No. 20170318-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

JEREMY BOWDEN,
Defendant/Appellant.

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Attempted Aggravated Murder, a first degree felony, in violation of Utah Code §76-5-202, one count of Receiving or Transferring Stolen Motor Vehicle, Trailer, or Semitrailer, a second degree felony, in violation of Utah Code §41-1a-1316, one count of Obstructing Justice, a second degree felony, in violation of Utah Code §76-8-306(1), four counts of Felony Discharge of a Firearm, a third degree felony, in violation of §76-10-508.1, and one count of Fail to Stop at Command of Law Officer, a class A misdemeanor, in violation of Utah Code §76-8-305.5, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Douglas Hogan presiding.

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INTRODUCTION

On October 30, 2015, someone shot at an officer. Witnesses gave varied descriptions of the shooter. Officers arrested Jeremy Bowden, who had run from a stolen truck, wearing clothing common to men in the area: jeans, a black jacket, and a bandana. In his pocket was an unfired bullet of a larger caliber than the bullets fired at the officer.

On appeal, Bowden first challenges the sufficiency of the evidence. Witnesses' descriptions of the shooter were too inconsistent to support a reasonable identification of Bowden. Evidence of his presence, his flight from officers, and his access to larger firearms and ammunition provided only a basis for speculation as to his involvement in the shooting. This Court should vacate Bowden's attempted murder conviction and the obstructing justice conviction.

Second, Bowden challenges the trial court's decision to admit evidence of the unfired bullet in his pocket. Having the larger bullet in his pocket did not make Bowden more likely to have shot smaller bullets. Admission of this irrelevant evidence requires reversal.

Third, Bowden challenges the trial court's denial of his motion to merge the felony discharge of firearm convictions with the attempted aggravated murder conviction. The State charged Bowden with five counts of felony discharge of a firearm. The State could not have presented its case for attempted aggravated murder without evidence of the firearm discharges. While the trial court agreed to merge one count, the trial court should have merged all five with the attempted aggravated murder conviction. This Court should remand for resentencing.

ISSUE AND STANDARD OF REVIEW

Issue I: Whether the State presented sufficient evidence of attempted aggravated murder, where identification descriptions were too inconsistent to support a reasonable identification of Bowden.

Standard of Review: "When a defendant challenges a jury verdict for insufficiency of the evidence, '[this Court] review[s] the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict.'" *State v. Noor*, 2012 UT App 187,¶4, 283 P.3d 543. This Court "will reverse the jury's verdict 'only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have

entertained a reasonable doubt that the defendant committed the crime of which he was convicted.'" *Id.*

Preservation: This issue is preserved by trial counsel's directed verdict motion made at the close of the State's case. R1224-26; Addendum C. But to the extent this Court believes the issue is not preserved, it should review the issue for plain error. *See State v. Mohamed*, 2012 UT App 183,¶3, 282 P.3d 1066 (per curiam). "When challenging the sufficiency of the evidence under the plain error doctrine, 'a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.'" *Id.* (quoting *State v. Holgate*, 2000 UT 74,¶17, 10 P.3d 346).

Issue II: Whether the trial court erred in allowing irrelevant and prejudicial evidence that Bowden had an unfired bullet in his pocket when arrested.

Standard of Review: While the standard of review for a trial court's relevance and prejudice determinations is abuse of discretion, the standard of review for the trial court's interpretation of evidentiary rules is correctness. *State v. Fedorowicz*, 2002 UT 67,¶¶32,35, 52 P.3d 1194; *State v. Horton*, 848 P.2d 708, 713 (Utah Ct. App 1993).

Preservation: This issue is preserved by trial counsel's motion at trial. R955-964; Addendum B. But to the extent this Court believes it is not, it should review the issue for plain error. *See State v. Powell*, 2007 UT 9,¶18, 154 P.3d 788.

Issue III: Whether the trial court erred in failing to merge four lesser charges of felony discharge of a firearm into attempted aggravated murder.

Standard of Review: "[W]hether 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,¶5, 122 P.3d 615.

Preservation: This issue is preserved by trial counsel's post-trial motion. R435-47, 1365-76; Addendum D. But to the extent this Court believes it is not, it should review the issue for plain error. *See Powell,* 2007 UT 9,¶18.

STATEMENT OF THE CASE

The State charged Bowden with attempted aggravated murder, a first degree felony, receiving a stolen vehicle, a second degree felony, obstructing justice, a second degree felony, five counts of discharge of a firearm, third degree felonies, and failure to stop at the command of law enforcement, a class A misdemeanor. R1-5,35-37. At trial, Bowden did not contest the receiving a stolen vehicle or failing to stop at the command of law enforcement charges. R780-81,1291. But Bowden unsuccessfully moved the trial court to exclude evidence that he had been arrested carrying an unfired bullet. R955-64. Bowden also unsuccessfully moved the trial court for a directed verdict. R1224-26. A jury convicted Bowden as charged. R35-37,1344.

Before sentencing, Bowden moved to merge the five counts of discharge of a firearm with the attempted aggravated murder count. R435-47,1365-76. The trial court merged one count of discharge of a firearm. R1376.

Bowden timely appeals. R466.

STATEMENT OF THE FACTS

a. The State's Case

On October 30, 2015, around 8:00 p.m., Officer Nathan Clark received information that a female fugitive would arrive at the Mouse Pad in Midvale. R841-43. Clark knew the Mouse Pad, an internet gaming facility, as a location for criminal activity and fugitives where he had previously made arrests. R843,880-81. At the Mouse Pad, Clark saw a black Chevrolet truck which he suspected was stolen. R843-47. He drove into an alley and confirmed on a website that the truck was stolen. R847-49,873-74,881-82;State's Exh.12. He could not see the stolen truck from the alley. R882. If anyone exited the truck in the ten to fifteen seconds while Clark entered the alley, Clark would not have seen that person. R882-84.

Clark parked behind the truck and checked the VIN plate. R848-49,865. He then backed into the alley where he had a good view of the truck and called dispatch around 8:25 p.m., requesting unmarked gang cars because his marked police vehicle "stuck out like a sore thumb." R849-51,873-74;State's Exh.12. He figured that the Mouse Pad's foot traffic had noticed him investigating and there was "a high likelihood" that he "had already been spotted and they knew that police were there." R788-89,850,876. He estimated a better likelihood of

apprehending someone if the people around the Mouse Pad did not notice more police. R850.

While speaking with dispatch, Clark saw a man approach the truck. R852,888. He dropped his microphone, saying "Never mind, I've got a suspect." R852,874,888. The falling microphone made the siren chirp. R888.

Clark got out of his car and pointed his firearm at the man, whom he identified at trial as Bowden. R853-54. Bowden stipulated to his involvement with the stolen truck at the Mouse Pad. R780-81,957-58. Clark ordered Bowden to the ground. R853-54. Bowden turned, faced Clark, and ran west. R854;State's Exh.1. Video depicted someone running towards the Family Dollar store at 8:32:08 p.m. R1178-79;State's Exh.191. Mouse Pad surveillance depicted other men in and around the Mouse Pad wearing similar clothing, including a second man with white shoes, dark pants, a hoodie, and a white cap. State's Exh.12, *See also* R1311. Clark radioed that he was chasing a white male who was in his thirties and wearing blue jeans, a black leather jacket or shirt, and a black bandana on his head. R855,885. He stopped and radioed that the man ran west through the Easy Pawn parking lot, towards Family Dollar. R855-56.

Around 8:30 p.m., Officer Tsouras, in his marked police car, heard Clark talking to dispatch. R787-88. Tsouras drove toward the Mouse Pad, parking in a nearby lot where he could see the black truck. R789-90,792-93. Hearing Clark notify dispatch of a male approaching the black truck, Tsouras turned on his overhead lights and drove toward the Mouse Pad. R793-94. As he drove east on

7200 South, Tsouras heard Clark describe a white male, wearing a white bandana, black jacket, and blue jeans, running west toward Easy Pawn. R794,825. Seconds later, Tsouras saw a male "matching the description," running west in front of Family Dollar. R795-96,834-37. This man wore a bandana or something similar with white in it, a black jacket, blue jeans, off-white or possibly yellowish shoes. R797,825. The man ran to the end of the walkway in front of Family Dollar and onto the sidewalk along 7200 South. R797. In the Family Dollar lot, Tsouras considered but decided against a foot chase. R798,821-22.

Also in the Family Dollar lot, a Family Dollar manager saw a man run past her from behind Easy Pawn. R1191-92. He brushed her shoulder, yelling. R1192-95. She described him as white, "angled" eyes "like [a] wolf's," a pointed nose, a dark green or khaki jacket, dark pants, dark shoes, and a dark hat. R1198-1200,1202-03. He was at least as tall as Bowden's lawyer[1]. R1201. She saw a police vehicle appear almost immediately after. R1196-97,1203. The man ran into the Les Schwab parking lot. R1197.

A bystander in a taco restaurant drive-through line across 7200 South saw a police car speed east and then a man in jeans and a light colored jacket run

[1] Bowden stood next to his defense counsel so the jury could see their relative heights. R1227-8,1230. *See In re J.A. and C.A.*, 2017 UT App 227, ¶30, n.5 (noting that in reviewing denial of a motion to dismiss, the Court of Appeals may review evidence contained in the record as a whole when a defendant introduces evidence after denial of the defendant's motion to dismiss). While the record does not specify who was taller, context indicates that Bowden was shorter than his lawyer. *Cf.* Utah R. Evid. 103(a)(1) (excusing trial counsel from stating specific ground for evidentiary ruling when such is "apparent from the context").

west, both on 7200 South. R935-41,953-54. Initially, he thought the man had no hat but said he might have had a hat. R951,953. A police car with lights and sirens then blocked the bystander's view. R940-41.

Tsouras saw the man run from the Family Dollar lot northwest through the Les Schwab lot. R799-800. In the Les Schwab lot, Tsouras tried to cut him off. R800. The man shot at Tsouras. R801-02,827. Bullets punctured Tsouras's car's window, left front headrest, laptop, and printer. R1057-1060,1073,1080-93,1097-99;State's Exh.80-90,95-96,99-119. He later found a bullet in his bulletproof vest and a matching hole in his shirt. R816-18,1165-71;State's Exh.123-25,130-141,156-57.The Family Dollar manager and taco line bystander also heard gunshots. R941-42,944-46,1198.

An off-duty trooper, O'Gwin, arrived at the Les Schwab lot in time to see a male wearing a dark hoodie, blue jeans, and white shoes running west while shooting. R1210-12,1222-23. O'Gwin got out of his car, drew his weapon, ordered the man to the ground, and even fired at him, but the man continued northwest, shooting. R1212-13. The man disappeared behind a dumpster, shot at O'Gwin, and disappeared over a wall. R1213-16,1221-22;State's Exh.147,150.

Tsouras drove to a gate where he saw "a male matching the description of the person who shot at me. . ." R806-07. The male wore "the same type of headgear, . . . black jacket and blue jeans" as the shooter. R808,830. The bandana, with "matching white" in it, "matched the description" he had received from Clark. R830. Tsouras yelled, "Police, show me your hands." R808. When

the man, who had a black object in his hand, did not respond, Tsouras shot him. R808-09. The man denied having a gun and pointed to his car. R809. Tsouras realized the man had been reaching for his keys. R809. When Clark arrived, Clark and Tsouras argued over whether the man Tsouras shot was the same man who had shot at Tsouras. R809-10,863. Tsouras did not know the man who shot at him and made no other identification of the shooter. R827.

Tsouras agreed that the man who shot at him could have been a different fugitive running from the Mouse Pad area after seeing Clark's vehicle. R823-24. He agreed it was possible that Bowden, fleeing from Clark, hid behind one of the parked cars. R822-24. Businesses were open and there was foot-traffic and pedestrians. R822. Tsouras did not remember seeing any doors closing but agreed it was possible that the man he chased had exited from a store or from elsewhere. R822-24. The Family Dollar store manager pointed out dumpsters in the Easy Pawn and Family Dollar parking lots where someone could have hidden. R1200-01;State's Exh.146. The State's Exhibits additionally depict buildings, vehicles, and shrubbery. State's Exh.1-2.

At least thirty officers set up a "containment," monitoring persons coming into and leaving the area. R901,903,1160-62. Participants activated their police cars' lights during the containment. R1002-03. Officers Franchow, Walser, and Lechuga assisted. R966-68,988,991,998-99. Franchow said the description of the man they sought was "very vague," a bald white male wearing a jacket. R972,984. Lechuga was told to watch for a male wearing a black shirt and black pants.

R991,994-95. Walser was told to watch for a white male adult, medium height, bald. R1000.

Franchow and Lechuga waited by a high fence. R966-71,988,991. After ten to fifteen minutes, Franchow saw a male jump over the fence, about 100 feet in front of him. R972. Defense counsel conceded at trial that Bowden jumped over the fence and ran from officers. R990,1311. Bowden wore a maroon or red t-shirt and jeans and appeared to be bald. R973,981,984,1163-64,1185-86;State's Exh.120. Franchow and Lechuga chased, tased, and arrested Bowden at 8:55 p.m. R973-94,1158-60,1162,1311. Walser found an unfired bullet in Bowden's pocket. R1001-02,1157-58,1185. Officers called off containment sixteen to twenty minutes later. R1185,1187-88.

Officer Stilson and a canine officer with a dog searched the area during and after the containment. R899,901-05,907-13. On top of a covered parking area, on the other side of the Les Schwab wall, Stilton found a gun and an ejected magazine. R910-13;State's Exh.144. A crime scene technician identified the gun as a 9 mm Ruger. R1064. Technicians identified the 9 mm casings fired at Tsouras as being from the Ruger. R1046-48,1052,1056-60,1070-73. Bowden stipulated that the Ruger was the gun that fired at Tsouras. R1068-69. A 9 mm gun is a common weapon that Tsouras had previously seen suspects possess. R829. No dark jacket, bandana, or hat was ever found. R1188-89,1160-61. One of the 9 mm casings of the bullet's shot at Tsouras was stamped "RP," a Remington brand. R1052,1147-48.

Officers searched the stolen truck. R1101-17. Bowden stipulated that an Ipad and a government document found in the truck belonged to him. R1104-06;State's Exh.73,160. The truck also contained gun parts, rifles, shotguns, a pellet gun, ammunition, and casings. R1106-17,1136-40;State's Exh.160-89. One unfired 9 mm round was an "RP," while three others were Federals. R1148. Remington and Federal are common, well-known manufacturers of ammunition. R1180-81. The owner of the stolen truck owned some but not all of the guns and ammunition. R1120-1130. He had never owned a 9 mm gun or ammunition. R1130. The bullet found in Bowden's pocket was Federal which is larger than a 9 mm and could not have fit into the Ruger. R1158,1181-82.

The Utah State Crime Lab performed DNA analysis. R916-22,924-25. This excluded Bowden as the source of DNA on the ejected magazine but was otherwise inconclusive. R923-26.

b. Bowden's motion to exclude evidence about the unfired bullet in his pocket.

