Case No. 20161019-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

SAUL MARTINEZ,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for attempted murder, a first-degree felony, possession of a dangerous weapon by a restricted person, a second-degree felony, aggravated assault, a third-degree felony, and three counts of felony discharge of a firearm, third-degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Richard McKelvie presiding

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INTRODUCTION

Martinez's wife left him. He blamed Victim and promised to kill him. Shortly thereafter, Martinez visited his brother-in-law, said he was going to kill Victim, showed the gun he would use "to do it," and said goodbye. Hours later, Martinez fired three shots at Victim and an off-duty police sergeant (who had helped Victim after his truck ran out of gas) as the two drove away.

Martinez said he wasn't the shooter. But following a bifurcated trial, a jury convicted him of attempted murder (Victim), aggravated assault (Sergeant), and three counts of felony discharge of a firearm. The trial court convicted him of possession of a firearm by a restricted person. Martinez raises two issues on appeal: (1) hearsay and (2) merger.

Hearsay. Days before the shooting, Victim confronted Martinez outside a restaurant and asked, "[Are you] looking for me to kill me"? The prosecutor questioned why Victim would ask that. Over Martinez's hearsay objection, Victim explained, "Because all the people from Tooele, they were telling me that he was looking for me . . . and wanted to kill me."

The trial court correctly ruled that Victim's explanation was not offered for its truth. It was offered to explain why he confronted Martinez. And even if it were hearsay, it was not prejudicial where it was not important to the State's case; it was cumulative of several much stronger threats and promises to kill Victim, and the evidence of Martinez's guilt was overwhelming.

Merger. Martinez says his three convictions for discharging a firearm (one per shot) should merge with attempted murder because they are based on the same act: shooting a gun at Victim. He claims merger is proper on three grounds: (1) single criminal episode (Utah Code Ann. § 76-1-402(1)); (2) lesser included offense (Utah Code Ann. § 76-1-402(3)); and (3) *Finlayson* merger.

But these counts cannot merge on any grounds because the legislature expressly prohibits merger of these convictions. And the Utah supreme court abrogated *Finlayson* or common-law merger, it no longer applies.

STATEMENT OF THE ISSUES

1a. Was Victim's explanation for confronting Martinez hearsay when it was offered only to show why he confronted him?

1b. Even if hearsay, is it reasonably likely that the jury would believe that Martinez was not the shooter where he twice threatened to kill Victim; then, on the night of the shooting, borrowed his neighbor's white SUV, told his longtime friend that he was going to kill Victim, showed him the gun he planned to use to kill Victim, said goodbye, and then Victim saw Martinez get out of a white SUV and shoot at him and Sergeant?

Standard of Review. When reviewing a hearsay ruling, the court's legal conclusions are reviewed for correctness, its factual findings are reviewed for clear error, and its ultimate ruling on admissibility is reviewed for abuse of discretion. *State v. Workman*, 2005 UT 66, ¶10, 122 P.3d 639.

2. Do Martinez's three convictions for discharge of a firearm merge with attempted murder where the legislature has explicitly stated that these convictions "do not merge"?

Standard of Review. "Whether one crime is a lesser included offense, which merges with a greater included offense, is a legal question of statutory interpretation reviewed for correctness." *State v. Smith*, 2005 UT 57, ¶6, 122 P.3d 615 (cleaned up).

STATEMENT OF THE CASE

A. Summary of relevant facts.[1]

Martinez blames Victim for stealing his wife

Victim did not know Martinez well. R704–05, 726. The two worked at the same Denny's Restaurant in Tooele for a couple of weeks. *Id*. Later, Victim worked with Martinez's wife (Wife) at a different Denny's in Lake Point. *Id*. Victim was divorced, and he and Wife became friends around the time that Martinez and Wife's relationship fell apart. R666–67, 704–05, R1017.

Martinez did not see this as a coincidence; he believed—as did others—that Victim and Wife were living together. R677, 684. He was angry and blamed Victim for stealing Wife and their daughter (Daughter) from him. R685, 689.

The finger gun

A month before the shooting, Victim, Wife, Daughter, and several others were having dinner at a friend's home when there was a knock at the door. R705–06. Without waiting for an answer, Martinez let himself in. R706. He looked "upset." R706–07. He stared at Victim, made his fingers into the

[1] Because this is an appeal from a jury verdict, the State presents the facts in the light most favorable to the verdict, addressing conflicting evidence only to the extent necessary to understand the issues on appeal. *See State v. Bond*, 2015 UT 88, ¶3 n.2, 361 P.3d 104.

shape of a gun, pointed it at Victim for three or four seconds, and left with Wife and Daughter. *Id*. Martinez never said a word. *Id*.

"Sooner or later I will kill you"

About a month later, and just three days before the shooting, Martinez again threatened Victim—this time at the Lake Point Denny's where both Wife and Victim worked. R664–675; 709–10.

The Denny's manager (Manager) was Wife's good friend and was aware of Martinez's feud with Victim. R660–61, 666, 677. So when Martinez arrived at the restaurant, Manager asked him to talk with her outside to avoid a "confrontation . . . in front of customers." *Id*. Outside, Martinez asked Manager if she knew where Wife and Daughter were at; Manager said she did not know. R667–68.

While the two were talking, Victim's shift ended, he came outside, and saw Martinez. R668, 709. Victim approached Martinez and asked if he was looking for him. *Id*. When Martinez said that he was looking for Wife and Daughter, Victim replied, "Well, I heard that you're looking for me because you're going to kill me." *Id*. Martinez responded, "No, not now or here at this moment, but I know where you and [Wife] live, and *sooner or later I will kill you*." R675 (emphasis added); *see also* 668; 709–10. Victim quipped, "[Y]ou know where you can find me," got in his truck, and left. R668–69.

Their exchange was calm, but serious. R669. They were not joking. *Id*. Manager was "scared"; she begged Martinez, "Please don't do anything here, please, please." *Id*.

Martinez borrows his neighbor's white SUV

Just three days later, the night of the shooting, around 6:00 or 7:00 p.m., Martinez asked to borrow his neighbor's white SUV to visit Daughter. R878, 881. The neighbor consented. R882–83. The neighbor knew that Wife had recently left Martinez and taken Daughter. R886. The neighbor said that this had affected Martinez "deeply"; he was a "very sad man." *Id*. While no time was discussed for returning the SUV, the neighbor understood Martinez was only borrowing it for the evening. R884, 888. But Martinez never returned it and she never saw him again. R882.

Martinez shows off the gun he plans to use to kill Victim

About an hour later, Martinez visited his brother-in-law (Brother-in-Law). R684–85. The two had been good friends for many years. R682–83. Martinez, with a beer in hand, was there to "say goodbye." *Id*. He had learned that Victim and Wife were living together and believed that they were "making fun of [him]." R688. He was "extremely nervous" and "mad." R685, 688–89. He said that "he couldn't handle everything" and that "he had to end all of this." R685–86. He "wasn't going [to let Victim] steal [Wife] and

[Daughter]" and said he that "had everything prepared to kill Victim." *Id.* He then pulled out a big, gray or lead colored gun from his pants and showed it to Brother-in-Law, telling him this was what he would use "to do it." R686.

