**IN THE UTAH COURT OF APPEALS**

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| **STATE OF UTAH** | ) | |
| | ( | |
| **Plaintiff/Appellee.** | ) | **REPLY BRIEF OF APPELLANT** |
| | ( | |
| **vs.** | ) | **Case No. 20170193-CA** |
| | ( | |
| **ANTHONY CHARLES MURPHY,** | ) | **Dist. Ct. Case No. 091100683-FS** |
| | ( | |
| **Defendant/Appellant.** | ) | |

Appeal from convictions for aggravated sexual assault and aggravated kidnapping, first degree felonies; forcible sexual abuse, a second degree felony; and aggravated assault, third degree felony, the First District Court, Cache County, before the Honorable Thomas Willmore

Utah Attorney General's Office
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### Statutes and Rules

**76-1-402(1)(2)(3)**

(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.

**76-5-405 Aggravated sexual assault**

(1) A person commits aggravated sexual assault if:
(a) in the course of a rape, object rape, forcible sodomy, or forcible sexual abuse, the actor:
(i) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;
(ii) compels, or attempts to compel, the victim to submit to rape, object rape, forcible

sodomy, or forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iii) is aided or abetted by one or more persons;

(b) in the course of an attempted rape, attempted object rape, or attempted forcible sodomy, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(iii) attempts to compel the victim to submit to rape, object rape, or forcible sodomy, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons; or

(c) in the course of an attempted forcible sexual abuse, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(iii) attempts to compel the victim to submit to forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons.

**76-5-404 Forcible sexual abuse.**

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

**76-5-302 Aggravated kidnapping.**

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:

(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) acts with intent:

(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;

(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;

(iii) to hinder or delay the discovery of or reporting of a felony;
(iv) to inflict bodily injury on or to terrorize the victim or another;
(v) to interfere with the performance of any governmental or political function; or
(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.
(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:
(a) Section 76-5-301, kidnapping; or
(b) Section 76-5-304, unlawful detention.

**76-5-103 Aggravated assault**
(1) Aggravated assault is an actor's conduct:
(a) that is:
(i) an attempt, with unlawful force or violence, to do bodily injury to another;
(ii) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
(iii) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another; and
(b) that includes the use of:
(i) a dangerous weapon as defined in Section 76-1-601;
(ii) any act that impedes the breathing or the circulation of blood of another person by the actor's use of unlawful force or violence that is likely to produce a loss of consciousness by:
(A) applying pressure to the neck or throat of a person; or
(B) obstructing the nose, mouth, or airway of a person; or
(iii) other means or force likely to produce death or serious bodily injury.

**Case Law**



## ARGUMENT

### I. THE TRIAL COURT ERRORED IN ALLOWING PRIOR ACTS THAT DID NOT MEET THE SIMILARITY REQUIREMENT UNDER THE DOCTRINE OF CHANCES

The State argued in their response that the trial court was correct in admitting the evidence of the Appellant's prior bad acts. Moreover, the State claims that the trial went through a proper analysis before admitting the 404(b) evidence. However, based on a recent decision by the Utah Supreme Court, the trial court did not properly admit the 404(b) evidence based similarity

In *State v. Lopez*, 2018 UT 5, 20151094[1], the Utah Supreme Court made further

[1] At the time of drafting this brief, *State v. Lopez*, 2018 UT 5, 20151094, has not been published in the Pacific Reporter, and does not have reference page numbers.

clarification regarding the doctrine of chances and the four foundational requirements for the set forth in *State v. Verde*. 296 P.3d 673 (Utah 2012).

"[E]vidence of prior bad acts may be admissible for non-character purposes and offered for the proper purpose. The rule lists examples of proper purposes—to establish motive, opportunity, intent, etc.—but the list is illustrative and not exclusive. So long as the evidence is not aimed at suggesting action in conformity with bad character, it is admissible under rule 404(b)." *State v. Verde*, 296 P.3d 673, 678 (Utah 2012).

In *State v. Lopez*, the defendant was charged with murder for shooting his wife in the head, behind her ear, while they were driving in a car. Conversely, Mr. Lopez states that his wife grabbed a gun and committed suicide in front of him. After seeing that his wife had shot herself, Mr. Lopez says he panicked and tried to turned his vehicle around to get her to a hospital. The police arrived on scene and didn't believe Mr. Lopez's story and charged him with murder.

Mr. Lopez did have gun shot residue on his hands, but the gun shot residue was inconclusive because he was in such proximity to the gun going off. Next, the medical examiner could not give an opinion on whether the Mr. Lopez's had shot herself because, again, the evidence was inconclusive.

