same conduct.
19 Um, isn't that a -- isn't that a -- an issue that really should
20 be resolved at sentencing and not with respect to whether or
21 not the conviction itself is entered? In other words, if the
22 Court imposes one sentence on the defendant for the conduct
23 that he has been convicted of and does not do it in a way that
24 increases the penalty imposed, doesn't that satisfy the
25 dictates of the double jeopardy clause?

1 **MS. SINGLETON:** Your Honor, I think -- I think it's
2 about -- I don't think it's simply about the sentence. I mean
3 I think the -- the double jeopardy clause, I mean merger is
4 what's judicially created to -- to ensure that people who
5 commit a single act that might violate more than one criminal
6 statute are not punished twice for that, and I think it's not
7 simply -- I mean I think punishment, and I -- we may have
8 addressed this before, is not simply the sentence imposed. I
9 mean I think there is -- I mean the conviction in and of itself
10 is being -- is -- is --

11 **THE COURT:** The concept of jeopardy as we use it
12 under these circumstances is an indication of whether or not
13 the defendant is put at some risk of conviction and punishment,
14 which is the reason that we can't, as I indicated earlier, take
15 those separate crimes of burglary, theft, rape and murder and
16 break those off into four trials so that we basically have four
17 shots at convicting him instead of putting all of our eggs in
18 one basket. Right? That's the whole idea behind the jeopardy,
19 that he is only placed once in jeopardy of being convicted.

20 That's not what you are arguing here, because all of
21 these counts were charged in the same information, tried in
22 front of the same jury, they considered that evidence and
23 convicted him on all of those counts.

24 **MS. SINGLETON:** Right, but it -- but it is at this
25 point that merger becomes ripe for your Honor to consider, and

1 I think that, um, that -- that the last section of our brief
2 addresses that in that -- I mean the -- the -- in State v.
3 Nielsen, the Supreme Court vacated the defendant's conviction
4 for aggravated kidnapping because the charge was used as an
5 aggravator in an aggravated murder conviction and burglary was
6 a lesser-included of that.

7 And so it's -- um, it does go to the conviction, um,
8 as to what this Court should consider as far as, um, you know,
9 what constitutes being placed in jeopardy. I mean I think -- I
10 mean, essentially, what it goes down to is not being punished
11 twice for the same conduct. And if your Honor does not merge
12 the three felony discharge counts with the attempted murder and
13 aggravated assault then Mr. Martinez is essentially being
14 punished, um, even if the -- even if your Honor doesn't
15 impose -- I mean your Honor is required to impose a sentence,
16 and even if it were a concurrent sentence it's still an
17 imposition of a sentence for the same conduct. So --

18 **THE COURT:** So what you are saying is, is that if he
19 is sentenced to five years to life. Or is it a first-degree
20 felony? I don't recall. First-degree felony, five years to
21 life on the first count, one to 15 -- zero to 15 on the second
22 count, and the others third-degree felonies? Zero to five on
23 each of them. Sentence is ordered to be served concurrently.
24 Where is the punishment that comes from the sentence of the
25 zero to five?

1 **MS. SINGLETON:** Well, I don't -- I don't think
2 that -- I mean this isn't a situation in which -- this isn't
3 just a practicality, your Honor. I mean this is a -- the
4 imposition of a sentence in and of itself, whether or not it
5 has any literal impact on Mr. Martinez, it is still an
6 imposition of a sentence.

7 **THE COURT:** Isn't that what we mean by punishment? I
8 mean punishment is actually enduring some negative consequence.
9 It's not just a theoretical thing.

10 **MS. SINGLETON:** Well, I --

11 **THE COURT:** It has to be something that actually
12 happens to you, a negative consequence.

13 **MS. SINGLETON:** Um, well --

14 **THE COURT:** So if he doesn't spend an extra day or
15 hour in jail, if he doesn't spend -- pay an extra penny in a
16 fine or -- or other monetary punishment --

17 **MS. SINGLETON:** Well, actually, your Honor, you know,
18 I -- I -- I was overly general when I said that he wouldn't --
19 that it wouldn't be -- suffer any actual punishment on those if
20 the Court ran them concurrently. Actually, according to the
21 matrix for how much time someone would serve, the -- the prison
22 considers 10 percent of the shorter sentence to be added to the
23 full length of the longer sentence on a concurrent enhanced.
24 And so there is a potential for him to be punished more
25 severely by booking his sentence on all three then merging --

1 **THE COURT:** You say that I would have to impose a
2 sentence. But why is that the case? Why could I not just say
3 I am going to sentence him to five to life on Count 1, I am
4 going to sentence him zero to 15 on Count 2, and I am not going
5 to sentence him on Counts 3 to 5, because I think that they
6 merge for sentencing purposes with the underlying convictions?

7 **MS. SINGLETON:** I think once the Court has elect --
8 decided that they merge for sentencing purposes the convictions
9 must be vacated.