During trial, Bowden's counsel moved to exclude evidence that Bowden had an unfired bullet in his pocket when he was arrested. R955-64. Defense counsel argued that the evidence was irrelevant more prejudicial than probative because it could not have fit into the gun that shot at Tsouras. R955,961. The State argued that the evidence was admissible because someone caught carrying an unfired bullet is comfortable with firearms and is therefore more likely to have shot at an officer. R956-57,960-62. The State also argued that in light of Bowden's admitted connection to the truck with the firearms and ammunition,

the bullet was not particularly prejudicial. R962-64. The trial court agreed with the State. R963-64.

c. Bowden's Motion for Directed Verdict

At the conclusion of the State's case, defense counsel moved for a directed verdict on the basis of insufficient evidence. R1224-1226. Defense counsel agreed that Clark had identified Bowden as the man he saw at the Mouse Pad, but argued that the descriptions of the man seen running and firing at Tsouras were "inconsistent at best" and insufficient to prove that Bowden was the one who shot at Tsouras. R1225. The trial court acknowledged inconsistencies but ruled that given the time each witness had to observe, there was still sufficient evidence for a reasonable jury to convict Bowden. R1226.

d. Merger.

Prior to sentencing, Bowden's counsel timely moved the trial court to merge Bowden's convictions for discharge of a firearm with attempted aggravated murder, arguing that the facts proving the five counts of discharge of a firearm were the same or fewer than the facts proving attempted murder. R435-47,482-491,1365-69,1371-73,1375. The State argued that all shots merited charges but agreed to merge one count of discharge into the attempted aggravated murder. R448-51,1369-71,1373-76. The trial court merged one count of discharge and otherwise denied Bowden's motion. R1375-76.

The trial court sentenced Bowden to five years to life on Count 1, one to fifteen years on counts 2 and 3, and mandatory three to five year terms on the

remaining four counts of discharge of a firearm. R462-63,1394-97, Addendum A. Counts 1-3 were to run consecutive to each other. R463,1394-97, Addendum A. Counts 4-7 were to run concurrent to each other and concurrent to other counts. R463,1394-97, Addendum A.

SUMMARY OF THE ARGUMENT

First, there was insufficient evidence to convict Bowden of attempted aggravated murder. Utah courts have found circumstantial evidence sufficient for identification when the evidence identifies a defendant. Here, inconsistent descriptions raise only the possibility that police arrested the right man.

Second, the trial court prejudicially erred in admitting evidence of Bowden having a large bullet in his pocket when arrested. The evidence was irrelevant as to whether Bowden committed the shooting and any probative value of the evidence was substantially outweighed by its prejudicial effect.

Finally, all of the discharge of firearm convictions should have merged with attempted aggravated murder. Facts used to convict Bowden for unlawful discharge were the same or less than the facts required to convict Bowden for attempted aggravated murder.

ARGUMENT

I. The evidence was insufficient to identify Bowden as the man who shot at Tsouras.

The State presented insufficient evidence that Bowden is the person that shot at Tsouras. This Court will "reverse the jury's verdict in a criminal case

when" it concludes "as a matter of law that the evidence was insufficient to warrant conviction." *State v. Gonzales*, 2000 UT App 136,¶10, 2 P.3d 954 (internal quotation marks omitted). It will "view the evidence in a light most favorable to the jury verdict," and reverse "if the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *Id*. (internal quotation marks omitted). Although the burden of establishing insufficiency "is high, it is not impossible." *Id*. This Court "will not make speculative leaps across gaps in the evidence." *Id*. (internal quotation marks omitted). In other words, "[t]o affirm the jury's verdict," this Court "must be sure the State has introduced evidence sufficient to support all elements of the charged crime." *Id*. (internal quotation marks omitted).

In the absence of direct evidence, circumstantial evidence must support reasonable inferences, "not mere speculation." *State v. Cristobal*, 2010 UT App 228,¶10, 238 P.3d 1096. In *Cristobal* this Court considered whether an unidentified male's presence and subsequent flight from the scene of the defendant's graffiti crime sufficiently illustrated that male's involvement for the defendant's conviction to be eligible for Group Crime Enhancement. *Id*. ¶¶9-15. A reasonable inference "is a conclusion reached by considering other facts and deducing a logical consequence from them." *Id*. ¶16 (internal quotation marks omitted). "When evidence supports only one possible conclusion, the quality of

the inference rests on the reasonable probability that the conclusion flows from the proven facts." *Id*. (internal quotation marks omitted).

With speculation, however, "the evidence supports more than one possible conclusion." *Id*. "[S]peculation is the act or practice of theorizing about matters over which there is no certain knowledge at hand." *Salt Lake City v. Carrera*, 2015 UT 73,¶12 358 P.3d 1067, (internal quotation marks omitted). In *Carrera*, which involved possession of a social security card, the defendant's knowledge that the card's owner did not give the defendant permission to have the card insufficiently supported an inference that the defendant possessed the card with nefarious intent. *Id*. ¶¶1,4,7,9. "[J]ury verdicts decided on the basis of remote or speculative possibilities of guilt are invalid." *Id*. ¶11 (internal quotation marks omitted).

To establish sufficient evidence of attempted aggravated murder, the State had to present evidence from which the jury could draw reasonable inferences that Bowden intentionally or knowingly attempted to cause the death of peace officer attempting to make an arrest. UTAH CODE §§ 76-5-202(f) and 76-4-101;R402. Identity is an element that must be proven beyond a reasonable doubt. *State v. Neilson*, 2017 UT App 7,¶21, 391 P.3d 398.

In *Neilson*, where the victim had lived in the defendant's house and described her father's friend "Don," identification was easily proven. *Neilson*, 2017 UT App 7,¶22. "[I]dentification can be inferred from circumstantial evidence." *Id*. (internal quotation marks omitted). This Court similarly found

circumstantial evidence sufficient for identification in *State v. Andersen*, 2003 UT App 50. In *Andersen*, the victim described the man who robbed him as wearing blue jeans, a light colored t-shirt, and a blue bandana. *Id*. *1. The victim described his attacker as working with an accomplice, a female prostitute who solicited the victim while the attacker took the victim's wallet, hit him on the head, and ran. *Id*. The wallet contained approximately $100 in smaller denominations. *Id*. Immediately after the robbery, officers saw the defendant pass a stolen Blazer while the officers spoke with the accomplice. *Id*. Shortly after, officers witnessed the defendant feigning sleep in the Blazer. *Id*. Officers pulled the defendant off a fence as he tried to flee. *Id*. On the other side of the fence they found a wad of cash in smaller denominations. *Id*. Although the defendant wore a multi-colored striped polo shirt, descriptions of the robber's clothing, his association with the accomplice near the Blazer, and the proceeds of the crime, together sufficed to identify the defendant as the robber. *Id*. **1 n.1 and 3.

Mere presence at a crime scene may establish a defendant's guilt only if presence, considered with the surrounding circumstances, supports a reasonable inference of participation in the crime. *See Cristobal*, 2010 UT App 228,¶¶17-18. In *Cristobal* this Court considered that the unidentified male's presence, his proximity to the defendant and the graffiti, and the strong odor of paint, created a reasonable inference of knowledge of the criminal activity. *Id*. ¶17. But, while the unidentified man's guilt could "reasonably be inferred," it was "equally reasonable that he was merely present during the crime." *Id*. His presence and

proximity did not create a reasonable inference that he had aided or encouraged commission of the crime. *Id*. ¶21.

One common factor in circumstantial identification cases is a defendant's lone presence at a crime scene. For example, in *State v. Worthen*, 765 P.2d 839, 851 (Utah 1988), evidence was circumstantial regarding who fatally struck a child. *Id*. The medical examiner testified that the fatal injury most likely happened twelve hours before death. *Id*. at 841. The defendant was the only adult in the home twelve hours before the child's death. *Id*. Thus, sufficient circumstantial evidence identified the defendant as the person who struck the child. *Id*.

Similarly, in *State v. Brown*, 948 P.2d 337,345-46 (Utah 1997),[2] sufficient circumstantial evidence linked the defendant to the murder where (1) only she and the victim had keys to his house; (2) she was unable to prove her whereabouts during the time a neighbor heard "pops" that the neighbor believed were gunshots; (3) the victim had received bank statements informing him of the defendant forging his checks; (4) the only items stolen from the victim's home were his wallet, handgun, and financial records; and (5) she gave inconsistent statements as to why she left soup on his porch. The Utah Supreme Court emphasized that only the victim and defendant had keys to the victim's house in

[2] In a successful PCRA action the defendant established her alibi and presented evidence that others had access to the victim's house. *Brown v. State*, 2013 UT 42, ¶¶15-17, 308 P.3d 486.

finding it reasonable for the jury to have inferred the defendant was the murderer. *Id*.

Likewise, in *State v. Lyman*, 966 P.2d 278, 282-83 (Utah Ct. App. 1998), circumstantial evidence identified the defendant as having special access to the crime scene. In *Lyman*, the defendant, who was primarily responsible for maintenance and cleaning, was the only person seen in the maintenance closet on the day surveillance equipment was stolen. *Id*. He was seen carrying a bucket of spackle. *Id*. He had borrowed a putty knife. *Id*. He had left the premises twice although he told detectives he had neither entered the closet nor left that day. *Id*. There was a new hole in the closet, covered by damp spackle. *Id*. This Court held that sufficient circumstantial evidence identified the defendant. *Id*.

Like mere presence, flight from a crime scene is insufficient to prove identification. Flight, even "immediately following commission of a crime" "is merely a circumstance to be considered with other factors as tending to show a consciousness of guilt and therefore guilt itself." *Cristobal*, 2010 UT App 228,¶14 (internal quotation marks omitted). In *Cristobal*, "it [could] reasonably be inferred that the unidentified male's flight from the scene of the crime was due to a guilty conscience." *Id*. ¶17. However, this Court deemed it equally reasonable that the unidentified man fled out of fear of being perceived as having participated in the defendant's crime. *Id*. Similarly, in *Salt Lake City v. Gallegos*, 2015 UT App 78,¶¶7-10, 347 P.3d 842, the defendant's flight plus clothing and scrapes gave rise to no more than speculation that the defendant had been

involved in a crime. *Id*. ¶10. "[A] further step is required," to conclude that flight stemmed from criminality. *Id*. "[T]here must be evidence separate from flight itself from which a jury could conclude beyond a reasonable doubt" a defendant's motivation for flight. *Id*. ¶8.

Circumstantial physical evidence supplements presence and flight evidence where the physical evidence connects the defendant to the crime. For example, in *State v. Harris*, 2015 UT App 282,¶¶4,7,14-18, 363 P.3d 555, officers responding to a store's security alarm caught the defendant fleeing, alone, from where he had been crouched behind the store's outdoor planter box. Officers found stolen items and burglary tools near the planter box. *Id*. ¶5. In the defendant's pocket was a shard of glass which "matched the thickness and hue" of the store's broken glass. *Id*. Evidence of the shard, which was "consistent with both the violent manner in which the glass was broken and the way the glass fell outward," supported reasonable inferences that "the defendant was standing next to the glass door when it was broken." *Id*. ¶¶13. "Because these inferences support a conclusion that one possibility is more probable than another . . . the inferences are reasonable and not speculative." *Id*. ¶14, (quoting *State v. Cristobal*, 2014 UT App 55,¶7, 322 P.3d 1170).

Circumstantial physical evidence can identify a gun's shooter. In *State v. Jaeger*, 1999 UT 1,¶¶9,29, 973 P.2d 404, where the issue was whether the victim's shooting death was a homicide or a suicide, an expert testified that "he would expect to find gunshot residue on the hands of anyone who fired this gun."

Id. ¶¶35-36. Gunshot residue on the defendant's hands identified the defendant as the one to have fired the gun. *Id*. ¶¶35-37.

In this case, the circumstantial evidence was insufficient to identify Bowden as the person who shot at Tsouras. A defendant challenging the sufficiency of evidence to support a verdict should marshal the evidence "as a natural extension of an appellant's burden of persuasion." *State v. Nielsen*, 2014 UT 10,¶¶40-41, 326 P.3d 645; *see also* Utah R. App. P. 24 (a)(8) advisory committee's note.

The marshaled evidence indicating Bowden's identity as the person who shot at Tsouras, in the light most favorable to the verdict, is the following:

1. Bowden was seen approaching the stolen truck at the Mouse Pad. R780-82,852,957-59,1183. He had possessions in the truck. R1104-06;State's Exh.73.
2. When Clark approached Bowden at the Mouse Pad, Bowden ran west, through the Easy Pawn lot towards Family Dollar. R852,856,872-77,1178-79.
3. Clark described Bowden as a "white male in about his thirties wearing blue jeans," a black leather jacket or shirt, and a bandana. R855.
4. Three to five seconds after hearing Clark's description, Tsouras saw a man running west on the front walkway of Family Dollar. R795-96. The person he saw wore a black jacket, blue jeans, and "some type of headgear." R796-98.
5. A series of shots were fired at Tsouras. R804,828,858-59,879,942,945,1047-52,1095-96,1147-48,1198,1212-14.
6. The Family Dollar manager saw a white male who ran by her, immediately before she saw a police car. The man wore a dark jacket, dark pants, and a hat. R1198-99,1202-03. His eyes and nose could have corresponded to photos of Bowden from the Mouse Pad. R1198-1201;State's Exh.151. She saw the man run into the Les Schwab parking lot and then heard gunshots. R1197-98.
7. Across the street, the taco line bystander line saw a man running west along 7200 South, wearing dark jeans and a jacket, followed by

a police car with lights and siren. R935-38,940-42,945,953-54. Although he thought it was light-colored, the taco line bystander was unsure about the jacket's color. R954.

8. Clark, Tsouras, the taco line bystander, and the Family Dollar manager each described only one man running. R796,835,855-57,938-941,943,946,949,951,1192-1201.
9. O'Gwin saw the shooter wearing blue jeans in the Les Schwab lot. R1210-12,1221,1223. His dashboard camera recorded a male in dark pants, dark top, and light shoes, apparently shooting. State's Exh.148.
10. Police set up a containment that lasted until 16 minutes after Bowden's arrest. R901,903,1160-62,1187-88.
11. Franchow was told to watch for a bald white male wearing a jacket. R972,984.
12. Lechuga was told to watch for a male in black shirt and black pants. R991,994-95.
13. Walser was told to watch for a white male adult, medium height, bald. R1000.
14. Bowden jumped over the fence and ran from officers. R972-79,991-93.
15. Franchow and Lechuga arrested Bowden within the containment area, not far from the shooting, 22 minutes after Clark radioed dispatch that Bowden ran from the Mouse Pad. R902-04,967-72,981,989,991-93,998,1160,1162-63;State's Exh.2.
16. Bowden was the only man the Franchow encountered avoiding officers and the only man arrested in the containment area. R981,1006.
17. When arrested, Bowden appeared to be bald and wore blue jeans. R973,981,984,1185-86,1163-1164;State's Exh.120.
18. Bowden had no bandana or jacket when arrested. R985.
19. The 9 mm gun that fired the shots was found near the Les Schwab lot. R910-12,1046-48,1052,1056-60,1068-73.
20. DNA could not exclude Bowden from having fired the 9 mm. R923-26.
21. One of the 9 mm casings from bullets shot at Tsouras was of the same brand as 9 mm ammunition found in the stolen truck. R1052,1107,1113-14,1146-48.
22. The truck owner had never owned a 9 mm firearm or 9 mm ammunition. R1130.

Even when viewing the evidence in the light most favorable to the verdict, the State presented insufficient evidence that Bowden was the man who shot at

Tsouras. *See*, UTAH CODE §§76-5-202, 76-4-101. Where, as here, there was an "absence of direct evidence" the jury was required to base its verdict "upon reasonable inference and not mere speculation." *Cristobal*, 2010 UT App 228,¶10. But, the evidence in this case, Bowden's clothing, his association with the stolen truck, and his flight from Clark towards the area where Tsouras got shot at and from officers after the shooting supported "more than one" equally likely conclusion: Bowden shot at Tsouras, or a different man in the area shot at Tsouras. *See id*. ¶16. Because there was nothing that made "one possibility more probable than another," concluding Bowden was the person that fired at Tsouras amounted to mere "speculation." *Id*.