Brother-in-law testified that it was "very clear" that Martinez wanted to kill Victim. R687. While Martinez had joked in the past about killing other people (not Victim), there was "something . . . going on," something about his demeanor, that Brother-in-Law "couldn't describe" that made him believe that Martinez was "serious" this time. *Id*.

Victim's truck breaks down, Sergeant helps

Roughly three hours later (around 10:30 pm), Victim left work from the Lake Point Denny's, got in his Chevy truck, and started towards Salt Lake City where his children were staying with Wife and Daughter. R710–11. Several miles into his drive on Highway 201, his Chevy ran out of gas. R712, 749–50. He pulled onto the right shoulder, turned on his emergency flashers, got out, grabbed his gas can, and started the half-mile walk to a nearby gas station. 712–13, 723–24, 850; D10. A light rain had just started to fall, and it was dark. R712, 724–25. The only light came from Victim's truck, passing cars, and the lighted intersection further up the road. 849–50.

After about 15 minutes, Victim reached the gas station, filled his gas can, and started walking back to his Chevy. R713–15, 850. At that same time,

a uniformed, off-duty police sergeant (Sergeant) was filling up his Toyota Tundra (his personal, unmarked truck) following his shift at the airport. R715–16, 745–48. He saw Victim carrying his gas can in the rain and asked if he needed a ride. *Id*. Victim accepted. *Id*.

Sergeant drove to Victim's Chevy, parked his Tundra behind it, and turned on his hazard lights. R716, 749–51.

The shooting

Victim got out of the Tundra and retrieved his gas can. R717, 756. Just then, a white SUV pulled in behind them. *Id*. The SUV's door opened, its dome light turned on, and Victim saw the driver's face. *Id*. It was Martinez. *Id*.; R719, 737, 743.

Victim returned to the Tundra's passenger door and nervously told Sergeant, "This guy wants to kill me." R717, 737, 757–58. "What"? Sergeant asked. R717, 737, 758. Victim repeated, "This guy is going to kill me." *Id*. Sergeant looked in his side mirror and saw a man holding a large, silver handgun in his left hand standing at the Tundra's bumper on the driver's side. R739, 759–60, 839–40. He watched as Martinez started moving to the passenger side and yelled at Victim, "[G]et back in the truck." *Id*. But Victim was "froze[n]" R760. After Sergeant's constant yelling to "get in, get in," Victim finally snapped out of it, got in, and Sergeant pulled away. 738, 761.

"Almost instantaneously with . . . pulling away," Sergeant and Victim heard three shots, "boom, boom, boom," "fairly rapid and close together." R719, 761–62, 844. All three lodged in the passenger side of Sergeant's Tundra. R922–23; DE9 (showing location of holes).

The investigation

Sergeant called 911 immediately. R719, 764. He told them that a man driving what looked like a white Jeep Cherokee had just shot at them. R766, 770. Victim told Sergeant that he knew the person that had shot at them and that this person "wanted to kill [Victim]." R763.

While on the phone, Sergeant and Victim saw a white Cherokee drive past. R720, 766-68. They thought it might be the one that shot at them and started following it. *Id*. As they followed it, Sergeant doubted that this was the same white SUV because it was not driving erratically or trying to get away. R768, 772–73.

The police arrived within minutes. R772, 779, 866–67. They stopped the Cherokee and asked Victim and Sergeant whether its driver was the shooter. *Id*. Sergeant said he "wasn't certain." R773. But Victim was. R720–21; 730–31, 740. He told police that the driver was not the shooter and that the shooter was Martinez. *Id*.; R867. The police questioned the driver, but determined he was not involved. R687.

The police also questioned Victim and Sergeant. R733. Both Victim and Sergeant explained what happened and Victim reiterated that he was certain it was Martinez that had shot at them. R721, 733.

The next day, the police found the neighbor's white SUV. R894–95. It had been abandoned in West Valley, roughly ten miles from the shooting. *Id*.[2] Martinez was nowhere to be found. Four months later, he was arrested in Los Angeles, California. R868.

B. Summary of proceedings and disposition of the court.

Hearsay. At the jury trial, Victim testified that he confronted Martinez and asked, "[Are you] looking for me to kill me"? R709; R668. The prosecutor queried why Victim asked such a question; Victim explained, "Because all the people from Tooele, they were telling me that he was looking for me . . . and wanted to kill me." *Id*. Martinez objected that Victim's explanation was hearsay. Aplt.Brf.15–27; R709. The trial court disagreed, ruling that the explanation was "not offered for the truth of the matter asserted." R709.

[2] Mileage estimate is based on Google Maps using the address of the shooting, around 8400 West on Highway 201 in West Valley (R749), and the address where the white SUV was located, 1881 West 3300 South, West Valley City (R894).

Victim's explanation that people from Tooele told him that Martinez was looking for him and wanted to kill him was never mentioned again at trial by either side.

Merger. Martinez first requested merger by oral motion at the close of the State's evidence. R997–1009. There, he asked the trial court to merge his charges (he had not been convicted yet) for discharge of a firearm with attempted murder because they were part of the same criminal episode (Utah Code Ann. § 76-1-402(1)) and involved the same act (shooting a gun at Victim) or because discharge of a firearm was a lesser included offense of attempted murder (Utah Code Ann. § 76-1-402(3)). The trial court denied this motion as premature. R1008–09. But said that Martinez could raise merger again if he were later convicted. *Id*.

After conviction, Martinez again raised the issue of merger. As in his oral motion, the written motion focused on statutory merger. R336–346. In two lines, Martinez referenced *Finlayson* merger as a possibility. R344 (noting his convictions "should merge . . . under [the *Finlayson*] rationale"). But this possibility was mentioned as part of his lesser-included offense arguments. R343–45.

At oral argument on the motion, Martinez did not address *Finlayson* merger. R1187–1212. He argued only statutory merger. *Id*. The trial court

denied the motion. It noted that "discharge of a firearm [was] not a necessary element" for attempted murder and thus was not "subsumed by the greater offense" of attempted murder. R1211. The trial court's order did not address *Finlayson* merger.

* * * * * *

In the end, Martinez was charged, convicted, and sentenced as follows:

Count/Charge	**Convicted**	**Sentence**
Count 1 (attempted murder)	Yes	3–Life
Count 2 (poss. of firearm by restricted person)	Yes	1–15
Count 3 (aggravated assault)	Yes	0–5
Count 4 (felony discharge of a firearm)	Yes	3–5
Count 5 (felony discharge of a firearm)	Yes	3–5
Count 6 (felony discharge of a firearm)	Yes	3–5

R1–5 (counts/charges), R333–35, 1154–55, 1165–70 (conviction), 365–67, 1253–54 (sentence). Counts 1 and 3 were ordered to run consecutive to one another. R365–67, 1254. The remaining counts were ordered to run concurrent with each another and with Counts 1 and 3. *Id*.

