Case No. 20161019-CA

IN THE

# UTAH COURT OF APPEALS

STATE OF UTAH,
*Plaintiff/Appellee,*

*v.*

JEREMY BOWDEN,
*Defendant/Appellant.*

## Brief of Appellee

Appeal from convictions for attempted aggravated murder, a first degree felony; receiving a stolen vehicle and obstruction of justice, both second degree felonies; four counts of discharging a firearm, all third degree felonies; and failure to stop at the command of law enforcement, a class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Douglas Hogan presiding


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[1] Unless otherwise noted, the State cites to current versions of these statutes for the Court's convenience.

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## INTRODUCTION

While running from the police, Defendant fired six shots at Officer Cory Tsouras, hitting him in the chest once. Fortunately, Officer Tsouras was wearing a bullet-proof vest. At trial, the State presented 18 witnesses and 191 exhibits that detailed the shooting. The State also presented evidence of Defendant's flight from police and how Defendant was identified as the shooter.

On appeal, Defendant first challenges his attempted aggravated murder conviction, arguing that insufficient evidence supported his identification as the shooter. In an unpreserved claim, Defendant challenges his obstruction of justice conviction, arguing that, like his attempted

aggravated murder conviction, insufficient evidence supported his identification as the person who discarded the gun. Both claims fail for the same reasons. A video showed Defendant firing a gun in the direction of Tsouras, the gun used in the shooting was found near where Defendant jumped a retaining wall while fleeing police, Defendant was the only person in the area fleeing, and one of the bullet casing recovered from the scene matched a bullet found in the truck Defendant had stolen.

Defendant next challenges the trial court's admission of the Federal bullet that police found in Defendant's pocket when they arrested him. Defendant argues that the trial court should have excluded the bullet as irrelevant and unfairly prejudicial. But the bullet was circumstantial evidence linking Defendant to the crime—it was the same brand as bullets found in the truck Defendant had stolen.

Last, Defendant argues that the trial court should have merged all five of his felony discharge of a firearm convictions with his attempted aggravated murder conviction. But the aggravated murder statute explicitly prohibits merging felony discharge of a firearm with aggravated murder. Defendant got a windfall when the court merged one.

## STATEMENT OF THE ISSUES

*Issue 1a*. Defendant was tried for the attempted murder of police officer Tsouras. Among other evidence, (1) a video showed Defendant firing a gun in the direction of Tsouras, (2) Defendant was the only person in the area fleeing, and (3) one of the bullet casings recovered from the scene matched a bullet found in the truck Defendant had stolen. Was the evidence sufficient to support the jury's attempted aggravated murder verdict?

*Standard of Review*. This Court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (quotation marks and citation omitted).

*Issue 1b*. Was the evidence so plainly insufficient that the trial court erred in submitting the obstruction of justice charge to the jury where the evidence was sufficient to submit the obstruction charge to the jury?

*Standard of Review*. On unpreserved sufficiency challenges, Defendant "must demonstrate first that the evidence was insufficient to support a conviction," and "second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *See State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346.

*Issue 1c.* Did the trial court erroneously deny Defendant's motion to exclude the Federal bullet found in his pocket?

*Standard of Review*. This Court upholds the trial court's evidentiary ruling unless "the trial court so abused its discretion that there is a likelihood that injustice resulted." *State v. Otterson*, 2008 UT App 139, ¶14, 184 P.3d 604 (quotations and citations omitted).

*Issue 2*. Did the trial court erroneously deny Defendant's motion to merge his four felony discharge of a firearm convictions with his attempted aggravated murder conviction?

*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, ¶6, 122 P.3d 615.

## STATEMENT OF THE CASE

### A. Summary of relevant facts.[2]

While running from the police, Defendant shot Officer Cory Tsouras in the chest. R801-07,816-17.

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[2] Consistent with appellate standards, the facts are recited in the light most favorable to the verdict. *State v. Maestas*, 2012 UT 46, ¶3, 299 P.3d 892.

In October 2015, Defendant stole a truck and "six or seven" guns from the truck owner's house. R1121-22. However, Defendant did not steal from the truck owner a 9 mm handgun—the type of weapon used to shoot and shoot at Officer Tsouras. *Id*., R1127; State's Exhibit (SE)161.

A few weeks later, on October 30, 2015, around 8 p.m., Defendant, wearing a bandana, a dark leather jacket, a red or maroon shirt, blue jeans, and white shoes, drove the stolen truck to a business center at a strip mall. R843, *see also* 1310 (At trial, Defendant admitted that he was at the business center and on surveillance video); SE12,151-153.