The State's argument in trial that only one man was seen running in the direction that Clark said he had seen Bowden run provides only speculative possibilities that the witnesses all described Bowden. *See Carrera*, 2015 UT 73,¶¶11-12;R1300-03. A similarly speculative possibility is that witnesses all described the same man. *Id*.;R1300-03. As defense counsel argued, witnesses' descriptions were "inconsistent at best." R794-95,797,807-10,824-25,830,834-35,837,855,884-85,938,941,950-54,972-73,978,981,984-85,991,994-95,1000,1003,1198-1203,1210-11,1222-23,1225,1230. The inconsistencies are more striking than the subtle differences in *Andersen*, where witnesses describing the robber's light colored t-shirt, "reasonably describe[d]" the defendant's striped polo shirt. *See Andersen*, 2003 UT App 50, n.1.

The State presented only speculative possibilities that the inconsistent witnesses all described Bowden. *See Cristobal*, 2010 UT App 228,¶¶16-17. While O'Gwin said the shooter wore a dark hoodie, Clark, Lechuga, Franchow, and Walser never saw Bowden wearing a hoodie. R797,855,973,981,984,1163-64,1185-86,1210-11. While Clark described Bowden as having a black bandana, Tsouras heard "white," and only described white in the shooter's bandana. R794,797,825,855,885. The Family Dollar manager said the man who ran by her was taller than Bowden's counsel, but Bowden was shorter. R1201,1230. Although close enough to have seen Bowden's face and describe his nose and eyes in detail, she mentioned no facial hair, possibly Bowden's most prominent facial feature. R1191-03;State's Exh.120. Inconsistencies forced the jury to theorize about "matters over which there is no certain knowledge." *See Carrera*, 2015 UT 73,¶12. Far from supporting "only one possible conclusion" —that witnesses saw Bowden, the evidence equally supported "more than one possible conclusion," namely that another man shot at Tsouras. *See Cristobal,* 2010 UT App 228,¶16.

The State presented only the possibility that inconsistent witnesses all described the same man. *See Cristobal,* 2010 App 228,¶¶17. As defense counsel pointed out, others at the Mouse Pad wore clothing that would match descriptions of the shooter. R1311-12;State's Exh.12. While Clark assumed the shooter was the same man he had encountered at the Mouse Pad, Tsouras insisted his shooter was the man Tsouras shot. R808-10,863. While Clark described Bowden as wearing a black bandana, Tsouras only described white in

the shooter's bandana. R794,797,825,855,885. The State characterized O'Gwin's video as depicting the shooter wearing light-colored shoes, but the Family Dollar manager said the man who ran past her wore dark shoes. R1201-02,1302. The taco line bystander saw a man running in a light-colored jacket but the Family Dollar manager said the man who ran by her wore a dark-colored jacket. R940-41,950-51,953-54,1199.

One "reasonable explanation" is that the witnesses describing light or dark clothing all saw the same man and simply perceived or remembered colors incorrectly. *See Cristobal,* 2010 UT App 228,¶17. But light versus dark are not subtle, subjective, distinctions. *Cf, Andersen*, 2003 UT App 50 (finding witnesses' descriptions of a light colored t-shirt "reasonably describe[d]" defendant's striped polo shirt). The State presented "two equally reasonable explanations . . . under these circumstances: either" the inconsistent witnesses inaccurately described the same man or the witnesses saw different men wearing clothing similar to other men in the area. *See Cristobal,* 2010 UT App 228,¶17;R794-95,797,805-10,824-25,830,834-35,837,855,884-85,938,940-41,950-54,1199,1201-02,1302;State's Exh.'s 12,147.

Unlike the defendants in *Brown*, *Worthen*, *Lyman*, and *Harris,* Bowden was no more likely to be the shooter than any other man in the area. Where the *Worthen* defendant could have been the only adult at home and the *Brown* defendant possessed the only keys to the crime scene, the area in the instant case was open for business. *See Worthen*, 765 P.2d at 851; *Brown*, 948 P.2d at

345;R822,842-43,880-81. Others were present on foot in the shooting vicinity, including a man who so closely resembled Tsouras's shooter that Tsouras shot him. R807-810,821-24,830. Unlike in *Harris* where only the defendant fled the security alarm, the Mouse Pad was known for crime and fugitives who, warned of police by Clark's movements and chirping siren, had as much motive and opportunity as Bowden to run. *See Harris*, 2015 UT App 282,¶11;R788-89,848-53,873-74,876-77,880-84,888-89;State's Exh.12. Unlike in *Brown*, Tsouras agreed his shooter could have been someone other than Bowden, someone who came from the same area. R796,822-24,1200-01;State's Exh.'s 1-2. Unlike in *Brown*, *Worthen*, *Lyman*, and *Harris*, the State did not present evidence upon which the jury could make rational identification inferences from Bowden's presence or subsequent flight.

Further, unlike the *Brown* defendant, Bowden had no more access to a 9 mm gun than any other man. *See Brown*, 948 P.2d at 345. In *Brown*, it was significant that the defendant could have used her keys to the victim's house and knowledge of where the victim stored his gun to obtain the victim's gun and shoot him. *Id*. Here, the State presented no evidence of Bowden's means to obtain a 9 mm gun. R1130. That Bowden could somehow have obtained a 9 mm gun is "one reasonable explanation." *See Cristobal*, 2010 UT App 228,¶17. An "equally reasonable explanation" is that another man, a Mouse Pad fugitive, possessed and shot the 9 mm gun, which is a common gun and contained a common ammunition brand. R829,880-81,1052,1148,1180-81.

The State presented no physical evidence to support a reasonable inference that Bowden possessed a 9 mm gun. Unlike in *Harris*, where the glass shard not only identified the defendant as being at the crime scene but illustrated the means of the crime, Bowden possessed nothing to indicate his having or shooting a 9 mm gun. *See Harris*, 2015 UT App 282 ¶¶4,7,14-18;R1002. Unlike the *Lyman* defendant, seen with the tools of his crime, Bowden was never seen with a 9 mm gun. *See Lyman*, 966 P.2d at 282-83. Unlike in *Andersen*, where the defendant was discarding stolen money when arrested, Bowden had nothing when arrested to indicate involvement in shooting a 9 mm. 2003 UT App 50,*1; R1002. Unlike in *Brown*, even with Bowden's access to 9 mm ammunition in the truck, Bowden would still have required a 9 mm gun to have shot at Tsouras. *See Brown*, 948 P.2d at 345;R780-81,853-54,957-59,1101-14,1130,1136-40. When arrested he had no bullet that would fit a 9 mm. R1002,1158,1181-82. Moreover, unlike in *Jaeger*, no gunshot residue or DNA indicated Bowden shot a gun. *See Jaeger*, 1999 UT 1,¶¶35-37;R923-26.

To the degree that fleeing demonstrated a guilty conscience, the State presented only the possibility that Bowden's flight stemmed from involvement in the shooting. *See Cristobal*, 2010 UT App 228,¶17; *Gallegos*, 2015 UT App 78,¶¶ 7-10. Where Bowden fled from Clark prior to the shooting, it is at least as likely that Bowden's reason for flight from Franchow and Lechuga was his connection to the stolen truck and his having heard gunshots. *See Cristobal*, 2010 UT App 228,¶17;R780-81,853-54,957-59. The "further step," in the form of evidence

linking Bowden's flight to the shooting is absent here. *See id*.; *Harris*, 2015 UT App 282,¶¶14-18.

The trial court asked the jury to speculate. Questions of whether Bowden resembled Tsouras's shooter required the jury to theorize "over matters over which there is no certain knowledge." *See Carrera*, 2015 UT 73,¶12. The jury's guilty verdict was likely "based solely on inferences that give rise to only remote or speculative possibilities of guilt." *Cristobal*, 2010 UT App 228,¶7. The jury's "conclusion lies within the realm of speculation rather than reasonable inference." *Id*. ¶19 n.10. This Court should therefore vacate Bowden's conviction for attempted aggravated murder.

For the same reasons, this Court should also vacate Bowden's conviction for obstructing justice. A defendant obstructs justice if he, "with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction or punishment of any person regarding conduct that constitutes a criminal offense. . . (c) alters, [] conceals or removes any item or other thing." UTAH CODE §76-8-306(1);R1279-80. Obstructing justice is a second degree felony if the conduct constituting the criminal offense is a first degree felony. UTAH CODE §76-8-306(3)(a).

To prove second degree felony obstructing justice, the State needed to provide sufficient evidence that Bowden fired the gun and then discarded it. *Id*. UTAH CODE §76-5-202;R2,1279-80,1297-98. If this Court finds insufficient evidence to prove Bowden's identity as the shooter, then it follows that evidence

of Bowden having been the person to have discarded the gun "with intent to hinder, delay, or prevent" officers finding the gun is necessarily insufficient. Where Bowden's obstructing justice conviction necessarily depended on sufficiency of the evidence that Bowden committed attempted aggravated murder, the evidence was *a fortiori* insufficient for obstructing justice.

These issues are preserved. "[A]s a general rule, a defendant must raise the sufficiency of the evidence by proper motion or objection to preserve the issue for appeal." *State v. Prater*, 2017 UT 13, ¶27, 392 P.3d 398 (quoting *State v. Holgate*, 2000 UT 74,¶16). "A claim is preserved "when it has been presented to the district court in such a way that the court has an opportunity to rule on it." *Id* (internal quotation marks and brackets omitted). Defense counsel specifically raised the issue of whether Bowden "is, in fact, the person that fired at the officer that day," in his motion for a directed verdict at the close of the State's case. R1224-25. Defense counsel additionally identified inconsistent descriptions of the person who fired at Tsouras as the basis for directed verdict. R1225. This gave the trial court the opportunity to rule on whether the State had presented evidence sufficient to identify Bowden as the person who shot at Tsouras. This ruling also resolved the issue of sufficiency of evidence of obstructing justice.

If, however, the Court believes this issue is not preserved, it should review the issue for plain error. *Prater*, 2017 UT 13 at ¶28. "To establish plain error [based on insufficient evidence], a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second

that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *Id.* (internal quotation marks omitted).

First, the evidence was insufficient to support Bowden's conviction where the evidence did not identify Bowden as the shooter. *See supra* Issue I, insufficiency. While circumstantial evidence may identify a defendant, the evidence must provide reasonable inferences, not merely grounds upon which to theorize a defendant's involvement in crime. *See Carrera*, 2015 UT 73,¶¶11-22; *see also Neilson*, 2017 UT App 7,¶22. Here, Bowden's presence in the area, clothing, access to 9 mm ammunition, and flight from officers, established one possibility but not a reasonable inference as to his involvement in the shooting. *See Cristobal*, 2010 UT App 228,¶¶16-17,21;R780-81,853-55,885,972-94,1001-02,1104-14,1120-30,1136-40,1148,1158-64,1178-79,1182-86. The evidence gave rise to speculation that Bowden shot at Tsouras but it is equally likely that another man in the area shot at Tsouras.

Second, the insufficiency was obvious and fundamental. *See Prater*, 2017 UT 13,¶28. Where identification of the shooter was an essential element, it was well-settled that the State had to present evidence supporting only one possible conclusion, that of Bowden's identity as the shooter. *See* UTAH CODE §§76-5-202; 76-4-101, *Cristobal*, 2010 UT App 228,¶16. Bowden's clothing, common to men in the area, his flight from police, and his access to ammunition, supported "more than one possible conclusion." *See id.*;R780-81,853-55,885,957-59,972-94,984,1001-02,1104-14,1120-30,1136-40,1148,1158-64,1162,1163-64,1178-

79,1182-86,1311;State's Exh.12. The motion for directed verdict also helped to make the error obvious. R1224-26. Thus, the jury verdict was based on "impermissible speculation." *See id*. ¶21.

To the degree this Court believes Bowden left unpreserved the issue of insufficient evidence to support the obstructing justice conviction, it should review for plain error. *Prater,* 2017 UT 13,¶28. First, where the evidence insufficiently supported attempted aggravated murder, it necessarily also insufficiently supported obstructing justice. UTAH CODE §76-5-202. Second, the insufficiency was obvious. *See Prater,* 2017 UT 13,¶28. "An example of an obvious and fundamental insufficiency is 'the case in which the State presents no evidence to support an essential element of a criminal charge.'" *Id*. (quoting *Holgate,* 2000 UT 74,¶17). An essential element of obstructing justice is that the actor's conduct is with intent "to hinder, delay, or prevent" investigation "regarding conduct that constitutes a criminal offense." UTAH CODE §76-8-306(1). Absent sufficient evidence identifying Bowden as the shooter, no evidence identifies Bowden as the person who concealed the 9 mm gun. R899-915,923-26,1064,1068-73.

II. The trial court erred by admitting irrelevant evidence that Bowden had an unfired Federal cartridge in his pocket when arrested.

Evidence that Bowden possessed an unfired cartridge when arrested should have been excluded under Rules 401, 402, and 403 of the Utah Rules of Evidence. First, evidence of the unfired bullet was irrelevant and therefore

inadmissible under Rules 401 and 402. Second, its potential for unfair prejudice outweighed its relevance under Rule 403. Third, reversal is required because there was a reasonable likelihood of a more favorable outcome, absent the evidence of the bullet in Bowden's pocket. Finally, the issue is preserved but can also be reviewed for plain error.

A. Evidence of the unfired bullet in Bowden's pocket was irrelevant and inadmissible.

Rule 402 provides that "[r]elevant evidence is admissible" and "[i]rrelevant evidence is inadmissible." Rule 401 defines relevant evidence.

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
> (b) the fact is of consequence in determining the action.

"Relevance is a low bar." *State v. Thornton*, 2017 UT 9,¶61, 391 P.3d 1016. In *Thornton*, which involved rape, sodomy, and sexual abuse, the defendant argued that evidence of his providing the child victim's mother with cocaine and encouraging her to prostitute herself was irrelevant and violated Rule 404(b). *Id*. ¶¶ 2,7,16-19,27-30,35-36,61. The Utah Supreme Court upheld admission of the prior acts as relevant to the prosecution's narrative to explain the defendant's position of power in the household and the victim's behavior. *Id*. ¶¶18,61.

Evidence concerning a defendant's knowledge or intent must be relevant to be admissible. In *State v. Vigil*, 922 P.2d 15,18-22,27 (Utah Ct. App. 1996), in a theft by deception trial, the defendant had accepted funds from three prospective families who wished to adopt his baby. The defendant attempted to introduce

evidence concerning services that licensed adoption agencies provide. *Id*. at 27. The defendant argued that the evidence would have demonstrated that the attorneys facilitating two of the three prospective adoptions provided incompetent adoption services. *Id*. The defendant argued that the incompetent adoption attorneys caused his deceptive behavior because with competent adoption services, he would have acted differently. *Id*. This Court said it was not only speculative but "wholly irrelevant what defendant 'may' have done under different circumstances . . . ." *Id*.

Utah courts find evidence of a defendant's access to weapons relevant where the evidence demonstrates how the defendant used the weapon to commit a crime. For example, in *State v. Reece*, 2015 UT 45,¶¶10,19,58,67, 349 P.3d 712, evidence that the defendant had a stolen assault rifle in his car when arrested had the relevant purpose of linking the defendant to the murder weapon. In *Reece*, the owner of the stolen rifle testified that the rifle was stolen along with a 9 mm Beretta. *Id*. ¶58. The defendant testified "that he could not have committed the murder because he did not even have access to a Beretta when the victim was killed." *Id*. Police never recovered the murder weapon. *Id*. ¶70. Evidence of the stolen rifle had "at least some 'tendency' to make it more probable that [the defendant] had access" to the Beretta, the murder weapon. *Id*. ¶¶66-67. The evidence of the stolen rifle was relevant to identify the defendant as the person who shot the victim using the stolen Beretta. *Id*. ¶68.