10 **THE COURT:** In -- in getting back to that there is --
11 there is a difference between having the conviction entered on
12 the record, is there not, and having the defendant actually
13 suffer a consequence from the conviction?

14 **MS. SINGLETON:** I, um --

15 **THE COURT:** I mean it just -- it seems to me at its
16 core that this is a sentencing issue and not a conviction
17 issue. It seems to me that if the State charges somebody
18 with -- I mean here again I will change the hypothesis on you a
19 little bit, and maybe it's unfair to do, but it's kind of an
20 esoteric conversation at this point anyway.

21 What if we have an individual who is arrested as they
22 often are with five different types of controlled substances,
23 and they are charged with possession with intent to distribute
24 methamphetamine, heroin, cocaine, marijuana and PCP? All
25 right? They are -- they have got it all in the same suitcase.

1 They are different substances. Each one is a different
2 element. But they are in the business of dealing with drugs.
3 You go to trial. The jury finds them guilty on all five of
4 them. Does the Prosecution has -- have to at that point, um,
5 elect which of those five convictions they actually want to
6 have entered?

7 **MS. SINGLETON:** No, your Honor, because there is
8 different drugs involved. There is different substances.

9 **THE COURT:** So there is different bullets involved.
10 Every pull of the trigger is a separate bullet. It's a
11 separate act. It's a separate opportunity to inflict the
12 damage that he is trying to inflict. And I think that that's
13 the gravamen that Mr. Graf talks about in his response, and
14 that is that, you know, if somebody pulls the trigger once they
15 have one opportunity to injure or kill somebody with the
16 discharge of that firearm. If they pull it a hundred times,
17 then it is a hundred times more likely that their impact is
18 going to be noted.

19 **MS. SINGLETON:** Well, but, your Honor, I think -- I
20 mean your Honor's example, okay, the possessing five
21 distributable amounts of different drugs? Right? Marijuana,
22 heroin, whatever you want to pick. First of all, in a
23 situation of that nature, some of those drugs are -- are
24 classified differently by level.

25 **THE COURT:** Right, schedule 1, schedule 2 and so on.

1 **MS. SINGLETON:** But -- but you wouldn't also -- I
2 mean they wouldn't charge -- if they are charging possession
3 with intent to distribute with those five substances they
4 wouldn't also be charged with simple possession of those
5 substances, right? And so --

6 **THE COURT:** Then that would be a lesser-included
7 offense.

8 **MS. SINGLETON:** Right. Because they are in
9 essence -- I mean by possessing, simply possessing the
10 controlled substance they are also -- and by that amount
11 possessing with intent. But in this case I mean the
12 distinction is that -- I mean the discharge is what constitutes
13 the aggravated -- the attempted murder. And so I understand
14 what you -- that -- that --

15 **THE COURT:** Factually it does.

16 **MS. SINGLETON:** Yes, there are many bullets, but at
17 the same time it is not like, you know, possessing with intent
18 to distribute meth also established something else above this.
19 And, um, that, therefore, because there were five substances,
20 they could only -- I mean if -- if -- I don't know, I don't --
21 I'm not familiar with, you know -- well, let -- well -- if --
22 if -- if possessing those five substances collectively have we
23 established some greater offense, like -- I'm having a hard
24 time (inaudible) what that might be, then I think that that
25 might be analogous to this case.

1 The issue that I think we have here is that it is the
2 same exact evidence and the same exact conduct by which the
3 State proved the attempted murder and what that conviction is
4 based on and the aggravated assault. And that's why it should
5 merge.

6 **THE COURT:** All right. Thank you, Ms. Singleton.
7 Mr. Graf?

8 **MR. GRAF:** Thank you, your Honor. Your Honor, the
9 State focused one of its arguments on Rossabout [phonetic].
10 And I think there is a lot of similarities in that case to this
11 case. In that case there was 12 discharges from a Glock, a
12 pistol, a handgun, as in this case there was three discharges.
13 And the court found that each trigger pull was a separate
14 incident. And it also noted that if it wasn't the case then
15 there would be no disincentive for the defendant to keep
16 pulling the trigger.

17 **THE COURT:** But in Rossabout was there a -- a higher
18 offense of attempted homicide or was it merely the discharge?

19 **MR. GRAF:** It was merely the discharge, your Honor.

20 **THE COURT:** So we are not talking about an issue
21 where there is a -- a potential lesser-included offense?

22 **MR. GRAF:** Correct.

23 **THE COURT:** All right.

24 **MR. GRAF:** In addition, in looking at the lesser-
25 included, if you take the element of the -- of Count 1 and you

1 boil it down, there is a difference between felony discharge of
2 a firearm and attempted murder, because there has to be a
3 discharge of a firearm at a vehicle is one of the counts, I
4 believe that's C, element C. And that is distinct from
5 homicide.

6 So, for example, you might -- you could try to argue
7 that aggravated assault is a lesser-included of attempted
8 murder, because if you distill it down you have similar
9 elements at the end that are -- that are similar. But in this
10 case that's not the case. And we would argue that it is
11 distinct.