The parties tried all but Count 2 to the jury. R1156. After the jury trial, by agreement, the parties tried Count 2 to the bench. R1156, 1158–1174.

Martinez timely appealed. R377–78.

SUMMARY OF ARGUMENT

Martinez alleges both hearsay and merger errors on appeal. Neither are valid.

Hearsay. Three days before the shooting, Victim confronted Martinez and asked, "[Are you] looking for me to kill me"? The prosecutor questioned why Victim did so; Victim explained, "Because all the people from Tooele, they were telling me that he was looking for me . . . and wanted to kill me." Martinez says this explanation is hearsay and prejudiced him. He is wrong.

The explanation is not hearsay because it was not offered to prove that Martinez was looking for Victim and wanted to kill him. It was offered to explain why Victim confronted Martinez—a proper, nonhearsay purpose.

And even if hearsay, it was not prejudicial. It was a short, four-line, one-sentence response to a single question in a three-day, nine-witness jury trial. It did not come up again. Yes, if taken for its truth it showed Martinez wanted to kill Victim; which may be prejudicial if it were the only such evidence. But it wasn't. In this same confrontation, Martinez said he knew where Victim lived and promised, "[S]ooner or later I will kill you." Then, three days later, the night of the shooting, Martinez borrowed a white SUV from his neighbor, told his longtime friend that he had everything planned to kill Victim, showed him the gun he would use "to do it," and said

"goodbye." Just three hours later, Victim saw Martinez get out of a white SUV and fire three shots at him and Sergeant. The next morning, police found the neighbor's white SUV abandoned ten miles from the shooting. Martinez was not found for four months, until he was arrested in California. In short, the alleged hearsay added nothing to the already overwhelming evidence of Martinez's guilt. Even without the alleged hearsay, there is no chance that the jury would have believed that Martinez was not the shooter.

Merger. Martinez says that his three discharge convictions (one for each shot) should merge with attempted murder because each are based on the same act: shooting a gun at Victim. He says merger is appropriate on three grounds: (1) single criminal episode (Utah Code Ann. § 76-1-402(1)); (2) lesser included offense (Utah Code Ann. § 76-1-402(3)); or (3) *Finlayson* merger.

But these counts cannot merge on any grounds because the legislature expressly prohibits merger of these convictions. And the Utah supreme court abrogated *Finlayson* or common-law merger, it no longer applies. *See State v. Wilder*, 2018 UT 17, ¶¶3, 33, 38, --- P.3d ---.

ARGUMENT

I.

Victim's testimony about what people from Tooele were saying was not hearsay because it was offered to explain why he confronted Martinez.

Three days before Martinez shot at Victim the two had an encounter outside a Denny's Restaurant. R665–69, 709–10. There, Victim confronted Martinez and asked, "[Are you] looking for me to kill me." R709; R668. The prosecutor asked why Victim would ask that; Victim explained, "Because all the people from Tooele, they were telling me that he was looking for me . . . and wanted to kill me." *Id*. Martinez argues that the trial court abused its discretion in overruling his hearsay objection to this statement. Aplt.Brf.15–27; R709. Not so.

The trial court appropriately ruled that Martinez's statement was not offered to prove "the truth of the matter asserted." R709. That is, it was not offered to prove that Martinez was looking for Victim and wanted to kill him. Instead, it was offered to explain Victim's conduct; to explain why he

confronted Martinez and asked if he was there to "kill [him]." *Id*.[3] This is a proper, nonhearsay purpose.

Yet even if it were hearsay, it was not prejudicial. There was overwhelming evidence that Martinez wanted to kill Victim and was the shooter, including Martinez's own statements that he was going to kill Victim and Victim's eyewitness testimony.

A. Out-of-court statements offered to explain a witness's actions, like Victim's here, are not hearsay.

An out-of-court statement is hearsay only if offered "to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c)(2). But if it is offered "simply to prove it was made, without regard to whether it is true," it is not hearsay. *State v. McNeil*, 2013 UT App 134, ¶48 302 P.3d 844. That is because the witness is testifying only that the statement was made, "a fact he personally knows." *Id*. Most often these statements explain "people's motives for later actions"—a proper, nonhearsay purpose. *Id*.

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[3] Martinez complains that the prosecutor "did not identify a purpose for the statements other than proving the truth of the matter asserted." Aplt.Brf.18–19, 20–21. But he does not say why that matters. This Court may affirm the trial court's admission of evidence if it "is sustainable on any ground." *State v. Burke*, 2011 UT App 168, ¶52 n.13, 256 P.3d 1102 (quoting *Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158). And here the prosecutor did not have a chance (or a need) to identify a nontruth purpose because the trial court quickly overruled the objection. R709.

This Court holds that out-of-court statements offered to explain actions are not hearsay. In *State v. Pedersen*, a victim advocate's recitation of third-hand allegations of sexual abuse was not hearsay because it was offered "to explain why [she] reported her suspicions of possible abuse." 2010 UT App 38, ¶24, 227 P.3d 1264. In *State v. Perez*, Perez's explanation that he ran from police because his friend told him that the car was stolen was not hearsay because it was "merely offer[ed] [as] an explanation for his actions." 924 P.2d 1, 3 (Utah Ct. App. 1996). And in *In re G.Y.*, out-of-court statements about the results of medical exams were not hearsay because they "were offered to explain" the caseworker's decisions and later "actions." 962 P.2d 78, 84–85 (Utah Ct. App. 1996).

The Utah supreme court agrees. In *State v. Loose*, it held that a social worker's repetition of victim's allegations of sexual abuse was nonhearsay because it was not offered for its truth. 2000 UT 11, ¶¶4, 10, 994 P.2d 1237. It was offered so that the jury could "understand how these allegations against [Loose] arose" and to allow the "State to present a cohesive case." *Id*.

Federal courts reach this same conclusion. In *Montez v. Wyoming*, a mother testified that she turned her car around because her boyfriend told her that Montez, whom she had just left her young children with, was "a rapist." 11-8022, 2011 WL 3154346 (10th Cir. July 27, 2011) (unpublished). The

Tenth Circuit held that this testimony was not hearsay because it was offered to show why the mother turned her car around, not to prove that Montez was, in-fact a rapist. *Id*.

It is no different here. The statement here was offered to explain why Victim confronted Martinez. It was made in response to the prosecutor's question of "*why*" Victim asked Martinez if he was "looking for [him] to kill [him]." R709 (emphasis added). It was not offered to prove that Martinez had threatened to kill Victim, wanted to kill Victim, or was the shooter; there was already more than enough evidence of that. *See* subsection I.B below.

The out-of-court statements in the cases Martinez relies on (at least the Utah cases) are different because they were not offered to explain actions. *See Stratford v. Morgan*, 689 P.2d 360, 364 (Utah 1984) (statement offered to explain the state of mind of plaintiff's predecessors-in-interest); *State v. McNeil*, 2013 UT App 134, 302 P.3d 844 (statement not offered to explain actions).[4] Indeed, the out-of-court statement in *McNeil* was hearsay in part because the State "identifie[d] *no subsequent actions* that [victim] took in response to hearing" the statement. *Id*. ¶48 (emphasis added).