Analogously, in *State v. Fedorowicz*, 2002 UT 67, ¶¶11,18-19, 32-33, 52 P.3d 1194, evidence of a defendant using whips and straps in consensual sexual activity was deemed relevant. *Fedorowicz* involved felony murder, child abuse, and child sexual abuse. *Id*. ¶1. As part of the State's burden to demonstrate a noncharacter purpose for the testimony under Rule 404(b), the State needed to establish relevance. *Id*. ¶¶18-19,31-32. "[E]ven if otherwise relevant as defined by rule 401, evidence is irrelevant and inadmissible under rule 402 if the evidence is material and relevant to prove only the defendant's proclivity to commit the crime charged." *Id*. ¶32. The evidence of the defendant using the whips and straps was not used to show proclivity but instead to show the defendant's knowledge and intent to use those particular weapons to cause the victim's injuries. *Id*. ¶¶33-34,37,43.

Courts have rejected the suggestion that a defendant's access to a weapon is relevant, absent evidence linking the weapon to the crime charged. For example, the District of Columbia Circuit Court in *United States v. King*, 254 F.3d 1098 (D.C. Cir. 2001) considered whether evidence of a sheathed nine inch knife with notched blade found in a vehicle's trunk was relevant to demonstrate the driver-defendant's knowledge and intent regarding a firearm found wedged in the back of a sunroof. *Id*. at 1099-1100. The Government argued to demonstrate a noncharacter purpose for the testimony under Federal Rule of Evidence 404(b), that the defendant's possession of the knife, a weapon, was relevant to show he possessed the gun in the same vehicle. *Id*. at 1101. But, the knife, even with its

notches, had nonviolent uses and could be legally possessed. *Id*. The knife was not, therefore, relevant noncharacter evidence of the defendant's knowledge of the gun in the sunroof. *Id*. Therefore, admitting evidence of the knife was error. *Id*.

In Delaware, *Farmer v. State*, 698 A.2d 946 (Del. 1997), resembles the instant case. *Farmer* involved attempted murder charges stemming from a shooting. *Id*. at 947. No projectile or casings were recovered, although the size of the entrance and exit wounds suggested the use of a small caliber firearm. *Id*. at 948. Police arresting the defendant found an automatic pistol in his apartment. *Id*. The prosecution, while conceding it could not link the pistol to the shooting, argued it was relevant to show the defendant's access to a firearm that he could have used to shoot at the victim. *Id*. However, without evidence linking the pistol to the shooting, evidence of the pistol was irrelevant. *Id*. Moreover, "such evidence carries the risk that the jury may associate mere ownership of a firearm with a disposition to use it." *Id*. at 949.

In the instant case the State argued that the large bullet "goes to show that [Bowden] is familiar with weapons, that he is somehow connected to them." R961. The State argued that where most people do not carry unspent cartridges in their pocket, the unspent cartridge in Bowden's pocket tended "to show that he is comfortable" with the cartridge. R961. The State explained that Bowden's interest in firearms and ammunition, in context with his access to the stolen truck containing firearms and ammunition, demonstrated Bowden's further comfort,

"and if you have one [bullet]," you "have the opportunity, possibly, to use one." R962-963. The trial court agreed on relevance. R962.

But, evidence of the unfired bullet in Bowden's pocket did not make more likely any facts relevant to the instant case. A defendant's proclivities are not relevant. *Fedorowicz*, 2002 UT 67,¶32. Someone with access to an object that could be used as a weapon is not more likely to possess a different weapon. *See King*, 254 F.3d at 1101. Ownership of a firearm is not relevant evidence of disposition to use it. *See Farmer,* 698 A.2d at 949. Similarly, Bowden's proclivity, disposition, or comfort with having a large bullet in his pocket did not make him more likely to have fired at Tsouras. R1002,1158,1181-82. Unlike in *Fedorowicz*, no evidence of Bowden's prior use of the larger bullet suggested Bowden's intent or knowledge in possessing it. *See Fedorowicz*, 2002 UT 67,¶33. Unlike in *Reece*, evidence of Bowden's possessing the large bullet did not make more likely his having the 9 mm gun that fired at Tsouras, where the large bullet could not have fit into a 9 mm gun. *See Reece*, 2015 UT 45,¶¶19,58;R1158,1181-82. The trial court should have prohibited this irrelevant evidence under Rules 401 and 402.

B. The potential for unfair prejudice outweighed the evidence's relevance.

If the evidence of the large bullet had been relevant, it should not have been admitted because its negligible probative value was substantially outweighed by its prejudicial effect. *See Thornton*, 2017 UT 9,¶62. Rule 403 allows courts to "exclude relevant evidence if its probative value is substantially

outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403.

"[U]nfair prejudice results only where the evidence has an undue tendency to suggest decision upon an improper basis." *Reece*, 2015 UT 45,¶69. For example, in *State v. Lucero*, a case involving murder and child abuse, the Utah Supreme Court considered the potential prejudicial effect of the child victim's prior injury. 2014 UT 15,¶¶1,33, 328 P.3d 841, *abrogated on other grounds*, *Thornton*, 2017 UT 9,¶¶27,42,44 (holding trial courts need not conduct "scrupulous examination" of proffered 404(b) evidence). The "danger of unfair prejudice was . . . quite low because the prior injury was tame in comparison to the fatal one," meaning a low risk of the jury's over-mastering hostility. *Id*. ¶35. But, Rule 403 requires that evidence "of scant or cumulative probative force" is not "dragged in by the heels for the sake of its prejudicial effect." *State v. Bartley*, 784 P.2d 1231, 1237 (Utah Ct. App 1989) (quoting *State v. Maurer*, 220 P.2d 981, 984 (Utah 1989)).

In *Vigil*, this Court expressed concern that the offered evidence could "confuse and/or mislead the jury." *Vigil*, 922 P.2d at 28. The offered evidence, which this Court considered speculative, would only have clouded "the real issue before the court," the defendant's intent. *Id*. at 28. Similarly, in *Farmer*, the Delaware Supreme Court considered that evidence of the defendant's possession of the pistol, unconnected to the shooting, presented potential for "unwarranted

inferences." *Farmer*, 698 A.2d at 949. "Speculation based on mere ownership of instruments adaptable for use in a crime subjects the defendant to the same risk that impermissible character or bad act evidence may pose– equating disposition with guilt." *Id*. Moreover, such speculation "creates prejudice, even apart from the weighing process required by [Delaware Rule of Evidence] 403." *Id*.

To determine whether the probative value of evidence is outweighed by its potential for unfair prejudice, courts may use the factors set forth in *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988); *See Lucero*, 2014 UT 15,¶32. These include *inter alia*, "the similarities between the crimes, . . . the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility." *Shickles*, 760 P.2d at 295-96.

The trial court incorrectly determined evidence of the large bullet was more probative than prejudicial. R964. The trial court reached its decision by considering the evidence in comparison with the effect of evidence of Bowden's access to firearms and ammunition in the stolen truck. R959-64. However, unlike in *Lucero*, in which the Utah Supreme Court considered evidence of the prior injuries "pretty tame," in light of the charges themselves and where the jury could draw inferences from the injuries, the evidence here was not "tame" in light of its potential to mislead. *See Lucero*, 2014 UT 15,¶35. Possessing a large bullet is not similar to shooting a small bullet. *See Shickles*, 760 P.2d at 295. The evidence invited the jury to speculate on circumstances not in evidence, that Bowden

possessed a 9 mm gun and shot at Tsouras. *See Vigil*, 922 P.2d at 27-28. The evidence likely misled the jury by asking them to extrapolate from evidence of the large bullet that Bowden had the disposition to shoot at Tsouras.

Bowden's conceded access to guns and ammunition in the stolen truck is a factor which cut against the State's need for the evidence. *See Shickles*, 760 P.2d at 295;R780-81,854,957-64,1104-14,1136-40,1146-48,1311. Where Bowden did not contest his access to the stolen truck, the unfired bullet was unnecessary to prove his access to the stolen truck. R780-81,854,957-59,1104-14,1136-40,1183,1311. Although the State is not obligated to accept a defendant's offer to stipulate on an issue, exclusion is still appropriate where its purpose "is addressed to an issue that is not actually disputed . . ." *Thornton*, 2017 UT 9, ¶59; *see also State v. Verde*, 2012 UT 60,¶28, 296 P.3d 673, *abrogated on other grounds*, *Thornton*, 2017 UT 9, ¶¶27,42,44. Defense counsel conceded Bowden's connection to the stolen truck in his opening statement and repeatedly throughout trial. R780-81,854,957-59,1104-14,1136-40,1183,1311; State's Exh.73. The State relied upon the concession in its argument that the pocketed bullet was relevant. R956. Where Bowden's connection to the truck was never disputed, evidence of the bullet in his pocket was not relevant for the alternative purpose of proving his connection to the truck.

Moreover, as "overmastering hostility," the evidence invited the jury to "draw unwarranted inferences." *See Shickles*, 760 P.2d at 296; *Farmer*, 698 A.2d at 949. Courts may exclude evidence under Rule 403 when the evidence has the

strong propensity to confuse or mislead a jury. *See Vigil*, 922 P.2d at 27-28. Bowden could not have fired the large bullet in his pocket at Tsouras. R1002,1158,1181-82. The evidence of the unfired bullet in Bowden's pocket caused "overmastering hostility" by allowing the jury to infer a personal interest in firearms from what was otherwise mere access. R780-81,854,957-59,1101-14,1136-40,1183,1311. Any inference that because Bowden possessed a large bullet he was more likely to have shot at Tsouras was therefore unfairly prejudicial. Because the above factors weighed in favor of exclusion, the evidence of Bowden having the unspent large bullet in his pocket was unduly prejudicial and inadmissible.

C. The bullet evidence was prejudicial because without it, there was a reasonable likelihood of a more favorable outcome for Bowden.

The trial court committed reversible error in admitting the evidence of the unfired large bullet in Bowden's pocket. This Court will reverse a verdict for evidentiary error "if the admission of the evidence . . . reasonably" affected "the likelihood of a different verdict." *State v. Davis*, 2013 UT App 228,¶80, 311 P.3d 538. *Davis* involved object rape and forcible sodomy. *Id*. ¶1. The defendant successfully argued that the victim's employer's precautionary measures, keeping pictures of the defendant at the employer's front desk with instructions to press "the panic button which" rang "directly to the police station if [the defendant] were to enter the building," were irrelevant. *Id*. ¶¶1,64-65,77-79. The defendant argued that the evidence of the precautionary measures could have caused the

jury to infer that the defendant was dangerous and violent. *Id*. ¶81. However, this Court determined that "any facts the jury could reasonably have inferred from the [erroneously admitted evidence] were presented to the jury in [] other testimony." *Id*. Moreover, the State did not refer to the irrelevant evidence in closing. *Id*. ¶83. Admission was therefore harmless. *Id*. ¶¶80-84.

Here, unlike in *Davis*, the State presented no other testimony from which the jury could have inferred in Bowden an interest in personally using a firearm. *See id*. ¶81. Moreover, unlike in *Davis*, the State emphasized to the jury in closing that Bowden had the unfired large bullet in his pocket. *See id*. ¶83;R1304. From this fact plus Bowden's access to the firearms and ammunition in the stolen truck, the State argued a personal interest in firearms and ammunition. R1304-05. "Obviously this man has an interest in firearms and ammunition. He's familiar with guns. This here is the shooter." R1305. From familiarity, the State then pointed to evidence that the shooter was "a pretty darn good shot too." R1305.

Where Bowden's connection to the truck only provided access to 9 mm ammunition, evidence of the large bullet in Bowden's pocket allowed the State to personalize an "interest in firearms and ammunition." From that personal interest, jurors could speculate that Bowden possessed the necessary familiarity and competence with weapons to have fired at Tsouras. R1305. The State presented no evidence otherwise tending to show that Bowden's intent regarding the firearms and ammunition in the truck was to shoot them (as opposed, for

example, to selling them). Moreover, the firearms and ammunition were available to anyone else entering or exiting the vehicle. R882-84. The evidence of the unfired bullet allowed the jury to speculate that Bowden had personal interest and familiarity from what was otherwise mere access. R1304-05. Moreover, even with the evidence of the large bullet in Bowden's pocket, the evidence was insufficient. *See supra* Issue I, insufficiency. Evidence of the large bullet on Bowden's person may have diverted the jury's attention from the lack of evidence otherwise connecting Bowden to the shooting. Unlike in *Davis*, erroneous admission of the evidence unreasonably affected "the likelihood of a" guilty verdict. *See id*. ¶84.

D. This issue was preserved, but if this Court finds otherwise, it may review the issue for plain error.

This issue is preserved. "An issue [] is preserved in the trial court when the record shows that (1) the issue is" timely raised; "(2) the issue is specifically raised; and (3) the issue is supported by evidence or relevant legal authority." *State v. Chavez-Espinoza*, 2008 UT App 191,¶9, 186 P.3d 1023, *cert. denied*, 199 P.3d 367 (internal quotation marks omitted). Here, defense counsel timely moved in trial to exclude this evidence. R955-64. He specifically explained how the evidence was irrelevant and "more prejudicial than probative." R955,957-58,961. He expressed concern that the jury could judge Bowden's character because of the bullet in Bowden's pocket. R955. By arguing the evidence's

irrelevance and potential prejudice, defense counsel timely and specifically raised the issue, supported by relevant legal authority.

To the extent the Court believes this issue is not preserved, it should review the issue for plain error. This Court may reverse an unpreserved error when "(1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful." *Powell,* 2007 UT 9,¶18 (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)).

First, the trial court committed error. Evidence of the unfired bullet in Bowden's pocket was irrelevant, inadmissible, and more prejudicial than probative. *See supra* Issue II, irrelevance. Bowden's possessing the large bullet did not connect him to the weapon that shot at Tsouras or provide evidence of knowledge or intent. *See Reece,* 2015 UT 45,¶¶66-67; *Fedorowicz,* 2002 UT 67,¶¶33-34. Instead, it provided the opportunity for the jury to "draw unwarranted inferences" regarding his character. *See Shickles*, 760 P.2d at 296; *Farmer*, 698 A.2d at 949.

Second, this error was obvious. An error is obvious when the law is well-settled at the time of trial. *See Powell,* 2007 UT 9,¶20. It is well-settled that evidence must have "a tendency" to make a fact that is "of consequence in determining the action" to be relevant. Utah R. Evid. 401. It is well-settled that irrelevant evidence is inadmissible. Utah R. Evid. 402. It is well-settled that to be admissible, evidence connecting a defendant to a weapon must make more likely a defendant's personal involvement in the charged crime. *See Reece,* 2015 UT

45,¶¶66-67; *Fedorowicz*, 2002 UT 67,¶¶33-34. It is also well-settled that proclivities are not relevant. *Fedorowicz*, 2002 UT 67,¶32. Moreover, it is well-settled that evidence inviting unwarranted inferences may be excluded under Rule 403. *See Shickles*, 760 P.2d at 296. The trial court here even considered the evidence irrelevant, initially. R959. But then, in light of the "low bar for relevance," and the State's claim that someone carrying an unfired bullet is more likely to shoot at an officer, the trial court admitted the evidence on grounds of its lack of prejudicial effect. R959-64. But the trial court never explained the evidence's relevance. *See* R959-64. This makes more obvious the relevance error.