Because of the inconclusive evidence, the prosecution used an expert to testify about how unusual it would be for a person to commit suicide in the manner alleged by Mr. Lopez. In addition, the prosecution wanted to present evidence of prior acts under 404(b) to show modus operandi, and wanted to establish that Mr. Lopez had a particular method

on the way he would have shot someone.

The prosecution introduced several prior acts involving Mr. Lopez threatening his wife or pointing a gun at her head. In addition, they were other allegations that Mr. Lopez had pulled his gun on other people, pointing it towards their head. The first incident involved coworker where Mr. Lopez pulled out a gun and pointed it his wife's head, near the left ear, and explained that was the best way to effectively kill someone. Next, there was an incident that Mr. Lopez pointed a gun at his wife's head during an argument. The trial court allowed the prior evidence, and the jury convicted Mr. Lopez. On appeal, it was argued that the prior acts should never have been admitted under 404(b).

Evidence of prior bad acts can be introduced as evidence, but there needs to be a thorough, and arduous examination of the prior incidents.

> Generally, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." We recognize an exception to that rule where prior acts are "relevant[, ] offered for a genuine, noncharacter purpose, " and not unduly prejudicial. State v. Lucero, 2014 UT 15, ¶ 13, 328 P.3d 841, abrogated on other grounds by State v. Thornton, 2017 UT 9, 391 P.3d 1016. "[G]enuine, noncharacter purpose[s], " id., include but are not limited to "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."
>
> *State v. Lopez*, 2018 UT 5, 20151094 (internal citations omitted)

The Utah Supreme Court, in *Lopez*, found that the prior incidents were not similar enough, and did not meet the foundational requirements under the *Verde* test for the doctrine of chances. "To use a prior act to show modus operandi, the prior act must bear a "very high degree of similarity" to the charged act and demonstrate "a unique or singular

methodology." *Id*. The Court further reasoned that the lack of similarity made it more difficult for the state to meet its burden in meeting the frequency requirement. *Id*.

In the present case, the trial court abused its discretion by failing to properly assess the prior acts under the *Verde*-foundational requirements. The trial court found that the prior incidents in this case were similar. R3411-14. There were three prior incidents that were used by the prosecution to rebut fabrication.

Although the prior acts were admitted to rebut fabrication, the prosecution also used the prior acts to establish a modus operandi, just like in the *Lopez* case. In the prosecution's closing argument, they went through each prior act and how they were similar to the alleged assault against T.W. R-5175-79.

Even the State, in their reply brief, argues that the prior conduct seems to have the same modus operandi. "Four women in three different states over sixteen years independently accused Defendant of sexual assault…. Alcohol was involved in each attack. Defendant exerted physical dominance over each victim by grabbing them, pinning them down and inhibiting their breathing. And in each instance, Defendant either attempted to sexually assault or sexually assaulted each victim…." (Brief of Appellee, pg.29, citations omitted)

Thus, the prosecution was using the 404(b) evidence to also establish that Mr. Murphy had a modus operandi, just like the prosecution in the *Lopez* case. Again, "To use a prior act to show modus operandi, the prior act must bear *a very high degree of similarity" Lopez* , 2018 UT 5, 20151094. Moreover, the "higher degree of similarity"

standard does differ from *Verde's* "roughly similar" standard. The Appellant is now addressing this issue in the reply brief because of the recent *Lopez* ruling.

The Utah Supreme Court found, in *Lopez*, that the prior acts were not similar enough to be admitted under the doctrine of chances. Furthermore, the *Lopez* case sets a higher legal standard on similarity and before a prior act can be admitted under the doctrine of chances. In *Verde*, the Court found that the prior acts must be roughly similar to the alleged conduct, and in *Lopez*, the Court found that there must be a "high degree similarity" when admitting prior acts under modus operandi. *Id*.

All the prior incidents used in the *Lopez* case were extremely similar. First, Mr. Lopez discusses with a co-worker about the best way to kill someone, and it is almost in the same manner his wife is killed. Moreover, Mr. Lopez takes out his own gun and puts it to his wife's head, behind her ear. This is very similar to the facts of the alleged murder and how Mr. Lopez's wife was shot. Moreover, Utah Supreme Court found that the other incidents where Mr. Lopez pointed a gun at other family members, were not similar enough be admitted under 404(b). *Id*.

Consequently, it is logical to assume that if the extremely similar acts in the *Lopez* case did not meet the "high degree of similarity" standard then prior acts involving Mr. Murphy are not similar enough to be admitted under the doctrine of chances.