Officer Nathan Clark was in the business center parking lot when he noticed the stolen truck. R843; SE11,143. As Clark investigated whether the truck was stolen, Defendant walked up to the truck and opened the driver side door. R854; SE11. When Defendant saw Clark, he ran. R854; SE11. Clark informed dispatch that he was chasing a white male in his thirties wearing blue jeans, a bandana, and a black leather jacket. R855; SE11.

Defendant ran through two adjacent parking lots towards a retail store. R855-56.

Officer Cory Tsouras, in response to Clark's dispatch parked nearby and could see that Defendant—and only Defendant—was running from Clark. R789-90; SE11. Tsouras watched Defendant run to the adjacent retail

store parking lot. R797,855-56. There, Defendant bumped into the retail store's night manager, and told her to "get the fuck out of my way." R1195. The manager did not see anyone else running in the area and described Defendant as "taller," with a "pointed nose," "sharp looking, almost like wolf's eyes," wearing "dark pants," and a dark jacket. R1195,1198-99.

As Defendant ran through the retail store's parking lot, Tsouras drove to the retail store to pursue Defendant. R798. When Tsouras saw Defendant—a male matching the description Clark gave, wearing a black jacket, blue jeans, and a "beanie, skull cap-type head gear"—run into tire store parking lot, he pursued him in his patrol car. R797-98,800; SE142.

Gary Midgely, who was across the street, watched Defendant run from the retail store parking lot to the tire store. R938; SE13,145. Midgely saw only Defendant running in the area. R940. Midgely described Defendant wearing dark pants and a jacket and was not "100 percent sure," but thought the jacket was light-colored. R941,953-54. Midgely explained that he was focused on what Defendant was doing, not what he was wearing. R952. Midgely saw Tsouras's patrol car catch up with Defendant in the tire store's parking lot, but the patrol car blocked his view of Defendant. R941-42,943; SE145. However, Midgely could still see Tsouras's patrol car and heard six to eight

rapid gunshots as soon as Tsouras's patrol car was parallel with Defendant. R942-43,944; SE145.

When Defendant ran on the passenger side his patrol car, Tsouras saw the muzzle of Defendant's gun flash and radioed "shots fired, shots fired." R801-02; SE11. It was 8:32 p.m. R1160; SE11. Tsouras did not stop to engage Defendant, but instead drove away from Defendant because the patrol car is "literally a coffin." R803,943; SE143. As he drove to the adjacent carwash parking lot, Tsouras heard Defendant fire four more times and saw three more muzzle flashes from Defendant's gun. R804-05.

Officer Andrew O'Gwin responded to the tire store parking lot just as Tsouras drove away and Defendant continued to fire at Tsouras. R945,1210. O'Gwin saw Defendant—wearing blue jeans, a dark hoodie, and white shoes—shoot his gun multiple times. R1210-12,1223; SE147.

Defendant fired six shots at Tsouras. R1052-55,1072. "Every single window" in Tsouras's patrol car was either "blown out or shattered." R863,1056; SE33. Four bullets hit Tsouras's patrol car; one of those bullets hit Tsouras in the chest. R1095-96; SE136-141,156,157.

The bullet that hit Tsouras entered the front passenger-side door of his patrol car, went through the laptop sitting in the front passenger seat, and hit

Tsouras in the chest. R1081-82,1091-92; SE95,110-114. Tsouras' bulletproof vest stopped the bullet. R816-17;R154,157; SE135-141,157.

A second bullet hit the passenger-side back window and ricocheted off the printer that sat on top of the front passenger seat headrest. R1080-81,1086-91,1098; SE78-83,100-109. The bullet then fragmented into two pieces. R1080-81. Both bullet fragments entered Tsouras's headrest, with one lodging in Tsouras's headrest and the other exiting out the back driver-side window. R1081; SE95. The third bullet hit the passenger-side front wheel well. R1060,1081-96; SE48,91-93,115-118. The fourth bullet hit the passenger-side top right corner of the patrol car. R1060-61,1083,1096; SE49,89,90.

The fifth and sixth bullets did not hit either Tsouras or the patrol car, but their casings were found in the tire store's parking lot. R1052-55; SE13-19,21-28,30,31. All the bullets came from the same Hi-point 9 mm handgun. R1072-73. One bullet was a 9 mm Ruger and the other five bullets were 9 mm Winchesters. R19,22,23,26,28,31.

After shooting Tsouras, Defendant ran and disappeared from Tsouras's view. R804. Tsouras thought he saw Defendant at the carwash and shot at the person that he thought was Defendant, but instead of shooting Defendant, Tsouras mistakenly shot an innocent bystander. R807.