Lastly, this error prejudiced Bowden because there was a likelihood of a more favorable outcome for Bowden had the trial court excluded the irrelevant and prejudicial evidence. *See supra*, Issue II, irrelevance. Unlike in *Davis*, the State otherwise lacked sufficient evidence identifying Bowden as the shooter. *See Davis*, 2013 UT App 228,¶81; *see supra*, Issue I, insufficiency. In fact, the State said it offered the evidence as leading to an inference of Bowden's personal interest, connection, comfort, and familiarity with firearms for the purpose identifying Bowden as the shooter. R956-57,961-62. The evidence of the unfired bullet in Bowden's pocket led the jury to speculate that Bowden had an interest in shooting firearms and therefore was more likely to have shot at Tsouras.

III. The trial court erred by failing to merge Bowden's convictions for discharge of a firearm with his conviction for attempted aggravated murder.

The convictions for attempted aggravated murder and discharge of a firearm should merge because the convictions involved a single act and each discharge was necessarily proven by the evidence used to prove attempted aggravated murder. "Merger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute." *State v. Smith,* 2005 UT 57, ¶7, 122 P.3d 615 (internal quotation marks omitted); *State v. Diaz,* 2002 UT App 288, ¶17, 55 P.3d 1131; *see also Brown v. Ohio,* 432 U.S. 161, 169 (1977). Utah's merger doctrine, codified in part at Utah Code section 76-1-402, is interpreted "to comply with the underlying constitutional guarantees against double jeopardy." *State v. Ross*, 951 P.2d 236, 241 (Utah Ct. App. 1997); *State v. Lopez,* 2004 UT App 410,¶8, 103 P.3d 153.

"[W]hen the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision." UTAH CODE §76-1-402(1). "A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense." UTAH CODE §76-1-402(3). An offense is a lesser included offense when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

Utah Code §76-1-402(3)(a); *see also State v. Chukes*, 2003 UT App 155,¶9, 71 P.3d 624.

Utah courts "apply a two part test to determine whether an offense is a lesser included offense." *Chukes*, 2003 UT App 155,¶10; *see Ross*, 951 P.2d at 241; *State v. Hill*, 674, P.2d 96, 97 (Utah 1983)). The first step is to "compare the statutory elements of the offenses." *Id*. If the two crimes are "such that the greater cannot be committed without necessarily having committed the lesser, then the lesser offense merges into the greater crime and the State cannot convict and punish the defendant for both offenses." *Id*. (internal quotation marks omitted).

"Only if the first analytical step does not resolve the issue need [this Court] proceed to the second analytical step." *Id*. (internal quotation marks and brackets omitted). "In most cases, comparison of the statutory elements will suffice to determine whether a greater-lesser relationship exists." *Id*. Where the crimes have multiple variations, however, the court will proceed to the second step and "'consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial....'" *Chukes*, 2003 UT App 155,¶10 (internal quotation marks omitted).

Utah courts focus on the State's theory when applying the second part of the test. *See Hill*, 674 P.2d at 98 (considering the variation of aggravated robbery presented to the jury when deciding whether theft was a lesser included offense); *Chukes*, 2003 UT App 155,¶22-27 (focusing on state's theory). A conviction for a

lesser offense cannot be upheld "merely because the jury could have found an additional element." *Ross*, 951 P.2d at 243. Instead, a conviction for a lesser must be reversed "unless the jury was 'required to find' the additional element." *Id*. (quoting *State v. Bradley*, 752 P.2d 874, 878 (Utah 1988)).

Applying the first part of this test shows that discharge of a firearm was a lesser included offense of attempted aggravated murder and that the discharge counts should have been merged. Comparing the statutory elements of the offenses demonstrates that "the greater cannot be committed without necessarily having committed the lesser." *See Chukes*, 2003 UT App 155, ¶10. The discharge statute defines the crime of discharge of a firearm in one of three ways: (a) ". . . in the direction of any person or persons, knowing or having reason to believe that any person may be endangered by the discharge of the firearm;" (b) "in the direction of any person or habitable structure" "with intent to intimidate or harass another or with intent to damage a habitable structure;" or (c) "in the direction of any vehicle" "with intent to intimidate or harass another." UTAH CODE §76-10-508.1(1). This is also how an attempted aggravated murder could be committed: attempted aggravated murder requires proof that a defendant intentionally or knowingly attempted to cause the death of a peace officer. UTAH CODE §§76-5-202(f),(k),(iv),(m); 76-4-101.

Any attempted aggravated murder committed by firing a gun includes all of the elements for discharge in the direction of a person with knowledge or having a reason to believe the person is endangered. *Compare* UTAH CODE §§76-5-202

with 76-10-508(1). If the State presented evidence by which a jury could find that the defendant fired a gun in the direction of another person, with the intent to or with knowledge the action could cause death, then each individual discharge would be established by "proof of the same or less than all the facts" required to prove attempted murder. *Ross*, 951 P.2d at 242. The actus reus of the variation of discharge under subsection (a), namely, to "discharge a firearm in the direction of any person," is an act proven by evidence of the act of attempting to murder by firing bullets which fly from the firearm and strike objects, such as a vehicle in which a person is sitting. UTAH CODE §76-10-508.1(1)(a). Further, the requirement that the defendant acted, "knowing or having reason to believe that any person may be endangered by the discharge of the firearm," is encompassed by proof of the intentional or knowing mental state required by attempted murder.

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

Because there are multiple variations of discharge, the second part of the test requires consideration of the evidence and the State's theory "to determine

whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial." *Id*. The evidence, arguments, and jury instructions, demonstrates that once the State proved attempted aggravated murder, the jury did not need to find an additional element to convict Bowden of discharge. *See Chukes*, 2003 UT App 155,¶10; *Bradley*, 752 P.2d at 878. Witness testimony and exhibits show that bullets were fired at Tsouras. R801-02,804-05,816-818,827,858-60,870,878-79,942,1046-60,1068-1073,1080-81,1085-99,1165-71,1209-12. This same evidence, indicating that a gun was pointed and fired at Tsouras was used to prove both the discharges and the attempted aggravated murder. R801-02,804-05,816-818,827,858-60,870,878-79,942,1046-60,1068-1073,1080-81,1085-99,1165-71,1209-12.

Under the State's theory, Bowden could not have committed the attempted aggravated murder without committing the firearm discharge. *See Hill*, 674 P.2d at 87. The State argued that the firearm discharge occurred when someone shot, intentionally, knowingly, or recklessly towards Tsouras and Tsouras's vehicle. R1292-93. The State argued that the attempted aggravated murder occurred when someone intentionally shot at Tsouras, knowing that he was a peace officer, attempting, with the fired bullets, to cause his death. R1294-97. The State then clarified, conflating the crimes in rebuttal, arguing that if the firing of four bullets towards the driver of the police vehicle "is not attempted aggravated murder . . . I have no idea what it is." R1325-26. Discharge of a firearm was the only means by which the shooter committed attempted aggravated murder. *See Chukes*, 2003

UT App 155,¶22-27;R801-802,816-818,827-28,859-860,870,878-79,1057-58,1073,1080-93,1098-99,1165-70. Although the jury instructions for discharge included the three alternatives in section 76-10-508.1(1)(a)-(c), the State presented no evidence or argument of intent to harass or intimidate with the shooting, as opposed to trying to kill Tsouras. R1294-97. Hence, the variation of section 76-10-508.1 actually proved could only be subsection (a).

Cases where convictions did not merge involved circumstances where the elements of one crime were not necessarily included in the elements of another. For example, discharge was not a lesser included offense of witness tampering because "there was evidence other than the discharge of the firearm upon which the jury could base Defendant's conviction for witness tampering." *State v. Yanez*, 2002 UT App 50,¶22, 42 P.3d 1248. In *State v. Suarez*, 736 P.2d 1040, 1042 (Utah Ct. App. 1987), the defendant's "taking of indecent liberties" by first placing his mouth on the victim's breasts and then placing his hand on her vagina were "separate acts requiring proof of different elements and constitute separate offenses." In contrast here, all of the elements for discharge in the direction of a person, knowing that a person would be endangered, are included in the elements for attempted aggravated murder; merger is therefore required.

Case law from other jurisdictions further supports Bowden's claim. For example, a defendant could not be convicted in New Mexico for both homicide and causing great bodily harm where both convictions were premised on the unitary act of firing seven gunshots at a vehicle driven by the victim. *State v.*

Montoya, 306 P.3d 426 (N.M. 2013); *see also People v. Tallwhiteman*, 124 P.3d 827, 836-37 (Colo. Ct. App. 2005), *as modified on denial of reh'g* (holding reckless endangerment is a lesser included offense of assault with intent to cause serious bodily injury because all of the elements are established by "the establishment of every element of first degree assault with intent to cause serious bodily injury"); *Alston v. State*, 643 A.2d 468 (Md.Ct. Spec. App. 1994) (holding that reckless endangerment is a lesser-included offense of murder, where the defendant engaged in a shootout, killing bystander); *Montes v. State*, 421 S.E.2d 710 (Ga. 1992) (holding assault convictions merged with murder conviction where the evidence of aggravated assault—that the defendant fired a deadly weapon and wounded the deceased victim—was also used to prove that defendant had committed murder).

In determining merger, some courts consider whether the convictions involve a single criminal episode, and assess whether the evidence used to prove the commission of one crime was used to prove the commission of another. As used in Utah Code section 76-1-402, "single criminal episode" means "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective." *State v. Irvin*, 2007 UT App 319,¶18, 169 P.3d 798 (citing UTAH CODE § 76-1-401). The test for "whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents." *Id*. (quoting *State v. Crosby*,

927 P.2d 638, 645 (Utah 1996)). "If there is but one intent, one general impulse, and one plan, . . . there is but one offense." *Id.*

In *Irvin*, the defendant robbed a store clerk, took the clerk's keys, and fled in her car. *Id*. at ¶19. The *Irvin* court determined that taking the keys "was part of one intention, one general impulse, and one plan," and therefore the defendant committed only one aggravated robbery. *Id*. The defendant had taken cash from the register and the clerk's keys "within a matter of seconds." *Id*. "The entire encounter lasted only a few minutes, and the taking of [the] keys was likely done to facilitate Defendant's escape with the stolen cash." *Id*. Similarly, in *State v. Bell*, 2016 UT App 157, ¶¶4,13-14,20, 380 P.3d 11, the defendant's attempt to steal a car and his grabbing a purse out of the car and running constituted one act of aggravated robbery and not two.

Other jurisdictions also consider whether the evidence used to prove commission of one crime was used to prove the commission of another crime. *See e.g.*, *State v. Watkins*, 236 P.3d 770 (Or.Ct.App. 2010) (multiple counts of assault arising from single criminal episode merged); *Brown v. State*, 539 S.E.2d 545 (Ga.Ct.App. 2000) (aggravated assault and aggravated battery merged where defendant's "actions were the result of a 'single act of firing a series of shots in quick succession at the victim'" (citation omitted)); *Grace v. State*, 425 S.E.2.d 865 (Ga. 1993)(aggravated battery and aggravated assault did not merge where defendant shot victim twice, but "[t]he evidence used to prove the commission of the aggravated assault was not used at all in proving the commission of the

aggravated battery."); *Owens v. United States*, 497 A.2d 1086 (D.C. 1985) ("[t]he fact a criminal episode of assault involves several blows or wounds, and different methods of administration, does not convert it into a case of multiple crimes").

As in *Irvin* and *Bell*, the conduct here lasted seconds and supports only one general intention or plan by the perpetrator. R801-05,858-60,942-46,1209-17;State's Exh.147. The State's theory was that shots were fired with the intent to kill Tsouras. R1294-97,1325-26.

Although the trial court favorably considered the State's argument, based on *State v. Rasabout*, 2015 UT 72, ¶14, 356 P.3d 125 (R1369-1376), *Rasabout* has limited application here. The *Rasabout* defendant asked the Court to merge each discharge into one count of discharge of a firearm. *Id*. ¶7. In *Rasabout*, "each shot [carried] an independent harm." *Id*. ¶14. Thus, the term "discharge" referred to each discrete shot. *Id*. ¶¶13-14. The *Rasabout* defendant was not charged with any higher felony for the multiple discharges to merge into. *Id*. ¶1. Here, however, the jury convicted Bowden of attempted aggravated murder in addition to the separate counts of discharge of a firearm. R1344-46. The discharge convictions merge with the attempted aggravated murder conviction because, unlike in *Rasabout*, all of the elements for discharge under subsection (a) are met when the elements for attempted aggravated murder are found. *See Lopez*, 2004 UT App 410,¶8. Discharge of a firearm in the direction of a person with the requisite knowledge is so closely related to attempted aggravated murder that discharge

convictions should merge with attempted aggravated murder. *Brown*, 432 U.S. at 169.

This issue was preserved. "A claim is preserved when it has been presented to the district court in such a way that the court has an opportunity to rule on it." *Prater*, 2017 UT 13,¶27 (internal quotation marks omitted); *see also Chavez-Espinoza*, 2008 UT App 191,¶9. A defendant preserves a merger argument by raising the issue at any time during trial "or following conviction on a motion to vacate." *Lopez*, 2004 UT App 410,¶7. Defense counsel filed and argued a motion to vacate following conviction. R435-447,1365-76. The motion specified the reasons for merger with references to relevant law. R435-447,1367-76.

To the extent the Court believes this issue is not preserved, it should review the issue for plain error. This Court may reverse an unpreserved error when "(1) an error exists; (2) the error should have been obvious to the trial court; and (3) the error is harmful." *Powell*, 2007 UT 9,¶18, 154 P.3d 788.

First, as argued above, the trial court erred in failing to merge the firearm discharge convictions with the attempted aggravated murder conviction. A defendant may not be convicted of both an offense and lesser included offenses. UTAH CODE §76-1-402. Where the facts used to prove the lesser offense are the same or lesser than facts used to prove an offense, convictions for the lesser included should be vacated. *Chukes*, 2003 UT App 155,¶¶10-21. All of the statutory elements for discharge are met when the elements for attempted aggravated murder by firing a gun are found. *See Lopez*, 2004 UT App 410,¶8.

Here, where proof of the attempted aggravated murder necessarily proved discharge of a firearm without additional elements, the lesser convictions should have merged.

Second, the error was obvious because the law regarding merger is well-settled. It is well-settled that a defendant may not be convicted of both an offense and lesser included offenses. UTAH CODE §76-1-402. It is well-settled that lesser included counts should merge when they depend on the same or fewer facts than those of a greater offense. *See Chukes*, 2003 UT App 155,¶¶10-21. And it was well-settled that *Rasabout* involved multiple instances of discharge of a firearm with no higher felony for the charges to merge into. *See Rasabout*, 2015 UT 72,¶¶7-15. The trial court's own doubts about how a different court might rule indicates the trial court's awareness of well-settled law. R1376.

Lastly, the error is harmful. *See Powell*, 2007 UT 9,¶18. Erroneous failure to merge convictions prejudices a defendant because it likely increases a defendant's time in prison, even if sentences run concurrent. *State v. Finlayson*, 2000 UT 10,¶¶25-26, 994 P.2d 1243. Here, but for the trial court's error, Bowden would not have been sentenced on the four counts of discharge of a firearm.