[4] Martinez also cites *Brown v. Florida*, 707 So. 2d 849 (Fla. Ct. App. 1998). *Brown* is not controlling and is contrary to this State's opinions in *Pederson*, *Perez*, *In re G.Y.*, and *Loose* that allowed out-of-court statements to explain a witness's actions. *See* discussion above.

The trial court thus did not abuse its discretion in ruling that Victim's explanation was not hearsay; that is, it was "not offered for the truth of the matter asserted." R709. Rather it was offered for the proper, nonhearsay purpose of explaining why Victim confronted Martinez and asked, "[Are you] looking for me to kill me." *Id*.

1. Relevance is different than hearsay.

Martinez says that if Victim's explanation was offered only to show why he confronted Martinez, then it was irrelevant to any of the disputed trial issues because Victim's reasons for confronting Martinez were not in dispute. Aplt.Brf.19–20. Thus, he argues, its only possible probative value could be for its truth. *Id*.

This argument conflates the rules of hearsay and relevance. Whether a statement is hearsay does not depend on its relevance to a disputed trial issue. It depends on whether it is (1) an out-of-court statement that is (2) offered "to prove the truth of the matter asserted." Utah R. Evid. 801. If it is, then it is hearsay. If it is not—if it is offered to explain later actions or for some other valid, non-truth purpose—then it is not hearsay.

That is not to say that the rules of relevance do not apply. If the non-truth reason for the nonhearsay statement has no relevance (it does not have a "tendency to make a fact [of consequence] more or less probable") then it is

inadmissible. Utah R. Evid. 401. But it is inadmissible because it is irrelevant, not because it is hearsay. But relevance is an objection that Martinez never made, never preserved, and does not argue here.[5]

And as the above-cases show, an out-of-court statement does not need to be relevant to a disputed trial issue to be nonhearsay. The reason that the victim's advocate reported sexual abuse to authorities in *Pedersen* was irrelevant to whether Pederson sexually abused his daughter. *Pedersen*, 2010 UT App 38, ¶¶1, 24. The reason that Perez ran from police was irrelevant to his charges of theft or driving without a license. *Perez*, 924 P.2d at 1–3. The reason that the caseworker took certain actions in *In re G.Y.* was not irrelevant to whether the mother's parental rights should have been terminated. *In re G.Y.*, 962 P.2d at 79, 84–85. The context provided by the social worker's recitation of out-of-court statements in *Loose* was irrelevant to whether Loose

[5] Here, once the court ruled that Victim's explanation was not hearsay, Martinez could have objected that it was irrelevant; or, even if relevant, it was unfairly prejudicial because the jury was likely to misuse the explanation as proof that he had threatened to kill Victim. He could have also asked for an instruction limiting the jury's use of the statement. He did none of these things. Thus, any relevance-based arguments are unpreserved. And because they are unpreserved Martinez must argue an exception to the preservation rule, which he fails to do. *State v. Johnson*, 2017 UT 76, ¶47, --- P.3d --- ("When an issue has not been preserved in the trial court, but the parties argue that issue on appeal, the parties must argue an exception to preservation for the issue to be reached on its merits.").

had sexually abused a child. *Loose*, 2000 UT 11, ¶¶1–4. The reason the mother turned her car around in *Montez* was irrelevant to whether Montez took indecent liberties with minors. 2011 WL 3154346, 1, 2.

In each of these cases, the out-of-court statements were irrelevant to a disputed trial issue. Yet, they were relevant, as is Victim's explanation here, for their "broad 'narrative value' beyond the establishment of particular elements of a crime." *State v. Verde*, 2012 UT 60, ¶28, 296P.3d 673 *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016.

2. The level of detail does not determine whether an out-of-court statement is hearsay.

Martinez also suggests that Victim's statement was offered for its truth because it contained "unnecessary details." Aplt.Brf.18, 20. But it didn't. It contained only what was necessary to respond to the prosecutor's question. It did not specify who told him that Martinez wanted to kill him, when they said it, where it was said, or how it was said (that is, whether they were joking or serious). And even if Victim's general explanation were too detailed, that does not make it hearsay.

Martinez cites *State v. Davis*, 2007 UT App 13, 155 P.3d 909. But *Davis* is different. The problem with the details from the out-of-court statement in *Davis* (an officer said he was responding to a call that defendant was currently in a motel room with "possibly a gun and dope") was that it created too great

a likelihood that the jury would misuse the statement as evidence of the actual crimes that Davis had been charged with, namely possession of a controlled substance and possession of a dangerous weapon by a restricted person. *Id*. ¶¶1, 4, 24. The Court explained that when an officer's reasons for responding to a crime scene "'become[ ] more specific by repeating definite complaints *of a particular crime*,'" it "'is so likely to be misused by the jury as evidence of that fact asserted that it should be excluded as hearsay.'" *Id*. ¶24 (quoting McCormick on Evidence § 248, at 257 (2d ed. 1972)).

Unlike the out-of-court statement in *Davis*, Victim's explanation does not prove Martinez's charged crimes. It shows only that at some unknown point Martinez may have told some unknown persons that he wanted to kill Victim.

In any event, *Davis*'s hearsay discussion is dicta—limited to its specific facts and offered only as a "brief discussion" for the trial court's "guidance" on remand in that case. *Id.* at ¶23. And more significantly, it is inconsistent with the text of rule 801, which defines hearsay based on the purpose for which it is offered, not on the risk a jury might use it improperly. *Cf. State v. Cuttler*, 2015 UT 95, ¶18, 367 P.3d 981 (holding that courts are "bound by the text of rule 403") (cleaned up). That is a subject for rule 403. *See* Utah R. Evid. 403 (excluding evidence "if its probative value is substantially outweighed

by a danger of … unfair prejudice" or other rule 403 concern). And in this case, there was little risk, let alone a substantial risk, of unfair prejudice where the jury was instructed that the statement was "not offered for the truth of the matter asserted." R709.

B. Martinez has not proved prejudice where the alleged hearsay was cumulative of much stronger and overwhelming evidence of his identity as the shooter and his intent to kill Victim.

Even if Victim's explanation were hearsay, it was not prejudicial. To prevail, Martinez must prove prejudice. *E.g.*, *State v. Honie*, 2002 UT 4, ¶54, 57 P.3d 977. That is, he must prove that "there is a reasonable likelihood that the verdict would have been different" if only the court had not admitted Victim's explanation (the alleged hearsay). *State v. Richardson*, 2013 UT 50, ¶40, 308 P.3d 526 (cleaned up). The "mere possibility" of a different verdict is not enough. *State v. Jeffs*, 2010 UT 49, ¶37, 243 P.3d 1250.