However, Defendant did not run towards the carwash. He ran to the north side of the tire store parking lot. R1210-11; SE147. O'Gwin saw Defendant running and commanded him to "Get on the ground" several times. R1212. Defendant ignored O'Gwin's commands and ducked behind a dumpster. R1213-14; SE147. Defendant then fired at O'Gwin and jumped the retaining wall into the Park Station Apartments. R1213-14; SE147. O'Gwin's dash cam did not capture Defendant's face, but showed Defendant wearing blue jeans, a dark jacket, and white shoes and firing his gun towards the carwash—the same direction that Tsouras drove—and jumping the retaining wall. R804-05; SE147.

One minute after Tsouras radioed "shots fired," a containment area was set-up. R1160-62; SE11. A containment area is like a "human fence," where officers are positioned to keep an area enclosed to contain a potential suspect. R901,999,1161-62. Over thirty officers responded to the containment area that was north, east, west, and south of the tire store. R1160-61. Officers stationed in the containment area radioed that they saw Defendant north of the tire store near the Brighton Place Apartments. R902-03; *see* SE2.

Two officers stationed at the Brighton Place Apartment as part of the containment area saw Defendant—bald, wearing a maroon t-shirt, and jeans—jump over a fence into the Brighton Place Apartments and run.

R968,972-73,989-990. The officers chased Defendant through the apartment complex and found him in the courtyard. R973. When one officer asked Defendant for his name and tried to detain him, Defendant ran. R974-76. The officers then chased Defendant through the apartment complex. R978-979. As they chased him, both officers yelled at Defendant to "stop" and "taser, taser." R976. One officer deployed his taser and hit Defendant, but Defendant ripped the taser cords off and kept running. R976-77. The officers chased Defendant to the back of the apartment complex and found him pacing by the fence line. R979,998; SE3. One officer told Defendant multiple times to "get on the ground," but Defendant ignored him. R980. The other officer then tased Defendant twice. *Id*. The officers then arrested Defendant. *Id*. At the time of his arrest, Defendant's hands were bloodied, and a .45 caliber Federal bullet was found in his pocket. R1002, 1164; SE121-122. Twenty-two minutes separated the shooting and Defendant's arrest. R1160.

After Defendant's arrest, the stolen truck was searched. Defendant's identification, Ipad, fifteen guns, gun parts, and various makes, calibers, and types of ammunition, including four 9 mm bullets and various calibers of Ruger, Winchester, and Federal bullets, were found. R1105-14,1136-40; SE73,160-189. Some, but not all, of the guns belonged the truck's owner. R1121-30. But the truck's owner had never owned a 9 mm handgun or 9 mm

ammunition. R1127,1130. One of the 9 mm bullets found in the truck was made by the same manufacturer as one of the bullet casings found at the shooting scene. R1146-1148; SE19,189

The Park Station Apartments—where Defendant jumped the retaining wall—were also searched. R911-13. Police found a Hi-point 9 mm handgun and its magazine on top of the covered parking near the place where Defendant jumped the retaining wall. R912-13; SE144; *see also* R1068-69 (At trial, Defendant stipulated that this weapon was used in the shooting). After the Park Station Apartments and the rest of the containment area were searched, approximately sixteen minutes after Defendant's arrest, the containment area was dismantled. R1187.

The gun, magazine, and bullet casings recovered from the shooting scene were tested for touch DNA. R921-22. The DNA tests excluded Defendant from the magazine and could neither include or exclude Defendant from the gun and the casings. R923-26.

**B. Summary of proceedings and disposition of the court.**

Defendant was charged with attempted aggravated murder, a first degree felony; receiving a stolen vehicle and obstructing justice, both second degree felonies; five counts of felony discharge of a firearm, all third degree

felonies; and failure to stop at the command of law enforcement, a class A misdemeanor. R35-37.

**Motion to exclude the Federal bullet.** During trial, Defendant moved to exclude the .45 caliber Federal bullet found in his pocket when he was arrested. R955. Defendant argued that admitting the bullet would be more prejudicial than probative under Utah R. Evid. 403. *Id*. The court denied Defendant's motion. R964. The court did not rule that the evidence was not unfairly prejudicial given the totality of the evidence. *Id*.

**Directed verdict motion.** At the close of the State's case, Defendant moved for a directed verdict. R1225. Defendant argued that the State had not proven that he was the shooter. *Id*. In response, the State argued that Defendant's identity was established by O'Gwin's dash cam showing Defendant wearing exactly what he's wearing at the business center and firing in Tsouras' direction, that Defendant was found shortly after the shooting in the containment area, and that Defendant was the only person seen running through the tire store parking lot. R1225-26.

The trial court denied the motion. *Id*. The court acknowledged that "some" descriptions changed "from witness to witness." R1226. However, the court found that there was "sufficient evidence" for a reasonable jury to convict Defendant even with the inconsistent descriptions because each

witness "had an opportunity" to observe Defendant and the State has "put on a prima facie case … for each of the counts as charged." *Id*.

The jury then convicted Defendant as charged. R419-21.