CONCLUSION

First, Bowden respectfully asks this Court to reverse and remand with an order to dismissal the attempted aggravated murder and obstruction of justice convictions because the evidence was insufficient. Second, Bowden asks this Court to reverse and remand for a new trial on all counts because of the

admission of evidence of the unfired bullet in Bowden's pocket was irrelevant and less probative than prejudicial. Finally, Bowden respectfully requests that this Court reverse the trial court's erroneous ruling on merger and remand for resentencing.

SUBMITTED this 26th day of January 2018.

ANDREA GARLAND (7205)
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,679 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in Georgia 13 point.

ANDREA J. GARLAND

CERTIFICATE OF DELIVERY

I, ANDREA J. GARLAND, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 26th day of January 2018.

ANDREA J. GARLAND

DELIVERED this _____ day of January 2018.

_____

ADDENDUM A

The Order of the Court is stated below:
Dated: March 24, 2017 10:50:15 AM

At the direction of:
/s/ L Douglas Hogan
District Court Judge

by
/s/ ANTHONY HENDRICKSON
District Court Clerk

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs. JEREMY MICHAEL BOWDEN, Defendant. Custody: Utah County Jail	:	Case No: 161400285 FS Judge: L DOUGLAS HOGAN Date: March 23, 2017

PRESENT
Clerk: anthonyh
Defendant
Defendant's Attorney(s): WESLEY J HOWARD

DEFENDANT INFORMATION
Date of birth: November 12, 1982
Sheriff Office#: 267671
Audio
Tape Number: 31 Tape Count: 4:08-4:58

CHARGES
1. ATTEMPTED AGGRAVATED MURDER - 1st Degree Felony
Plea: Not Guilty - Disposition: 02/03/2017 Guilty
2. RECEIVE OR TRANSFER STOLEN VEHICLE - 2nd Degree Felony
Plea: Not Guilty - Disposition: 02/03/2017 Guilty
3. OBSTRUCTING JUSTICE - 2nd Degree Felony
Plea: Not Guilty - Disposition: 02/03/2017 Guilty
4. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony
Plea: Not Guilty - Disposition: 03/23/2017 Dismissed w/ Prejudi
5. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony
Plea: Not Guilty - Disposition: 02/03/2017 Guilty
6. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony
Plea: Not Guilty - Disposition: 02/03/2017 Guilty
7. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony
Plea: Not Guilty - Disposition: 02/03/2017 Guilty
8. FELONY DISCHARGE OF A FIREARM - 3rd Degree Felony

Plea: Not Guilty - Disposition: 02/03/2017 Guilty
9. FAIL TO STOP AT COMMAND OF LAW ENFORCEME - Class A Misdemeanor
Plea: Not Guilty - Disposition: 03/23/2017 Dismissed w/ Prejudi

HEARING

TIME: 4:09 PM
Counsel for the defendant argues the motion filed on behaf of his client.

TIME: 4:13 PM
State's response.

TIME: 4:17 PM
Defense's rebuttal.

TIME: 4:24 PM
Court rules that count 4 should be vacated.

TIME: 4:32 PM
Victim's wife addresses the court.

TIME: 4:56 PM
Court orders Count 9 closed with credit for time served.

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

Based on the defendant's conviction of RECEIVE OR TRANSFER STOLEN VEHICLE a 2nd Degree

Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of OBSTRUCTING JUSTICE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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

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

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

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

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

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
Counts 1-3 are to run consecutive to each other. Counts 4-7 carry a mandatory term of 3-5 years which are to run concurrent to each other and concurrent to the other counts. Restitution is to remain open and sent to the Board of Pardons once determined.

ALSO KNOWN AS (AKA) NOTE
JEREMY BOWDEN
JACOB DRAGE
MICHAEL BOWDEN

CUSTODY

The defendant is present in the custody of the Utah County jail.

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

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 161400285 by the method and on the date specified.

EMAIL: UTAH STATE PRISON udc-records@utah.gov
EMAIL: ADC TRANSPORT adc-transportation@slco.org

Date: 03/24/2017 /s/ ANTHONY HENDRICKSON

Deputy Court Clerk

ADDENDUM B

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. JEREMY MICHAEL BOWDEN, Defendant.	Case No. 161400285 TRANSCRIPT OF: JURY TRIAL VOLUME 2

BEFORE THE HONORABLE L. DOUGLAS HOGAN

WEST JORDAN COURTHOUSE
8080 SOUTH REDWOOD ROAD
WEST JORDAN, Utah 84088

February 1, 2017

THE COURT: We're back on the record. All counsel and the defendant are present.

Is there an item we need to take care of before the jury comes back?

MR. HOWARD: Yes, Your Honor. State has an exhibit -- is it 148? -- that they intend to introduce.

THE COURT: Okay.

MR. PLAYER: It is --

THE COURT: I'm looking at a log video that would show as a video still from a dash cam.

MR. HOWARD: No, that would be wrong.

MR. PLAYER: No. 158.

THE COURT: 158. Okay.

MR. HOWARD: Yeah. Unfired round found on Mr. Bowden. Your Honor, this -- this unfired round that the officer who is about to testify found on Mr. Bowden is a different caliber than the weapon that was found near the scene of the shooting. It's, I believe, a .44 versus a 9mm. It's defense's position that it's more prejudicial than probative to introduce to the jury the fact that this unfired round is found on Mr. Bowden because I can't read their minds, I don't know what their attitudes are about weapons or firearms. They may make judgments about his character just by the fact that he has an unfired round in his pocket. It's not probative because it doesn't in any way connect him to the shooting that took place

in front of Les Schwab. And so we'd ask that the -- the court to exclude that from evidence.

THE COURT: Okay. Response, Mr. Player?

MR. PLAYER: Thanks, Your Honor.

The defense in this matter is that it was a different individual who fired at Officer Tsouras and so I would look to 404(b) for the permitted uses in a criminal case of other acts. If this even is another act, which would be to establish absence of mistake on the part of identity or identity itself. However, I think it's a stretch to call it another act because Mr. Bowden is -- is during the course of the arrest, actually found to be in possession of this .40 caliber unspent cartridge.

The fact -- that fact coupled with the fact that there were multiple firearms found in this truck that did not belong to the truck owner, multiple, and a variety of cartridge casings and ammunition found in this stolen truck that did not belong to the truck owner I think does establish that Mr. Bowden, who was in possession of that truck, had access to that truck, was in that truck, had items in that truck, was somebody that was interested in firearms and ammunition, comfortable with firearms and ammunition to the point where he's actually carrying a round -- an unspent cartridge, and our allegation is, another firearm and the rounds for that firearm.

And I think that somebody who has that sort of

affinity for firearms and ammunition is more likely somebody that is willing to use a firearm or ammunition, you know. Somebody that smokes a cigarette is probably more likely to smoke a cigar than somebody that doesn't smoke at all. And so I think there is relevance and the standard is not whether it's more -- whether it's prejudicial. It has to be -- the probative value has to be substantially outweighed by the danger of unfair prejudice and in this matter we don't think that standard would be met to preclude the State from putting on evidence of a defendant who has been charged with using a firearm. The fact that he has ammunition, even if it fits another firearm, on his person at the time of his arrest within minutes of the alleged shooting.

THE COURT: Do you intend to introduce another firearm as a piece of evidence?

MR. PLAYER: We intend to ask the truck owner if when he went to collect his items other firearms were found in the truck, but, no, we're not going to be presenting to the jury actual, physical other firearms.

THE COURT: Okay.

MR. HOWARD: And we're -- we're not going to object to any photographs that the State has showing the contents of this pickup truck and we've already conceded that Mr. Bowden is associated with that vehicle in some way. But just going off of the standard that Mr. Player's reminding the Court of, it is

creating unfair prejudice to bring up this unspent cartridge in his pocket when it has absolutely no connection to the firearm that was found nearby the shooting and no connection to the cartridges found on the ground at the site of the shooting, no connection to any spent bullets that were found inside Officer Tsouras's car.

It's -- it's not relevant, and it's prejudicial. Therefore, we would ask the Court to exclude it.

THE COURT: Okay. All right. And correct me if I'm wrong, Counsel, there is no question as to identity. You start out talking about the rule -- talks about one of the exceptions being identity or to establish identity, that doesn't seem to be the argument you're making now, Mr. Player. Is that right?

MR. PLAYER: The argument about the identity has been made by counsel for --

THE COURT: Right. Right. But I took it from -- and maybe I may be wrong because we're not there yet, Mr. Howard. I took it from the way that some of your questions have been going and in our opening statement that you're not contesting that Mr. Bowden is associated with that truck?

MR. HOWARD: We are not contesting that, Your Honor. We're conceding that.

THE COURT: Okay. You're conceding that. Are you -- and maybe I'm jumping the gun. Are you conceding the fact that the interaction that's initially held with officer -- is it

Croft?

MR. PLAYER: Clark.

THE COURT: Clark. Officer Clark when he challenges at the truck, are you conceding that that is in fact Mr. Bowden?

MR. HOWARD: Yes, Your Honor.

THE COURT: At that point in time?

MR. HOWARD: Yes.

THE COURT: Okay. All right. I agree with the defense. I don't think this -- this piece of evidence is particularly relevant and without getting to the 404(b) analysis on relevancy grounds, I'm going to exclude it. I don't think it's relevant.

MR. PLAYER: Is the Court precluding me from talking about the items in the truck?

THE COURT: No. No.

MR. PLAYER: Sounds like the Court is not.

THE COURT: No. I just don't -- I just don't think it's relevant to bring up that he had one of the cartridges in his -- on his person, in his pocket. I don't see how that -- how that helps any of the charged offenses, how it's relevant to the offenses as charged in the information.

Do you want to make further argument on that because I -- you responded to 404(b) and Mr. Howard also mentioned relevance. I'm having a hard time seeing the relevance.

MR. PLAYER: The relevance was my example of somebody who is --

THE COURT: Right.

MR. PLAYER: -- carrying ammunition is somebody that's more comfortable with using it within minutes of a --

THE COURT: Right.

MR. PLAYER: -- of a shooting.

MR. HOWARD: That's -- that's a NRA argument there, Your Honor.

THE COURT: Right. Right.

MR. HOWARD: Any number of people --

THE COURT: Right.

MR. HOWARD: -- feel comfortable.

THE COURT: Mr. Howard is not objecting to -- are there photographs of the vehicle, the contents of the vehicle, you're going to have the owner talk about what was discovered in the vehicle that was not his, you're not objecting to any of that, right, Mr. Howard?

MR. EVERSHED: I think the test for relevance is frankly evidence is relevant if for -- 401, if it has any tendency to make a fact more or less probable than it would --

THE COURT: Right.

MR. EVERSHED: -- be without the evidence. In this case, the allegation is that the defendant used a firearm, fired that firearm at a police car and then fled. The fact

that he has an unspent cartridge in his pocket just goes to show that he is familiar with firearms, that he is somehow connected to them. Not everybody in the world, I would imagine, who in this room has an unspent cartridge case in their pocket? Just that fact alone it just shows that it is more likely than not, it is more -- more or less than probable.

It does have a tendency to show that he is comfortable with this and when it's -- when the charge is he uses a firearm, he fires a firearm at a defenseless police officer, the fact that he has a cartridge casing, even though it's a different caliber does meet the relevancy requirement that it does have a tendency to make that more or less probable than it would without the evidence. I think that's the State's position on relevance.

THE COURT: Okay.

MR. HOWARD: Your Honor, that argument is extremely attenuating because you could make that argument if he had a pocketknife. Any person who carries a pocketknife or a hunting knife is a person more likely to shoot at an officer. That's an argument you can make, but it's -- it's far from conclusive. It's not relevant in this case. We wouldn't be having this argument at this point if that had been a 9mm unspent cartridge in his pocket, but it wasn't. It's a completely different caliber and has no relevance in regard to the shooting that took place at Les Schwab.

MR. EVERSHED: Well, I think coupled with a very standard low standard of relevancy, it's a very low standard. It's any tendency to make a fact more or less probable than [inaudible].

THE COURT: Okay. I will agree with the State on the relevance argument. That takes us back to 404. So then that puts the argument back in 404(b). Correct?

MR. EVERSHED: I think --

MR. PLAYER: Or 403.

MR. EVERSHED: I think -- I think the defense was talking about 403, specifically.

THE COURT: I'm sorry. Sorry.

And again, Mr. Player, your analogy and your argument is simply that it's more likely that someone who is comfortable with firearms and the type of person that would actually use one, it's more -- is more likely that Mr -- Mr. Bowden, because he's got an unspent cartridge is, in fact, that person?

MR. PLAYER: When they make the -- the issue that there is some third unknown individual, was after doing this.

THE COURT: Right.

MR. PLAYER: And you've got an individual who has -- is interested in firearms and ammunition, has ammunition on his person, has been in a truck, has a variety of ammunition and firearms?

THE COURT: Talk to me more about that. What else is

found on the truck? What?

MR. PLAYER: There are at least four different caliber of ammunitions in that truck that --

THE COURT: None of which -- none of which the owner of the truck claims is his?

MR. PLAYER: Correct. 357. There is a -- there is a .380 that I can think of off the top of my head. There is also a .40 caliber inside of the truck.

THE COURT: Okay.

MR. PLAYER: That -- that the owner of the truck says, "Those aren't mine." There is guns in that truck that he says those -- "There were guns in that truck when I came to identify my property that weren't mine."

That means somebody that is -- has that volume and that variety of firearms and ammunition is somebody that is comfortable with them and has them. And if you have one, you're -- have the opportunity, possibly, to use one.

THE COURT: Okay. All right. And, again, Mr. Howard, your argument is that that's going to be unfairly prejudicial?

MR. HOWARD: Yes, Your Honor.

THE COURT: The jury being -- yet we're going to have pictures that show all these other things that you're not objecting to.

MR. HOWARD: I'm not objecting to the pictures of the

vehicle and what was inside.

THE COURT: Okay.

MR. PLAYER: And the standard is substantially outweighed by unfair prejudice.

THE COURT: Right. Right. Mr. Howard, I'm going to deny your objection. I do not think that finding the unspent cartridge, although it differs in caliber from the weapon that was used is going to be unfairly prejudicial given the totality of the evidence that's going to be presented here. I agree with the State's argument. I'm going to allow it.

Okay. Thank you. Is there anything else we need to take care of before the jury returns?

MR. PLAYER: No. We're calling Shane Franchow.

MR. EVERSHED: No. In terms of housekeeping I think we have three witnesses left. I think we'll -- I think it's fair that we will get through all of them. I don't know when. We might be done in an hour or so, but that's -- that's where we'll cap. Our next witness that we will begin with tomorrow is going to be lengthy. I guess the only reason why I'm saying this is once we're done with these three, we will be done.

THE COURT: It wouldn't make sense to start the next one?

MR. EVERSHED: Yes.

THE COURT: Okay.

MR. EVERSHED: And we're on track and we will be done

ADDENDUM C

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, PLAINTIFF, VS. JEREMY MICHAEL BOWDEN, DEFENDANT.	Case No. 161400285 Transcript of: JURY TRIAL VOLUME III

BEFORE THE HONORABLE L. DOUGLAS HOGAN

WEST JORDAN COURTHOUSE
8080 SOUTH REDWOOD ROAD
WEST JORDAN, UTAH 84088

FEBRUARY 2, 2017

TRANSCRIBED BY: Susan S. Sprouse, RPR, CSR

A. So I went back to my trunk to retrieve my duty-issued rifle.

Q. What kind of rifle?

A. It is a AR-15.

Q. Okay. Nothing further.

THE COURT: Ladies and gentlemen, is there any questions?

Okay. Thank you, Officer.