Martinez says that Victim's explanation was prejudicial "because it went to the [important] issues of identity and intent." Aplt.Brf.21–22, 25. He concludes that without Victim's explanation, "the jury would have doubted that [he] was the shooter or that he acted with intent." *Id*. at 22.

Yet to reach his conclusion, Martinez overstates the importance of Victim's explanation, downplays stronger, cumulative evidence of his threats and promises to kill Victim, and ignores the overall strength of the State's

case. *See McNeil*, 2013 UT App 134, ¶¶52, 53, 55 (noting courts may consider the alleged hearsay's importance, whether it is cumulative, and the overall strength of the case in determining if it was prejudicial).

1. The alleged hearsay was not important.

Martinez exaggerates the importance of Victim's explanation to the State's case. Aplt.Brf.22. It was a short, four-line, one-sentence response to a single question in a three-day, nine-witness jury trial. It did not come up again. Neither the State nor Martinez questioned other witnesses about it or used it in their closing arguments.

There is nothing to suggest that Victim's explanation was important to the State or to the verdict. That is so because, at best, it was cumulative of much stronger, more specific, and overwhelming evidence of Martinez's identity and intent, which the State relied on. *See* subsections I.B.2–3 below.

2. The alleged hearsay was cumulative.

If taken for its truth, Victim's explanation showed that Martinez was looking for Victim and wanted to kill him. R709. Thus, it might have been helpful, as Martinez suggests, to prove his identity as the shooter and his intent to kill Victim. Aplt.Brf.21–22. And if it were the only such evidence, then the issue of prejudice may be a closer question. But it wasn't, and the question is not close.

Martinez threatened or promised to kill Victim three different times, not counting the alleged hearsay. The first incident happened roughly a month before the shooting at a dinner attended by Victim, Wife, and Daughter. R706–07. There, a visibly upset Martinez knocked on the door, let himself in, made a finger gun, pointed it at Victim for three or four seconds, and left without saying a word. *Id*.

The second incident happened about a month later and just three days before the shooting. There, Victim confronted Martinez outside a Denny's Restaurant and asked, "[Are you] looking for me to kill me"? Martinez replied, "No, not now or here at this moment, but *I know where you and [Wife] live, and sooner or later I will kill you*." R675 (emphasis added); *see* R709–10.

The third incident happened just three hours before the shooting. There, Martinez visited his Brother-in-Law to "say goodbye." R685. Martinez was drinking, "mad," and "extremely nervous." R683, 685, 688–89. He told Brother-in-Law that he "had everything prepared to kill Victim" because he "wasn't going [to let Victim] steal [Wife] and [Daughter]." R685–86. Martinez then pulled out a big, gray gun, showed it to him, and said this is what he was going to use to kill Victim. R686. That night, Brother-in-Law said it was "very clear" that Martinez wanted to kill Victim. R687.

Martinez downplays these incidents as jokes. Aplt.Brf.25. They were not. Martinez's finger gun was made after he interrupted a dinner, was visibly "upset," and left without saying a word. R706–07. Manager said that Martinez's threat was "serious," he was not "joking," and she even begged him not to do anything outside the restaurant. R669. Brother-in-Law said that while Martinez had joked in the past about killing other people, there was "something . . . going on," something about his demeanor, that Brother-in-Law "couldn't describe" that made him believe that Martinez was "serious" this time. R687. Again, he said it was "*very clear* . . . that what [Martinez] wanted to do was kill." *Id*. (emphasis added).

Martinez also claims that the alleged hearsay was more "believable" than these three incidents because it came from people who were "neutral" and "not connected to the offense in any way." Aplt.Brf.24. But vague statements from unknown Tooele residents made at unknown times are not more believable than Martinez's own, detailed statements made days and hours before the shooting. These incidents (except for the finger gun) were corroborated by Martinez's longtime friends, Manager and Brother-in-Law, neither of whom like Victim. R661–64, 676, 683–84. If their testimony was biased in any way, it would be in favor of Martinez and against Victim, which makes their testimony much more believable than the alleged hearsay.

These three incidents, especially the second and third, are cumulative of, and much stronger than, the alleged hearsay. Like the alleged hearsay, they show that Martinez wanted to kill Victim and was planning to do so. But they are more detailed, are Martinez's own statements, and are corroborated by Martinez's friends. Not only that, but the third showed that Martinez "had everything prepared" to kill Victim, including the gun, and was ready to do it the very night of the shooting.

3. The evidence of Martinez's guilt is overwhelming.

These three incidents, on their own, are enough to identify Martinez as the shooter and prove his intent to kill. But there is more.

Victim was "100 percent" certain that he saw Martinez get out of the white SUV and shoot at him and Sergeant. R719. Martinez says that the jury had reason to doubt Victim's identification because he had motive to incriminate Martinez ("to remove Martinez from the picture and clear the way for a relationship with [Wife]") and because of the poor weather and lighting conditions. Aplt.Brf.22–23. While this may be true, Victim's actions after seeing Martinez show his identification was credible.

When Victim saw Martinez's face, he froze and twice told Sergeant, "This guy is going to kill me." R758–59; *see also* R737, 857. He said this even though he never saw a gun. R737. Sergeant had to "constantly" yell at Victim

to get his attention and get him back in the truck. R760. These actions show Victim not only *instantly* knew the man who got out of the white SUV, he also knew, *instantly*, that this man wasn't there to be a Good Samaritan—he was there to kill him. *See* R1168 (showing trial court found Victim credible because of Victim's "immediacy of recognition [of Martinez] and [his] immediacy of apprehension"). He knew this instantly because of Martinez's on-going threats and promises to kill him. Victim could not have instantly known this about some random person (or a hitman hired by Victim's ex-wife as Martinez speculates). Aplt.Brf.26 (suggesting Victim's ex-wife may have put a "hit" on Victim because of a custody battle).

Victim's instant identification, coupled with Martinez's threats and promises to kill Victim, prove Martinez was the shooter and intended to kill Victim. Thus, it is not reasonably likely that Martinez would have had a more favorable outcome if only the alleged hearsay was excluded.

But there is still more evidence. Hours before the shooting, Martinez borrowed his neighbor's white SUV. R878, 881–82. And both Sergeant and Victim said Martinez got out of a white SUV that night.

Contrary to Martinez's claim, the fact that Sergeant and Victim initially thought the white SUV was a Jeep Cherokee does not mitigate the importance of this evidence. Neither of them said they were positive it was a Jeep

Cherokee. R720 ("[I]t was like a Jeep Cherokee."); R756 ("To me, it looked like a white Jeep Cherokee. . . . [It] appeared to have been a Jeep Cherokee."); R766 ("I think he was in a white Jeep Cherokee"). Neither saw any "Jeep" marks or labels. R861. Both were basing their belief on seeing its "headlight shape" and "square front end" for several seconds, at night, with its head lights on, and (understandably) were more concerned about the man holding a gun than what kind of car he was driving. R861–62.