12 In addition, Defense talked about how in my argument
13 to the jury, in my closing argument, evidence presented, I
14 presented no evidence for a possibility of a threat and that,
15 therefore, I couldn't go forward on element -- I believe the
16 third element of felony discharge. However, the jury heard
17 evidence of threats made to the -- to the victim on three
18 separate occasions.

19 And my statements aren't evidence. It's just simply
20 information for the jury. The jury listened to all the
21 evidence. At the end they decided, and I cannot tell you why
22 they decided why, because I wasn't in there, but they heard all
23 that evidence and found distinct -- distinctively convictions
24 for all five counts. And, therefore, I think there is an
25 argument to leaving it to the jury in that sense to

1 determine -- not trying to dissect why they made that decision.
2 I think that's an important point as well.

3 And, your Honor, I would submit based off my motion
4 as well at this point.

5 **THE COURT:** All right. Thank you, Mr. Graf.
6 Ms. Singleton?

7 **MS. SINGLETON:** The fact that the jury decided to
8 convict Mr. Martinez on all five is not -- has no bearing,
9 really, on whether this Court elects to merge or -- merge the
10 convictions. Merger becomes ripe at this point in time. It's
11 not the jury's decision to make that kind of a legal
12 determination as to this is when merger is ripe.

13 And, um, I -- I -- I think that -- I would just sort
14 of direct the Court's attention to the cases of State v. Ellis
15 and State v. Irvin that were cited in the last paragraph of our
16 memorandum, which -- in which it is made clear that when a
17 criminal defendant -- um, the criminal defendant may not be
18 sentenced on more than one of the merged crimes and that,
19 therefore, the trial court would have to vacate all merged
20 convictions. And that would be our request.

21 **THE COURT:** All right. But those cases only apply if
22 the Court merges.

23 **MS. SINGLETON:** The Court elects to merge the
24 (inaudible).

25 **THE COURT:** Well, I think that it's a really

1 interesting issue and probably one that deserves consideration
2 by greater minds than mine, but you are stuck with mine at this
3 point. And I still see it, quite frankly, as a sentencing
4 issue. I see this as an issue that involves whether or not the
5 Court can impose a separate punishment for the attempted murder
6 and the discharge of a firearm if the evidentiary underpinnings
7 of both are the same.

8 Um, discharge of a firearm is not a necessary element
9 in the attempted homicide. Now, factually, the evidence
10 supports that that's how the defendant attempted to -- to kill
11 the intended victim.

12 But whereas I think that this may be an issue for
13 sentencing I don't see that for purposes of this motion there
14 is any double jeopardy implicated, because the defendant was
15 tried at one time for all of the charges that arose out of the
16 same criminal episode. He is -- he is subject to one
17 sentencing, even if the Court might impose sentences on more
18 than one count.

19 Again, that's not before me right now. The only
20 thing that's before me right now is whether or not these
21 independent counts of discharge of a firearm somehow get
22 subsumed by the greater offense of attempted homicide. And my
23 reading of the statutes and the case law is that it does not.

24 And so I am going to deny the motion to vacate the
25 three counts. I will set the matter for sentencing. I will

1 encourage further argument on the issue as it relates to how
2 the Court imposes sentencing, whether or not a separate
3 sentence can or should be meted out for those -- those
4 discharge of firearm counts. But as it relates to whether or
5 not the convictions will remain on the record the motion is
6 denied.

7 All right. So can we set the matter for sentencing?
8 We need to order a presentence report to be prepared?

9 **MR. GRAF:** Yes, your Honor.

10 **THE COURT:** Because we have not done that yet. We
11 have November 7th available. We have November 21st available.

12 **MR. NITECKI:** Lets go to November 7th, your Honor.

13 **THE COURT:** All right. We will set the matter for
14 sentencing on November 7th at 8:30 a.m. Or maybe we ought to
15 do it at 2:00 p.m., so we will have a little bit more time to
16 consider the issues. AP&P should do a presentence report.

17 (These proceedings were concluded at 3:52 p.m.)
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ADDENDUM F

Utah R. Evid. 801

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Utah R. Evid. 802

Rule 802. The Rule Against Hearsay

Hearsay is not admissible except as provided by law or by these rules.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

Utah Code § 76-1-401

§ 76-1-401. “Single criminal episode” defined--Joinder of offenses and defendants

In this part unless the context requires a different definition, “single criminal episode” means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of [Section 77-8a-1](#) in controlling the joinder of offenses and defendants in criminal proceedings.

Credits

Laws 1973, c. 196, § 76-1-401; Laws 1975, c. 47, § 1; [Laws 1995, c. 20, § 127, eff. May 1, 1995.](#)

Utah Code § 76-1-402

§ 76-1-402. Separate offenses arising out of single criminal episode--Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Credits

Laws 1973, c. 196, § 76-1-402; Laws 1974, c. 32, § 2.