THE WITNESS: Thank you, sir.

THE COURT: You are excused.

MR. EVERSHED: Yes, Your Honor, he's excused. That will be our last witness, Your Honor. All of the exhibits are in and the State would now rest.

THE COURT: Okay. With that, is now an appropriate time to take a recess, Mr. Howard? Mr. Evershed?

MR. EVERSHED: Yes, Your Honor.

THE COURT: Okay. We're going to take about a five-minute recess and then we'll reconvene. Okay. Mr. Stewart, do you want to escort out.

THE BAILIFF: Please remain seated.

THE COURT: The jury has now exited the courtroom. The State has rested.

Mr. Howard.

MR. HOWARD: Your Honor, let me present at this time a motion for a directed verdict in this matter.

Before the Court should properly send this to the jury, there has to be sufficient evidence that a reasonable jury can find beyond a reasonable doubt that the evidence suggests that the defendant -- or that they -- there's sufficient evidence for the jury to find guilt beyond a reasonable doubt.

And I think in this case, the defendant was identified by Officer Clark at the Mouse Pad; thereafter, after identification or descriptions of the perpetrator firing the weapon is inconsistent at best.

Ms. Wiley, whom we just had on the witness stand, Officer Trooper O'Gwin, and -- excuse me, Officer Tsouras have different descriptions of what this individual looked like.

It's our assertion, Your Honor, that there's not sufficient evidence for a reasonable jury to find beyond a reasonable doubt that Mr. Bowden is, in fact, the person that fired at the officer that day and submit that to the Court.

THE COURT: Okay. Any response?

MR. EVERSHED: Your Honor, we have Mr. Bowden located at the Mouse Pad. There's no dispute to that. We have him running westbound according to Officer Clark. We have Ms. Wiley saying that she sees one individual running, pointed nose, identifies white male, bandanna, jacket running -- exactly what he's wearing running through that parking lot. We see one male going through the Les Schwab parking lot. He's

seen on a dash cam video with a jacket, blue jeans, white shoes, wearing exactly what he's wearing at the Mouse Pad, firing at this officer and then going northbound, housing his gun. And who is found 22 minutes after this whole thing, after a containment is set up is none other than Mr. Bowden. And we've established identity.

THE COURT: Okay. In considering the evidence that's been presented, the Court will acknowledge that some of the descriptions, details of the descriptions changed from witness to witness. However, those inconsistencies, given the period of time each of the persons, each of the respective witnesses had an opportunity to make an observation, the Court does find there is still sufficient evidence for a jury, a reasonable jury to make a finding on this case. And, therefore, I'm going to deny Mr. Howard's motion for directed verdict.

I do believe a reasonable jury, given the evidence, could convict the defendant, and that the State has, in fact, put on a prima facie case against the defendant for each of the counts as charged.

All right. With that, Mr. Howard.

MR. HOWARD: Could we just approach for a moment, Your Honor.

THE COURT: Yes.

(Discussion held at sidebar off the record.)

THE COURT: You think it will work?

ADDENDUM D

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

THE STATE OF UTAH, Plaintiff, -v- JEREMY MICHAEL BOWDEN, Defendant	**DEFENDANT'S MOTION TO VACATE FIVE COUNTS OF FELONY DISCHARGE OF A FIREARM** Case no. 161400285 JUDGE L. DOUGLAS HOGAN

Jeremy M. Bowden (Bowden), by and through counsel, Wesley J. Howard, moves this Court to vacate his convictions on five counts of felony discharge of a firearm, on the grounds that the convictions on those counts are based on the events which occurred in the course of a single criminal episode. Bowden's motion is supported by the following memorandum.

FACTS

In support of its theory of the case, the State offered the testimony of Detective Nate Clark (Clark) who told the jury of an encounter with Bowden during the evening of October 30, 2015. Clark testified he attempted to stopped Bowden as Bowden approached and attempted to enter a stolen motor vehicle. Instead of complying, Bowden fled on foot. Clark radioed to police dispatch, and other officers, that a suspect was running west near 7200 South.

Officer Cory Tsouras (Tsouras) also testified for the State, explaining how he was on patrol in his police vehicle the night of October 30, 2015 when he heard Clark's radio

communication. Almost immediately thereafter, Tsouras spotted a person running in the area in the direction described. According to Tsouras, the suspect eventually left the sidewalk parallel to 7200 South and crossed through the Les Schwab parking lot. It was there, Tsouras testified, that he attempted to stop the suspect. According to Tsouras, as he drew near the suspect, the suspect fired on him. Tsouras immediately accelerated forward and away from the suspect. When Tsouras found his path forward blocked, he exited his vehicle and sought refuge behind the engine block. Meanwhile Tsouras continued to received rounds fired from the suspect. Testimony from Tsouras and physical evidence at the scene suggest at least five rounds were fired during the engagement.

Additional witnesses for the State testified that Bowden was found and captured in the area shortly thereafter. The Defense conceded that Bowden was the person Clark encountered and that Bowden was the person arrested nearby a short time later. State argued that Bowden was the same person encountered by Tsouras. The State also argued that the five rounds fired by Bowden were not warning shots or an attempt to intimidate Tsouras, but rather constituted Bowden's attempt to murder Officer Tsouras.

After careful deliberation by the jury, Bowden was found guilty of all nine charges, including five counts of Felony Discharge of a Firearm.

ARGUMENT

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

This Court should vacate the Defendant's convictions on five counts of felony discharge of a firearm because the convictions merge with the conviction for attempted murder. This is because all convictions stem from a single criminal episode and all felony discharge counts were

necessarily proven by the evidence used to prove attempted murder. "Merger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute." *State v. Diaz*, 2002 UT App 288, ¶17, 55 P.3d 1131. "The protection against double jeopardy is guaranteed in both the federal and Utah state constitutions." *State v. Trafny*, 799 P.2d 704, 709 (Utah 1990) (citing U.S. Const. amend. V; Utah Const. art. I, § 12). To this end, the federal constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life of limb." U.S. Const. amend. V. The analogous clause of the Utah constitution reads "[t]he accused shall not be . . . twice put in jeopardy for the same offense." Utah Const. art. I, § 12.

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

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

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

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

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

omitted)).

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

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

Like in *Irvin*, the conduct in this case lasted mere seconds, and supports only one general intention or plan by the perpetrator. The State's theory of the case was that the five shots were fired with intent to kill Tsouras. There is no way to determine the sequence of the shots, or if one

or another was fired for a different purpose. The underlying objective of the shots, according to the State's theory, was to kill rather than merely intimidate Tsouras.

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

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

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

Where the crimes have multiple variations, however, the court will proceed to the second step and "'consider the evidence[, arguments, and jury instructions] to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial….'" *Chukes*, 2003 UT App 155, ¶10. Utah courts focus on the State's theory when applying the second part of the test. *See State v. Hill*, 674 P.2d 96, 98 (Utah 1983) (considering the variation of aggravated robbery presented to the jury when deciding whether theft was a lesser included offense); *Chukes*, 2003 UT App 155, ¶ 22-27 (focusing on state's theory). A conviction for a lesser offense cannot be upheld "merely because the jury could have found an additional element." *Id*. Instead, a conviction for a lesser must be reversed "unless the jury was 'required to find' the additional element." *Id*.

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

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

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

The State could prove the defendant had the knowledge that an act presented a danger to a person's physical safety by showing he acted with the intent to cause death or knowledge that the nature of his conduct would likely result in death. If the State presented evidence by which a jury could find that the defendant fired a gun in the direction of another person, with the intent to or with knowledge that the action could cause death or serious bodily injury, then each individual discharge would be established by "proof of the same or less than all the facts" required to prove both attempted murder. *Ross*, 951 P.2d at 242. The actus reus of the offense of discharge of a

firearm under subsection (a), namely, to "discharge a firearm in the direction of any person," is an act proven by evidence of the bullet flying from the firearm and striking an object, such a vehicle, in which a person is sitting. Further, the requirement that the defendant acted "knowing or having reason to believe that any person may be endangered by the discharge of the firearm" is encompassed by proof of the intentional or knowing mental state required by attempted murder. Utah Code §76-10-508.1(1).

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

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

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

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

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

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

Further, the Utah Supreme Court's recognition that some crimes are so related as to be appropriate for merger even though they do not meet the section 76-1-402 test further supports the Defendant's argument that the discharge counts should merge with the attempted murder conviction. *See Finlayson*, 2000 UT 10; *State v. Lee*, 2006 UT 5, ¶31, 128 P.3d 1179. Discharge

of a firearm in the direction of a person with the requisite knowledge is so closely related to intentional or knowing attempted homicide that discharge convictions should merge with attempted murder under this rationale. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

Case law from other jurisdictions further supports the Defendant's claim. For example, a defendant could not be convicted in New Mexico for both homicide and causing great bodily harm where both convictions were premised on the unitary act of firing seven gunshots at a vehicle driven by the victim. *State v. Montoya*, 306 P.3d 426 (N.M. 2013); *see also People v. Tallwhiteman*, 124 P.3d 827, 836-37 (Colo. App. 2005), *as modified on denial of reh'g* (holding reckless endangerment is a lesser included offense of assault with intent to cause serious bodily injury because all of the elements are established by "the establishment of every element of first degree assault with intent to cause serious bodily injury"); *Alston v. State*, 643 A.2d 468 (Md.Ct.App. 1994) (holding that reckless endangerment is a lesser-included offense of murder, where the defendant engaged in a shootout, killing bystander); *Montes v. State*, 421 S.E.2d 710 (Ga. 1992) (holding the assault convictions merged with the murder conviction where the evidence used to prove aggravated assault—that the defendant fired a deadly weapon and wounded the deceased victim—was also used to prove that defendant had committed murder).

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

II. IF MERGED, THE CONVICTIONS MUST BE VACATED.

Once a jury returns convictions on multiple charges, the merger issues become ripe for adjudication. *State v. Ellis*, 2014 UT App 185, ¶12, 336 P.3d 26 (citing *State v. Lopez*, 2004 UT

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

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

CONCLUSION

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

Respectfully submitted this 13th day of March, 2017.

/s/ Wesley J. Howard

WESLEY J. HOWARD
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the Salt Lake District Attorney's Office, via the court's electronic filing system, this 13th day of March, 2017.

Stacie Misner

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

WEST JORDAN DEPARTMENT

STATE OF UTAH, PLAINTIFF, VS. JEREMY MICHAEL BOWDEN, DEFENDANT.	Case No. 161400285 Transcript of: MOTION & SENTENCING

BEFORE THE HONORABLE DOUGLAS HOGAN

WEST JORDAN COURTHOUSE
8080 SOUTH REDWOOD ROAD
WEST JORDAN, UTAH 84088

MARCH 23, 2017

TRANSCRIBED BY: Susan S. Sprouse, RPR, CSR

March 23, 2017

P R O C E E D I N G S

* * *

THE COURT: All right. This is case No. 1614000285. That's the case that we're here for sentencing on today. I see there's been a motion filed by the Defense. The State's filed in opposition of that motion. We have other cases that are trailing. Where would you like to start? Makes sense to argue the motion first?

MR. HOWARD: Deal with the motion first.

THE COURT: Okay. Mr. Howard.

MR. HOWARD: Your Honor, Mr. Bowden has been convicted of attempted aggravated murder. And I did notice in my, my memorandum that I misspoke saying that all of the felony charges were necessary for committing Count 1. That's certainly not true of theft -- receipt of a stolen vehicle and obstruction of justice. But in regard to the five counts of felony discharge of a firearm, the -- Count 1 could not stand without conviction or finding of guilt in those five instances.

The -- they're prerequisite to attempted aggravated murder that the State proved that some action was taken by the party, Mr. Bowden in this case, to attempt to take the life of another person. If he had never fired a gun, there would be no Count 1. That's why those five charges should merge into Count 1, the attempted murder charge.

The State makes reference to State v. Rasabout which is a case that has some interesting parallels with this case, but there are also some significant differences. The main difference is as -- and I couldn't, from reading the opinion, I could not see that Mr. Rasabout was ever charged with any other charges other than the firing of the firearm at a house and car. But the defendant in that case was asking the court to merge all of those single incidences of firing a gun into one, all of which had the same elements, all of which were the same charge.

In this case, Mr. Bowden is asking the Court not to merge four of the counts into one but to merge the five felony discharge of a firearm into the Count No. 1, the attempted murder. And that's a significant difference because there's no -- in the Rasabout case, there's no higher degree of felony into which those 12 discharges can be merged. They each stood alone.

Now, the State may want to try to pick one of those of the five firings that were -- Mr. Bowden is convicted of. May want to pick one of those and say, oh, that's the one where he intended to kill Officer Tsouras. But there's no logical or factual basis to support that supposition. It's -- it's purely a supposition if you put -- pick one bullet over the other one.

The theory of the State is that Mr. Bowden fired his -- a firearm at Officer Tsouras with the intent to kill

him. And they -- they are not free to choose which bullet or which firing or the order in which they were fired to determine which one was an attempt to kill Officer Tsouras and then dismiss the others as incidental.

And so we would ask the Court to dismiss the five counts of felony discharge of a firearm, merge them into Count 1, the aggravated murder.

THE COURT: Okay. Thank you, Mr. Howard.

Mr. Evershed.

MR. EVERSHED: Yes, your Honor. There were six shots towards the officer's car. Therefore, we had six counts. We had an attempted aggravated murder, and we have five counts of felony discharge of a firearm. So each of those counts represent under Rasabout a single unit of prosecution. Under Rasabout, 12 shots were fired. The trial court merged all of them down to one, but then the Utah Supreme Court said, no, these are individual units of prosecution. Each one is a -- each discreet shot is a violation of the statute.

So that's how we went forward on the case: Six shots, six charges, one attempted aggravated murder, five a discharge of a firearm, felony discharge of a firearm.

The Defense argues merger, but again under Rasabout, that does not -- that's not allowed. Double jeopardy is not implicated. Again, these are six individual counts and shots. And finally, the single criminal episode I stated, Rasabout was

also inapplicable, because again we have six individual counts.

The State didn't offer an alternative approach, however, in reviewing the PowerPoint presentation and the closing argument that was proffered before the jury. I did see in our argument, again, the shot that was -- that went to the vest was the attempted aggravated murder, which is argued as such.

And then the shot that was -- that went through the headrest, again, that was used in closing argument as well, these are proofs of, you know, attempted aggravated murder.

But then we have other shots. One that went up over by the tire, the roof of the car, two others that we don't know where they hit. Those are separate and distinct units of prosecution. And so as an alternative approach, if your Honor wanted to merge the two that nearly killed the man into attempted aggravated murder, and then we have the other, what would be the remaining four counts of felony discharge of a firearm, again single units of prosecution under Rasabout, the State is okay with that compromise here. But for those reasons, not much more -- no more of a merger than that should occur in this case.

The defendant fired six shots. He did indicate -- and again, the theory, and this was under Rasabout which, you know, I'm -- I'm familiar with. Under Rasabout, the argument to the court, I know the court was addressing, is there is a

difference here. In that when you fire 12 shots at a home, that's different than three. Obviously, the -- the likelihood somebody would be injured, something devastating happening arises exponentially with each shot. And so that individual should, and rightly, be punished, and the State is right in prosecuting that. If we just had two shots here, there could be an argument.

THE COURT: Essentially, the difference between unloading an entire magazine into a home --

MR. EVERSHED: Right.

THE COURT: -- versus firing a single shot?