Here, the prior allegations against Mr. Murphy vary in the type of victim and situation. In the 2001 Kentucky case, the incident involved a daughter a family friend, and Mr. Murphy was not in any romantic relationship with the alleged victim. (See Brief of

Appellant, pg. 8-9). In this case, Mr. Murphy was found not guilty of sexual assault. The 2003 Kentucky allegations involved a woman who passed out while Mr. Murphy gave her a ride, and the alleged assault took place in a pickup truck. *Id*. And, again there was not a romantic relationship with the alleged victim, and charges were never filed in this incident. *Id*. Lastly, in the 2013 West Valley City case, a prostitute, M.M, and Mr. Murphy were in an altercation about the exchange of money for sex, and again there was no romantic relationship. *Id.* In West Valley, Mr. Murphy was found guilty of general assault, as a misdemeanor. *Id.*

The presence of alcohol, sexual assault, dominance and restraining victims does nothing to distinguish these allegations from hundreds of other sexual assault allegations. Moreover, the key difference between the prior incident and current case is the romantic relationship. Here, the alleged victim is Mr. Murphy's wife, T.W. Furthermore, the prior incidents vary in location, time, and type victim. "In analyzing the similarity between the two acts, courts consider a variety of indicators, including " the time lapse between the crimes, and whether the crimes occurred in the same general locality." *State v. Lucero*, 328 P.3d 841, 2014 UT 15 (2014).

In addition, Mr. Murphy was either found not guilty of the prior incidents, charges were never filed, or charges were reduced. Mr. Murphy has never been convicted any prior sexual crime. "[S]imilarity and frequency, interact with each other to become a safeguard against the doctrine of chances becoming a work-around for the admission of otherwise improper propensity evidence. For doctrine of chances purposes, frequency does not mean

just how many times a prior act has occurred, but whether "[t]he defendant [has] been accused of the crime or suffered an unusual loss 'more frequently than the typical person endures such losses accidentally." *State v. Lopez*, 2018 UT 5, 20151094.

In this case, the prosecution not only used the prior incidents for fabrication purposes, but to also show modus operandi. The prosecution went into great detail about each of the prior incidents involving Mr. Murphy, and how they were similar to the current charges. There is no question that the prosecution wanted to show the jury that Mr. Murphy had a modus operandi.

The legal reasoning in the recent *Lopez* case states that the prior incidents must have been "highly similar" to be introduced as evidence under the doctrine of chances. Moreover, based on the *Lopez* legal analysis, and applying it to Mr. Murphy's case, the prior sexual assault history did not meet the "high degree of similarity" standard to be admitted. Therefore, the trial court errored in admitting the prior acts, and the jury was prejudiced, which prevented Mr. Murphy from receiving a fair trial.

## II. TRIAL COURT ERRORED BY FAILING TO GRANT A MISTRIAL

### A. The jury was tainted by T.W's improper statement about the shooting.

There is a "reasonable likelihood" that the improper statement influenced the jury and prevented Mr. Murphy from receiving a fair trial. The trial court found that T.W's statement was prejudicial, and that the prosecution should have been more cautious in questioning the victim.

The State contends in their reply brief that the improper statement made by T.W

was not elicited by the prosecutor. However, the prosecutor was aware of the trial courts ruling that the prior shooting was off limits. Moreover, the prosecutors string of questions, during direct, clearly leads T.W into talking about the shooting.

Again, here is the following exchange was between the prosecutor and T.W during direct examination:

***Prosecutor**: "[D]o you know a woman by the name G.A.O?"*

***T.W**: "I know of her. That's Tony's ex-wife."*

***Prosecutor**: Okay. Is that his ex-wife that he was married to in Florida in 1997ish?"*

***T.W**: That's what I understand."*

***Prosecutor:** "At the time what you reported this assault to the Smithfield Police Department were you aware of any general allegations that she had made against this defendant?"*

***T.W**: "That they had filed for divorce"*

***Prosecutor**: "Well, I am talking about like a criminal accusation; were you aware that she had accused him of any crimes?"*

***T.W**: "I understand she shot him five times."*

***Prosecutor**: "Okay, wait, wait."*

***T.W**: "That's all I know."*

(R-4357-58)

T.W was aware of the shooting allegations, and the prosecution's questions walked her down that line questions to obtain that response. Asking the question about "prior

criminal accusations" was intentional. Furthermore, prosecution should have cautioned T.W not to discuss the shooting prior to testifying at trial.

When the prosecutor was dangerously close in asking questions that may solicit an improper response, a side bar was held, and the trial court cautioned the prosecution about the direction of his questions. R-4356-57. After the prejudicial statement, trial counsel immediately objected. Then trial court made a finding, on the record, that the jury was prejudiced by the statement, which led to the court giving a curative instruction. R-4376-77.