And finally, when and where the neighbor's white SUV and Martinez were found are also evidence. Martinez never returned the white SUV. Police found it the next morning abandoned in West Valley, roughly ten miles from the shooting. R893–94. And Martinez? He disappeared for four months until he was arrested in California. R867–68.

The evidence here was so strong that not only a jury, but also the trial court, found Martinez to be the shooter. Martinez's conviction for possession of a firearm by a restricted person was tried to the bench, after the jury trial. R1156–73. There, the trial court "independently evaluate[d] the evidence notwithstanding the [jury's] verdict." R.1165. It said that the evidence was "compelling," found that there was "no rational alternative hypothesis," and

concluded "beyond a reasonable doubt" that Martinez was the shooter. R1167, 1169.[6]

Martinez's threats and promises to kill Victim, Victim's immediate identification of Martinez, the gun, the white SUV, all add up to only one conclusion: Martinez was the shooter and he was shooting to kill. A single, isolated remark that people from Tooele were saying Martinez wanted to kill Victim is not enough to undermine this Court's confidence in that conclusion. *Richardson*, 2013 UT 50, ¶40.

[6] Martinez also says that the alleged hearsay infected his bench trial. Yet there is nothing to suggest the trial court was in any way influenced by it. As Martinez admits, the trial court focused on the events of the shooting only. Aplt.Brf.25–26. It never considered the hearsay or any pre-shooting events. And a judge, unlike a jury, is presumed to have considered only competent evidence and to use it for a proper purpose. *State v. McLaughlin*, 452 P.2d 875, 876 (Utah 1969) (holding no prejudice where inadmissible statements were used because trial was to the court, which understood their limited use); *State v. Gillespie*, 213 P.2d 353 (Utah 1950) (holding hearsay evidence in a bench trial was harmless as the Court "assume[d] that the trial court would base the conviction on competent evidence."). Further, the judge here specifically ruled at the time that the alleged hearsay was not offered for its truth. R709. So unless Martinez can show that the trial court ignored its own ruling and relied on the alleged hearsay for its truth (something he cannot do and has not done) he cannot prove prejudice.

II.

Martinez's three convictions for discharge of a firearm do not merge with attempted murder under either statutory or *Finlayson* merger.

Martinez says that his three convictions for discharging a firearm (one for each shot) should merge with his attempted murder conviction because they are based on the same act or conduct: shooting a gun at Victim. Aplt.Brf.27–28. According to him, he is entitled to merger on three separate grounds: (1) Utah Code Ann. § 76-1-402(1) (Same Act in Single Criminal Episode); (2) Utah Code Ann. § 76-1-402(3) (Lesser Included Offense); and (3) *Finlayson* or common-law merger. *Id*.

All of Martinez's merger claims fail. They fail because the legislature expressly prohibits felony discharge of a firearm from merging with murder and attempted murder. And *Finlayson* or common-law merger fails for a more basic reason: the Utah supreme court abrogated it in *State v. Wilder*, 2018 UT 17, ¶38, --- P.3d ---. It no longer applies.

A. The legislature prohibits merger of discharge of a firearm with attempted murder.

Defendant first contends that his felony-discharge-of-a-firearm offense must merge under section 76-1-402(1). That provision requires merger when "the same act of a defendant under a single criminal episode . . . establish[es]

offenses which may be punished in different ways under different provisions of [the] code." Utah Code Ann. § 76-1-402(1) (West 2015).

"To resolve whether convictions must merge, the determination to be made is whether the legislature" intended the convictions to be punished separately. *State v. Bond*, 2015 UT 88, ¶69, 361 P.3d 104 (cleaned up). Section 76-1-402(1) is the beginning of that analysis, but not its end.

Section 76-1-402(1) requires merger unless the specific criminal statute itself says otherwise. If the legislature explicitly states that a crime will not merge with another, that is, if the legislature intends multiple convictions and punishments, then "the merger doctrine has no effect." *Bond*, 2015 UT 88, ¶70; *see also State v. Smith*, 2005 UT 57, ¶11, 122 P.3d 615 (stating when the legislature clearly intends to "exempt [a] statute from operation of the general merger requirements," merger does not apply); *State v. Kerr*, 2010 UT App 50, ¶3, 228 P.3d 1255 (holding the "concepts of merger, double jeopardy, and lesser-included offenses are inapplicable" to enhancement statutes; that is, where the legislature states they do not apply). Accordingly, to determine the legislature's intent as to any given crime, this Court must look to "the plain language of the statute that defines the criminal offense." *Bond*, 2015 UT 88, ¶69.

Here, the plain language of the murder statute is clear that felony discharge of a firearm does not merge with attempted murder:

> (a) Any predicate offense described [here]in . . . that constitutes a separate offense does not merge with the crime of murder.
>
> (b) A person who is convicted of murder, based on a predicate offense described [here]in . . . that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Utah Code Ann. § 76-5-203(5) (West 2015). Predicate offenses include "a felony violation of Section . . . 76-10-508.1 regarding discharge of a firearm or dangerous weapon"—the violation at issue here. *Id*. at § 76-5-203(1)(v).

Subsection (b) provides that merger is not required in felony murder cases, Utah Code Ann. § 76-5-203(2)(d); that is, when the crime of murder is "*based on* a predicate offense." Utah Code Ann. § 76-5-203(5)(b) (emphasis added). Because this is not a felony murder case, but an attempt to commit an intentional or knowing murder, subsection (b) does not apply. But subsection (a) does. It is not limited to felony murder, providing that "[a]ny predicate offense . . . that constitutes a separate offense"—in this case felony-discharge-of-a-firearm—"*does not merge with the crime of murder*." *Id*. § 76-5-203(5)(a) (emphasis added). Thus, Martinez's felony discharge offenses do not merge with his attempted murder conviction.

The felony-discharge-of-a-firearm statute, as recently amended, is also clear that it does not merge with attempted murder. Before 2009, a person could be convicted of discharging a firearm only under "circumstances *not amounting to criminal homicide or attempted criminal homicide*." Utah Code Ann. § 76-10-508.1 (West 2008) (emphasis added). In other words, if defendants' actions amounted to murder or attempted murder, they could only be charged with those crimes. They could not be charged with both murder and discharge of a firearm. But in 2009, the Legislature removed the "not amounting to" limitation. H.B. 37, 2009 General Session (Utah 2009); *see also* Utah Code Ann. § 76-10-508.1 (West Supp. 2016). The merger-exemption provisions of the murder statute thus control.

The fact Martinez was convicted of attempted murder, as opposed to murder, is immaterial. The offenses do not merge because "[a]ttempt crimes," like attempted murder, are only "derivatives of completed crimes, and the express language of *both the completed crime statute* and the attempt statute determines the elements of the attempt crime." *State v. Casey*, 2003 UT 55, ¶13, 82 P.3d 1106 (emphasis added). "Thus, a conviction for attempted murder must satisfy the elements of the murder statute, with the obvious exception that the murder need not be completed, and the attempt statute." *Id*.