MR. EVERSHED: Firing a single shot. Yes. And so one should be prosecuted rightfully because of that, because of the risk. In this case, if -- if the defendant shot two rounds at Officer Tsouras and one hit the vest and one hit the headrest, that's -- that could be attempted aggravated murder, which is what we would argue, and maybe that's it.

But in this case he did more than that. And he should be punished and prosecuted -- well, he was prosecuted but convicted and then punished for everything he did, not more, not less, but for everything he did and what he was convicted of. And I think that's the argument there.

THE COURT: Okay. All right.

Anything further, Mr. Howard, on that, on that issue?

MR. HOWARD: Yes, your Honor. I just don't think the

State can properly parse it out that way and determine which shots had a particular intent. It comes down to marksmanship by the theory just presented. If a -- if Mr. Bowden had fired one shot and completely missed the vehicle, or if he had fired a shot and hit the vehicle but nowhere near Officer Tsouras, you can still bet that the State would have still filed attempted aggravated murder charges. So marksmanship should not be the determining factor here. Because Mr. Bowden was lucky or a good marksman or for whatever reason, one of them came dangerously close to taking Officer Tsouras's life, you can't logically determine that that was the bullet where he intended to kill the officer.

THE COURT: And Mr. Howard, your argument here distinguishing between this case and Rasabout is in Rasabout there wasn't a more serious lead count that was charged. It was just the discharge.

MR. HOWARD: Exactly each count.

THE COURT: In this case we have, we have an attempted homicide and that -- that's the difference.

MR. HOWARD: Each count had identical elements to be proven for each of those 12 shots. In this case, Count 1 needed to be the firing of the firearm in order to be supported and to be -- to have a conviction in front of the jury. It's unsupportable without those shots being fired.

Now -- and then my point is that you can't parse it

out and say shot No. 1 or 3 or 5 is the one that hit the headrest or hit the protected vest and the others are just incidental and, therefore, should be charged separately and should be punished separately. But they all were in support of under the State's theory, an intent to kill Officer Tsouras.

MR. EVERSHED: And what I would say in response again in Rasabout, there's no distinction. There's nothing under the law that says, well, if there's a more serious offense, then there's some kind of distinction. No.

In Rasabout they just say, are there individual units of prosecution? That's what it comes down to. And the State's theory here is that, yes, there are. One count, attempted murder, five counts felony discharge, six bullets.

THE COURT: Right.

MR. EVERSHED: Now if there is a compromise there, maybe one of them could merge and, again, that's just if. Again, the State's response is all of them should be separate and distinct.

THE COURT: Right. But in -- just for the purpose of argument here to Mr. Howard's point, if there had been only four shots, we take away the one that hit the vest and the one that hit the headrest, the State still would have charged the lead count as it was charged and now it would have been what, the next closest bullet?

MR. EVERSHED: Well, I think -- again, these are all

hypotheticals, but what could have happened in that case is that obviously that's a more difficult case to prove of attempted aggravated murder. We don't have bullets going right toward his head and chest.

THE COURT: I certainly don't think it would be a stretch to say the State brought a case with a guy running in a moving car and shots fired into the car, that that was attempted homicide.

MR. EVERSHED: Yes, that could have been a theory. But again, if that's one unit of prosecution, one bullet that goes towards him, then the State could only go with attempted aggravated murder or with felony discharge. What makes this case different from that hypothetical is that there wasn't one, there wasn't two, there were six.

THE COURT: Right.

MR. EVERSHED: And this man should face the convictions of all of those six individual things that happened. Just because he didn't fire fine and he shouldn't be punished for having eight, he should be punished and face what he did do, and that's six individual firings of a firearm.

And so the question is: Can the State charge him like that? Yes. There are six distinct things that happened. He pulled that trigger six different times, not two, not 10, but six, and he should face what he needs to face because of that.

THE COURT: Okay.

MR. HOWARD: Your Honor, treating them as separate prosecuted -- prosecutable units leads a person to believe that the State, therefore, since all six of these shots were fired at the officer, that the State could have charged attempted aggravated murder six times rather than -- rather than discharge of a firearm, felony discharge of a firearm. They could have charged attempted aggravated murder six times, but that obviously would have merged into one. They are attempting to avoid the merger issue by parsing out one bullet that has the intent to kill, the other bullets just bad shooting.

MR. EVERSHED: No, what our intent is here, is, again, this isn't marksmanship, this isn't anything else other than what we can legally in law do. We can charge this man with what he did. And then a jury can decide if we've proved it.

In this case, the jury didn't say not guilty, not anything. They said guilty as charged. So the question is here is that do these things merge? And the arguments have been, well, they are all part of one thing. No, they are all individual, different counts, all separate units of prosecution. Under Rasabout, it's absolutely clear, we can charge an individual with what he has done, with each crime that he has committed. In this case he did six of them.

THE COURT: Okay. All right. Um, the way it was

charged, the State used one of the discharges that went towards the attempted aggravated murder which was charged in Count 1. The State in its memoranda has offered an alternative, which is to say because they've argued and they've reviewed the argument that was made at closing argument, that there were two shots and that's the way they argued it, that they agree that it's arguable that one of these counts should be vacated.

I'm going to vacate one of the counts at this point in time based upon the memoranda that has been filed, and I'm going to agree with the State on that point.

I think another court may take another view of this and it may be that they agree with Mr. Howard's argument in totality, that that wasn't the intent of Rasabout or that case; however, at this point in time, I'm going to vacate one count. So that leaves us with Count 1, attempted aggravated murder; Count 2, receipt or transfer of stolen vehicle; Count 3, obstructing justice; and then one, two, three, four felony discharge of a firearm counts. So I've granted in part the Defense's motion but only in part.

MR. EVERSHED: And then, your Honor, there is also --

THE COURT: And then the failure to stop at the command of a law enforcement officer, which should that be -- at this point should that be renumbered or do we skip?

MR. EVERSHED: I think -- I think we could just strike what would be, I think, Count 9, dismiss that.

ADDENDUM E

Utah Code § 76-4-101 (2015)

§ 76-4-101. 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.

Credits

Laws 1973, c. 196, § 76-4-101; Laws 2004, c. 154, § 1, eff. May 3, 2004.

Utah Code § 76-5-202 (2015)

§ 76-5-202. Aggravated murder

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

(d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping;

(e) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Subsection 76-9-704(2)(e);

(f) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

(g) the homicide was committed for pecuniary gain;

(h) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

(i) the actor previously committed or was convicted of:

(i) aggravated murder under this section;

(ii) attempted aggravated murder under this section;

(iii) murder, Section 76-5-203;

(iv) attempted murder, Section 76-5-203; or

(v) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(i);

(j) the actor was previously convicted of:

(i) aggravated assault, Subsection 76-5-103(2);

(ii) mayhem, Section 76-5-105;

(iii) kidnapping, Section 76-5-301;

(iv) child kidnapping, Section 76-5-301.1;

(v) aggravated kidnapping, Section 76-5-302;

(vi) rape, Section 76-5-402;
(vii) rape of a child, Section 76-5-402.1;
(viii) object rape, Section 76-5-402.2;
(ix) object rape of a child, Section 76-5-402.3;
(x) forcible sodomy, Section 76-5-403;
(xi) sodomy on a child, Section 76-5-403.1;
(xii) aggravated sexual abuse of a child, Section 76-5-404.1;
(xiii) aggravated sexual assault, Section 76-5-405;
(xiv) aggravated arson, Section 76-6-103;
(xv) aggravated burglary, Section 76-6-203;
(xvi) aggravated robbery, Section 76-6-302;
(xvii) felony discharge of a firearm, Section 76-10-508.1; or
(xviii) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(j);

(k) the homicide was committed for the purpose of:
(i) preventing a witness from testifying;
(ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;
(iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or
(iv) disrupting or hindering any lawful governmental function or enforcement of laws;

(l) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;

(m) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(n) the homicide was committed:
(i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered; or
(ii) by means of any weapon of mass destruction as defined in Section 76-10-401;

(o) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(p) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(q) the victim was a person held or otherwise detained as a shield, hostage, or for

ransom;
(r) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death;
(s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind; or
(t) the victim, at the time of the death of the victim:
(i) was younger than 14 years of age; and
(ii) was not an unborn child.

(2) Criminal homicide constitutes aggravated murder if the actor, with reckless indifference to human life, causes the death of another incident to an act, scheme, course of conduct, or criminal episode during which the actor is a major participant in the commission or attempted commission of:
(a) child abuse, Subsection 76-5-109(2)(a);
(b) child kidnapping, Section 76-5-301.1;
(c) rape of a child, Section 76-5-402.1;
(d) object rape of a child, Section 76-5-402.3;
(e) sodomy on a child, Section 76-5-403.1; or
(f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.

(3)(a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony.
(b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.
(c)(i) Within 60 days after arraignment of the defendant, the prosecutor may file notice of intent to seek the death penalty. The notice shall be served on the defendant or defense counsel and filed with the court.
(ii) Notice of intent to seek the death penalty may be served and filed more than 60 days after the arraignment upon written stipulation of the parties or upon a finding by the court of good cause.
(d) Without the consent of the prosecutor, the court may not accept a plea of guilty to noncapital first degree felony aggravated murder during the period in which the prosecutor may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).
(e) If the defendant was younger than 18 years of age at the time the offense was committed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

(4)(a) It is an affirmative defense to a charge of aggravated murder or attempted aggravated 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 as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder.

(5)(a) Any aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense does not merge with the crime of aggravated murder.

(b) A person who is convicted of aggravated murder, based on an aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Credits

Laws 1973, c. 196, § 76-5-201; Laws 1975, c. 53, § 1; Laws 1977, c. 83, § 1; Laws 1983, c. 88, § 12; Laws 1983, c. 93, § 1; Laws 1984, c. 18, § 5; Laws 1985, c. 16, § 1; Laws 1991, c. 10, § 8; Laws 1994, c. 149, § 1; Laws 1996, c. 137, § 3, eff. April 29, 1996; Laws 1997, c. 11, § 1, eff. May 5, 1997; Laws 1999, c. 90, § 1, eff. May 3, 1999; Laws 2000, c. 125, § 2, eff. May 1, 2000; Laws 2001, c. 209, § 9, eff. April 30, 2001; Laws 2002, c. 166, § 4, eff. May 6, 2002; Laws 2005, c. 143, § 1, eff. May 2, 2005; Laws 2006, c. 191, § 1, eff. May 1, 2006; Laws 2007, c. 275, § 3, eff. April 30, 2007; Laws 2007, c. 340, § 1, eff. April 30, 2007; Laws 2007, c. 345, § 1, eff. April 30, 2007; Laws 2008, c. 12, § 2, eff. Feb. 26, 2008; Laws 2009, c. 157, § 2, eff. May 12, 2009; Laws 2009, c. 206, § 1, eff. May 12, 2009; Laws 2010, c. 13, § 2, eff. March 8, 2010; Laws 2010, c. 373, § 2, eff. May 11, 2010; Laws 2013, c. 81, § 1, eff. May 14, 2013.

Utah Code § 76-8-306 (2015)

§ 76-8-306. Obstruction of justice in criminal investigations or proceedings --Elements--Penalties--Exceptions

(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense:

(a) provides any person with a weapon;

(b) prevents by force, intimidation, or deception, any person from performing any act that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any person;

(c) alters, destroys, conceals, or removes any item or other thing;

(d) makes, presents, or uses any item or thing known by the actor to be false;

(e) harbors or conceals a person;

(f) provides a person with transportation, disguise, or other means of avoiding discovery or apprehension;

(g) warns any person of impending discovery or apprehension;

(h) warns any person of an order authorizing the interception of wire communications or of a pending application for an order authorizing the interception of wire communications;

(i) conceals information that is not privileged and that concerns the offense, after a judge or magistrate has ordered the actor to provide the information; or

(j) provides false information regarding a suspect, a witness, the conduct constituting an offense, or any other material aspect of the investigation.

(2)(a) As used in this section, "conduct that constitutes a criminal offense" means conduct that would be punishable as a crime and is separate from a violation of this section, and includes:

(i) any violation of a criminal statute or ordinance of this state, its political subdivisions, any other state, or any district, possession, or territory of the United States; and

(ii) conduct committed by a juvenile which would be a crime if committed by an adult.

(b) A violation of a criminal statute that is committed in another state, or any district, possession, or territory of the United States, is a:

(i) capital felony if the penalty provided includes death or life imprisonment without parole;

(ii) a first degree felony if the penalty provided includes life imprisonment with parole or a maximum term of imprisonment exceeding 15 years;

(iii) a second degree felony if the penalty provided exceeds five years;

(iv) a third degree felony if the penalty provided includes imprisonment for any period exceeding one year; and

(v) a misdemeanor if the penalty provided includes imprisonment for any period of one year or less.

(3) Obstruction of justice is:
(a) a second degree felony if the conduct which constitutes an offense would be a capital felony or first degree felony;
(b) a third degree felony if:
(i) the conduct that constitutes an offense would be a second or third degree felony and the actor violates Subsection (1)(b), (c), (d), (e), or (f);
(ii) the conduct that constitutes an offense would be any offense other than a capital or first degree felony and the actor violates Subsection (1)(a);
(iii) the obstruction of justice is presented or committed before a court of law; or
(iv) a violation of Subsection (1)(h); or
(c) a class A misdemeanor for any violation of this section that is not enumerated under Subsection (3)(a) or (b).

(4) It is not a defense that the actor was unaware of the level of penalty for the conduct constituting an offense.

(5) Subsection (1)(e) does not apply to harboring a youth offender, which is governed by Section 62A-7-402.

(6) Subsection (1)(b) does not apply to:
(a) tampering with a juror, which is governed by Section 76-8-508.5;
(b) influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole, which is governed by Section 76-8-316;
(c) tampering with a witness or soliciting or receiving a bribe, which is governed by Section 76-8-508;
d) retaliation against a witness, victim, or informant, which is governed by Section 76-8-508.3; or
(e) extortion or bribery to dismiss a criminal proceeding, which is governed by Section 76-8-509.

(7) Notwithstanding Subsection (1), (2), or (3), an actor commits a third degree felony if the actor harbors or conceals an offender who has escaped from official custody as defined in Section 76-8-309.

Credits

Laws 2001, c. 209, § 10, eff. April 30, 2001; Laws 2001, c. 307, § 2, eff. April 30, 2001; Laws 2003, c. 179, § 1; Laws 2004, c. 140, § 2, eff. May 3, 2004; Laws 2004, c. 240, § 3, eff. March 22, 2004; Laws 2005, c. 13, § 27, eff. March 1, 2005; Laws 2009, c. 213, § 1, eff. May 12, 2009.

Utah Code § 76-10-508.1 (2015)

§ 76-10-508.1. 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).

Credits

Laws 2008, c. 296, § 4, eff. May 5, 2008; Laws 2009, c. 157, § 4, eff. May 12, 2009; Laws 2014, c. 248, § 3, eff. May 13, 2014.

Utah Code § 76-1-401

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

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

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

Credits

Laws 1973, c. 196, § 76-1-401; Laws 1975, c. 47, § 1; Laws 1995, c. 20, § 127, eff. May 1, 1995.

Utah Code § 76-1-402

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

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

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

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

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

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

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

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

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

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

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

Credits

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

Utah R. Evid. 401

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

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

Utah R. Evid. 402

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Utah Constitution;
- a statute; or
- rules applicable in courts of this state.

Irrelevant evidence is not admissible.

Utah R. Evid. 403

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

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

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977)(surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979); State v. Johns, 615 P.2d 1260 (Utah 1980); Reiser v. Lohner, 641 P.2d 93 (Utah 1982).