### B. The curative instruction was unable to remedy the prejudicial effect T.W's improper statement.

There is sufficient evidence that the jury was still thinking about T.W's statement, even after the curative instruction.

A juror asked the trial court the following on the record:

***Juror**: The ex-wife. Can we know her name?*

***The Court**: I told you're her name in my instruction.*

***Juror**: We can remember her name. We just can't remember anything else?*

***The Court**: No. You don't even need to remember her name. You don't even need to consider anything about G.A.O [ex-wife] Okay?*

R-4442.

Clearly, the jury was still thinking about what had happened with Mr. Murphy's ex-wife. Furthermore, the jury asked the above question hours after the curative instruction.

Trial counsel again objected on the record, and requested a mistrial, which was again denied by the trial court. R-4443.

Moreover, the statement was so incendiary that the curative instruction was unable to remedy the damage that had already occurred. Therefore, the trial court errored in denying the motion for a mistrial, and the case should be remanded for a new trial.

## III. AGRAVATED KIDNAPPING SHOULD STILL MERGE INTO AGGRAVATED SEXUAL ASSAULT UNDER *STATE V. WILDER*

Since filing the Appellant's brief, the Utah Supreme Court has established new legal precedent, regarding merger, in *State v. Wilder*, 2018 UT 17, 20160952[2]. In *State v. Wilder* the Utah Supreme Court overturned the landmark case, *State v. Finlayson*, 994 P.2d 1243, 1246 (Utah 2000). "We renounce the common-law merger test, which we first set forth in *State v. Finlayson*, 2000 UT 10, 994 P.2d 1243, and recapped in *State v. Lee*, 2006 UT 5, 128 P.3d 1179, and hold that the controlling test is the statutory standard set forth in Utah Code section 76-1-402(1). *Id.*

Based on the legal reasoning in *Wilder*, the merger of crimes will be governed solely by the codified merger statute.

The statute that governs merger is Utah Code § 76-1-402(1)(2)(3)

> (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

[2] At the time of drafting this brief, *State v. Wilder, 2018 UT 17, 20160952*, has not been published in the Pacific Reporter, and does not have reference page numbers.

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.

Even under the merger statute, Mr. Murphy's charge of aggravated kidnapping still merges with aggravated sexual assault. This statute explains that when a defendant commits multiple crimes, during a single criminal episode, that the defendant shall only be punished for any separate and distinct criminal acts. Thus, any crime that was related to the sexual assault should merge into one crime.

Mr. Murphy's movements of the victim were inconsequential and incidental to the sexual assault. At no time did Mr. Murphy ever force T.W to leave the residence, and any movement of T.W was in the home and directly related to the alleged sexual assault.

The fight between Mr. Murphy and his wife started outside, in the backyard, and moved inside the home. Once inside, the prosecution argues that because Mr. Murphy prevented T.W from leaving the home, and a kidnapping occurred. According to T.W's

version of events, Mr. Murphy moved her around the house, going up stairs and down stairs, during the physical and sexual assault, which did prevent her from leaving the house, but were merely incidental to the sexual assault. R4287-89.

However, according to the facts, as soon as the sexual assault had stopped, T.W was able to get her car keys and leave. *Id.* Thus, T.W ability to leave after the sexual assault establishes that the detention was only incidental to the sexual assault.

Trial counsel did preserve this issue, in part, in the post-conviction motions. However, trial counsel argued that a different charged merged with aggravated sexual assault. In Appellant's brief, it was argued that trial counsel was ineffective for failing to properly argue merger under the *Finlayson-lee* test. However, "[a]s a matter of law, counsel cannot be ineffective for failing to raise and rely on bad law." *State v. Wilder*, 2018 UT 17, 20160952. Therefore, the issue of merger is still preserved based on the *Wilder* ruling.

Therefore, based on the recent legal precedence, the aggravated kidnapping charge should merge with the aggravated sexual assault, and this case should be remanded back the trial court, and Mr. Murphy should be re-sentenced on the charges.

## CONCLUSION

For all or any of the argument submitted above, Mr. Murphy respectfully requests that his convictions be reversed, and the case remanded back to the district court for a new trial.

RESPECTFULLY SUBMITTED this 23rd day of June, 2018.

/s/ Michael C. McGinnis
MICHAEL C. MCGINNIS
Attorney for Mr. Murphy

## CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2018, I emailed a true and correct copy of the foregoing REPLY BRIEF OF THE APPELLANT, and have caused 6 true and correct copies, one containing original signature, of the foregoing to be filed with the Clerk of the Utah Court of Appeals and two additional copies to be mailed first class to the following:

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/s/ Michael C. McGinnis
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