In sum, the legislature views felony discharge of a firearm in an attempted murder as a characteristic that "warrant[s] harsher punishment" and thus the murder statute explicitly permits both separate convictions and punishments for felony discharge of a firearm and attempted murder. *Bond*, 2015 UT 88, ¶71; *Smith*, 2005 UT 57, ¶¶10–11. The legislature's view is controlling. *Id*.

B. Felony discharge of a firearm is not a lesser included offense of attempted murder.

Martinez also argues that merger is required under Section 76-1-402(3) governing lesser included offenses:

> 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;
>
> (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.

Utah Code Ann. § 76-1-402 (3) (West 2015). But Martinez's reliance on subsection (3) fails for the same reason it failed under subsection (1)—by the express terms of the murder statute itself, felony discharge of a firearm does

not merge with murder or attempted murder. That said, Martinez's lesser-included-offense claim would fail in any event.

As noted, an offense is an included offense, and merges with the greater offense, when "[i]t is established by proof of the same or less than all the facts *required* to establish commission of the offense charged." Utah Code Ann. § 76-1-402(3)(a) (emphasis added). "To be necessarily included in the greater offense, the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser." *Schmuck v. United States*, 489 U.S. 705, 719 (1989); *see State v. Chukes*, 2003 UT App 155, ¶10, 71 P.3d 624. Thus, if "the lesser offense requires *an element* not required by the greater offense," it is not a lesser included offense. *Schmuck*, 489 U.S. at 716; *Chukes*, 2003 UT App 155, ¶10.

The question of whether a lesser-greater relationship exists "turns on the statutorily defined elements of the two crimes." *Finlayson*, 2000 UT 10, ¶16 *overruled in part by State v. Wilder*, 2018 UT 17, ¶33, --- P.3d ---. While courts may look "to the facts to determine what crime, or variation of the crime, was proved . . . once this determination is made, the court looks [only] to [its] statutory elements." *Id.* In other words, "the focus" of any lesser-included-offense analysis "is on the [crime's] statutory elements" not the facts

used to prove those elements. *State v. Meacham*, 2000 UT App 247, ¶29, 9 P.3d 777 (emphasis added).

Here, because discharge of a firearm requires an element not required by attempted murder, a lesser-greater relationship does not exist between the two. The discharge statute contains three variations of the crime. Utah Code Ann. § 76-10-508.1(1). All three require "discharge of a firearm." *Id*. But attempted murder does not. It requires only that Martinez: (1) attempted to; (2) intentionally or knowingly; (3) cause Victim's death. *Id*. § 76-5-203(2); R1118–19. And attempt exists where Martinez engaged in "conduct constituting a substantial step toward commission" of the murder and he intended to commit the murder. Utah Code Ann. § 76-4-101; R1119.

True, Martinez attempted to murder Victim by discharging his firearm. But, again, discharge of a firearm is not a required for attempted murder. Even Martinez admits this. Aplt.Brf.34–37 (recognizing that discharge "can be" or "could be" a lesser included offense of attempted murder but is not necessarily one); R1199 ("I would agree with your Honor that discharging a firearm is not an element of the attempted murder statute, certainly." (cleaned up)). That is because attempted murder, may be committed in various ways. And because discharge of a firearm is not an element of attempted murder, there is no merger. *See Hawkins v. State*, 415 S.E. 2d 636

(Ga. 1992) (holding discharge of a firearm did not merge with murder because discharging a firearm was "unnecessary to prove" murder); *see also People v. Whyde*, No. 334120, 2017 WL 6624700 (Mich. Ct. App. Dec. 28, 2017) (unpublished) (holding assault by strangulation does not merge with assault with intent to murder because assault with intent to murder "does not specifically require strangulation, and strangulation is not the only way to murder another person").

The flaw in Martinez's lesser-included arguments, like Finlayson's, is his "emphasis on the facts of the case" as opposed to "the elements of the crime." *Finlayson*, 2000 UT 10, ¶16. He emphasizes that discharging the firearm was "how [Martinez] attempted" to kill Victim. Aplt.Brf.37. That may be true, but *Finlayson* made clear that the focus is not on the "how," but on the elements alone. *Finlayson*, 2000 UT 10, ¶¶15, 16; *see also Schmuck*, 489 U.S. at 716–17 (holding the focus is solely on the elements of the crime). There, it was not enough that the evidence supporting aggravated kidnapping was "inseparable from and integral to the evidence which established the elements of the forcible sex crimes." *Finlayson*, 2000 UT 10, ¶13. The supreme court held that you look only to the elements of the crime. *Id*. ¶16. And because aggravated kidnapping required detention and the forcible sex

crimes did not (even if a detention was "inherent"), there could be no lesser-greater relationship. *Id*.

The same is true here. The lesser offense of discharge has an element (discharge of a firearm) that is not *required* by the greater offense of attempted murder. While murder may be committed by use of a firearm, it is not required. Thus, there is no lesser-greater relationship.

C. The Utah supreme court abrogated *Finlayson* or common-law merger, it no longer applies.

In *State v. Wilder*, the Utah supreme court "renounce[d] the common-law merger test" articulated in *Finlayson*. 2018 UT 17, ¶38, --- P.3d ---; *see also id.* ¶3, 18, 19, 33. It no longer applies. *Id*. Thus, Martinez's *Finlayson* or common-law merger claims necessarily fail.[7]

[7] It is also worth noting that Martinez never preserved his *Finlayson* merger claim. To do so he would have needed to raise the issue "to a level of consciousness that allow[ed] the trial court an adequate opportunity to address it." *State v. Worwood*, 2007 UT 47, ¶16, 164 P.3d 397 (cleaned up); *see also State v. Zaragoza*, 2012 UT App 268, ¶6, 287 P.3d 510. That didn't happen here. Martinez did briefly mention *Finlayson* merger as a possibility in two lines of his written merger motion. But he did not detail how it would apply here and he never argued *Finlayson* merger during either of the two, separate hearings on the motion. So the trial court never had an opportunity to rule on whether *Finlayson* merger would apply.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Martinez's convictions.

Respectfully submitted on May 17, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 8, 892 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

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/s/ Nathan Anderson
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CERTIFICATE OF SERVICE

I certify that on May 17, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☑ hand-delivery at:

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/s/ Melanie Kendrick

Addenda

Addendum A

Utah Code Annotated § 76-1-402 (West 2015 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.

Utah Code Annotated § 76-4-101 (West 2015) Attempt--Elements of offense

(1) For purposes of this part, a person is guilty of an attempt to commit a crime if he:

(a) engages in conduct constituting a substantial step toward commission of the crime; and

(b) (i) intends to commit the crime; or

(ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.

(2) For purposes of this part, conduct constitutes a substantial step if it strongly corroborates the actor's mental state as defined in Subsection (1)(b).

(3) A defense to the offense of attempt does not arise:

(a) because the offense attempted was actually committed; or

(b) due to factual or legal impossibility if the offense could have been committed if the attendant circumstances had been as the actor believed them to be.

Utah Code Annotated § 76-5-203 (West 2015) Murder

(1) As used in this section, "predicate offense" means:
(a) a clandestine drug lab violation under Section 58-37d-4 or 58-37d-5;
(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;
(c) kidnapping under Section 76-5-301;
(d) child kidnapping under Section 76-5-301.1;
(e) aggravated kidnapping under Section 76-5-302;
(f) rape of a child under Section 76-5-402.1;
(g) object rape of a child under Section 76-5-402.3;
(h) sodomy upon a child under Section 76-5-403.1;
(i) forcible sexual abuse under Section 76-5-404;
(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;
(k) rape under Section 76-5-402;
(l) object rape under Section 76-5-402.2;
(m) forcible sodomy under Section 76-5-403;
(n) aggravated sexual assault under Section 76-5-405;
(o) arson under Section 76-6-102;
(p) aggravated arson under Section 76-6-103;
(q) burglary under Section 76-6-202;
(r) aggravated burglary under Section 76-6-203;
(s) robbery under Section 76-6-301;
(t) aggravated robbery under Section 76-6-302;
(u) escape or aggravated escape under Section 76-8-309; or
(v) a felony violation of Section 76-10-508 or 76-10-508.1 regarding discharge of a firearm or dangerous weapon.

(2) Criminal homicide constitutes murder if:
(a) the actor intentionally or knowingly causes the death of another;
(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
(c) acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
(d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;
(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer or military service member in uniform while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4;

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer; or

(iii) an assault against a military service member in uniform under Section 76-5-102.4;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(4); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3) (a) Murder is a first degree felony.

(b) A person who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life.

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(c) This affirmative defense reduces charges only from:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

(5) (a) Any predicate offense described in Subsection (1) that constitutes a separate offense does not merge with the crime of murder.

(b) A person who is convicted of murder, based on a predicate offense described in Subsection (1) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Utah Code Annotated § 76-10-508.1 (West 2015) Felony discharge of a firearm-Penalties

(1) Except as provided under Subsection (2) or (3), a person who discharges a firearm is guilty of a third degree felony punishable by imprisonment for a term of not less than three years nor more than five years if:

(a) the actor discharges a firearm 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) the actor, with intent to intimidate or harass another or with intent to damage a habitable structure as defined in Section 76-6-101, discharges a firearm in the direction of any person or habitable structure; or

(c) the actor, with intent to intimidate or harass another, discharges a firearm in the direction of any vehicle.

(2) A violation of Subsection (1) which causes bodily injury to any person is a second degree felony punishable by imprisonment for a term of not less than three years nor more than 15 years.

(3) A violation of Subsection (1) which causes serious bodily injury to any person is a first degree felony.

(4) In addition to any other penalties for a violation of this section, the court shall:

(a) notify the Driver License Division of the conviction for purposes of any revocation, denial, suspension, or disqualification of a driver license under Subsection 53-3-220(1)(a)(xi); and

(b) specify in court at the time of sentencing the length of the revocation under Subsection 53-3-225(1)(c).

(5) This section does not apply to a person:

(a) who discharges any kind of firearm when that person is in lawful defense of self or others;

(b) who is performing official duties as provided in Section 23-20-1.5 or Subsections 76-10-523 (1)(a) through (e) or as otherwise authorized by law; or

(c) who discharges a dangerous weapon or firearm from an automobile or other vehicle, if:

(i) the discharge occurs at a firing range or training ground;

(ii) at no time after the discharge does the projectile that is discharged cross over or stop at a location other than within the boundaries of the firing range or training ground described in Subsection (5)(c)(i);

(iii) the discharge is made as practice or training for a lawful purpose;

(iv) the discharge and the location, time, and manner of the discharge are approved by the owner or operator of the firing range or training ground prior to the discharge; and
(v) the discharge is not made in violation of Subsection (1).

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

Q. From the witness stand?

A. Yes.

Q. Well, let me take you to Sunday, July 5th, 2015. Were you working in the early morning hours?

A. Yes.

Q. And did you see Saul that day?

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

Q. And what happened?

A. When I got out, he was talking to Marta outside of the restaurant, and I ask him if he was looking for me to kill me.

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

A. Because all the people from Tooele, they were telling me that he was looking for me --

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

A. -- to kill me.

THE COURT: Overruled. It's not offered for the truth of the matter asserted.

Q. (BY MR. GRAF) I'm sorry. Could you repeat that? Let me start again. Let me ask the question again. Why did you ask Saul if he was going to kill you?

A. Because in Tooele everybody was telling me that he wanted to kill me.

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

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

for me later.

Q. When he told you that, what was his tone of voice like?

A. Upset.

Q. And what did you do?

A. I went to my truck, and I left for home.

Q. How far away was your truck from where the conversation was happening with Saul?

A. Well, it could be from here to the second door, from here to the exit.

Q. Okay. So not -- from the witness stand to not the first door but the second door to the hallway?

A. Yes.

Q. And was your truck in clear view to where Saul Martinez was standing?

A. Yes.

Q. Did you know why Saul Martinez wanted to kill you?

A. Because he was saying that I was going out with his ex-wife or...

Q. Let me take you to July 8th, 2015. Were you working that day?

A. Yes.

Q. And what time did you get off work?

A. Honestly, I don't remember the dates, but about 10, 10:30, 10.

Addendum C

IN THE THIRD JUDICIAL DISTRICT COURT - SALT LAKE

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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

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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September 26, 2016 3:17 p.m.

P R O C E E D I N G S

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

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

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

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

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

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

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

MS. SINGLETON: Sure.

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

MS. SINGLETON: Sure.

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

MS. SINGLETON: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SINGLETON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: By discharging the firearm.

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

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

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

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

MS. SINGLETON: I'm sorry?

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

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

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

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

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

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

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

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

MS. SINGLETON: Yes.

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

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

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

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

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

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

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

THE COURT: Other than the evidence of intent.

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

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

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

THE COURT: Sure.

(A pause in the proceedings.)

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

THE COURT: Sure.

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

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

statute?

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

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

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

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

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

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

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

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

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

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

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

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

MS. SINGLETON: Well, I --

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

MS. SINGLETON: Um, well --

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

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

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

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

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

MS. SINGLETON: I, um --

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

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

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

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

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

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

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

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

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

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

THE COURT: Factually it does.

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

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

THE COURT: All right. Thank you, Ms. Singleton.

Mr. Graf?

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

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

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

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

MR. GRAF: Correct.

THE COURT: All right.

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

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

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

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

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

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

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

THE COURT: All right. Thank you, Mr. Graf.

Ms. Singleton?

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

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

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

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

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

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

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

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

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

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

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

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

MR. GRAF: Yes, your Honor.

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

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

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

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

C E R T I F I C A T E

I, BRAD J. YOUNG, hereby certify that I transcribed the electronic recording of the proceedings in the above-entitled and numbered matter and that the foregoing is a true and correct transcription, except where it is indicated that the recording was inaudible, to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 8th day of February, 2017.

Brad Young

BRAD YOUNG
COURT REPORTER