**Defendant's merger motion.** Following the jury's verdict, Defendant moved to merge his five felony discharge of a firearm convictions with his attempted aggravated murder conviction. R435-45. The State opposed the motion. R448-51. But the State argued in the alternative that it was "fair to merge a single count of discharge of a firearm into the attempted aggravated murder charge and vacate that single count" because the basis for attempted aggravated murder could have been either the bullet that went into the driver-side headrest or the one that hit Tsouras. R451.

The court agreed with the State's alternative argument. R490-91. The court merged one count of felony discharge of a firearm into Defendant's attempted aggravated murder conviction then vacated that one count of felony discharge of a firearm. R491.

**Sentencing.** For his attempted aggravated murder conviction, the court sentenced Defendant to five-years-to-life in prison. R457. For his receiving a stolen vehicle and obstructing justice convictions, the court sentenced Defendant to two terms of one-to-fifteen-years in prison. R457-58. For his four felony discharge of a firearm convictions, the court sentenced

Defendant to four terms of zero-to-five-years in prison. R458. The court ordered Defendant's attempted aggravated murder, receiving a stolen vehicle, and obstructing justice convictions to run consecutively, and his felony discharge of a firearm convictions to run concurrently to one another and to his other convictions. R458. For his failure to stop at the command of law enforcement conviction, the court ordered Defendant to serve 365 days in jail. R1395.

Defendant timely appealed. R466-67.

## SUMMARY OF ARGUMENT

**Point 1.** Defendant challenges his attempted aggravated murder and obstruction of justice convictions. He also challenges the trial court's denial of his motion to exclude the Federal bullet found in his pocket.

In a preserved claim, Defendant argues that insufficient evidence supported his attempted aggravated murder conviction because the evidence was too circumstantial to identify him as the person who shot Officer Tsouras. Defendant's claim fails. It is well-settled that circumstantial evidence alone is sufficient to establish guilt. And here, Defendant's identification was supported by, among other evidence, multiple witnesses' testimony that a person dressed the same or similarly to Defendant was the only person running from police and shot in Tsouras's direction, videos, that

that one of the bullets found in the truck Defendant stole was made by the same manufacture as one of the bullet casings found at the scene, and that Defendant was arrested with bloody hands, a bullet in his pocket, and close in time and proximity to the shooting scene.

In an unpreserved claim, Defendant argues that insufficient evidence supported his obstruction of justice conviction because, like his attempted aggravated murder conviction, the evidence was too circumstantial identify him as the person who discarded the gun used to shoot Tsouras. On this record, Defendant cannot show that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury. Ample evidence supported that Defendant discarded the gun, including that the gun used to shoot Tsouras was found next to where Defendant jumped the retaining wall between the tire store and the Park Station Apartments.

Defendant argues under Utah R. Evid. 401, 402, 403, and 404 that the trial court erred when it did not exclude the Federal bullet found in his pocket. Rules 401, 402, 403, and 404 apply to extrinsic evidence—evidence of *other* bad acts. Here, the bullet was intrinsic to Defendant's crimes, thus, Utah R. Evid. 401, 402, 403, and 404 do not apply. The trial court properly admitted the bullet where it was found on Defendant's person, tied him to the stolen

truck, and was evidence of his access to and familiarity with guns and ammunition.

**Point 2.** Below, the trial court merged one of Defendant's five felony discharge of a firearm convictions with his attempted aggravated murder conviction. On appeal, Defendant argues that the trial court erred when it did not merge his remaining four felony discharge of a firearm convictions with his attempted aggravated murder conviction.

Defendant's claim fails because the aggravated murder statute explicitly prohibits merger of felony discharge of a firearm and aggravated murder. And Defendant's conviction for the attempt crime does not change that analysis where a conviction for attempted aggravated murder must satisfy the aggravated murder statute elements, except that the murder need not be completed.

# ARGUMENT

## I.

### THE STATE PRODUCED AMPLE EVIDENCE TO LINK DEFENDANT TO THE SHOOTING OF A POLICE OFFICER AND CONCEALING THE EVIDENCE OF THE SHOOTING.

Defendant challenges the sufficiency of the evidence to support his attempted aggravated murder and obstruction of justice convictions. Br.Aplt.13-30. In a preserved claim, Defendant argues that insufficient evidence supported his attempted aggravated murder conviction because the evidence was too circumstantial to identify him as the person who shot Officer Tsouras. Br.Aplt.13-27. In an unpreserved claim, Defendant argues that insufficient evidence supported his obstruction of justice conviction because, like his attempted aggravated murder conviction, the evidence was too circumstantial to identify him as the person who discarded the gun used to shoot Tsouras. Br.Aplt.27-30. Defendant also argues that the trial court erroneously rejected his argument that evidence that police found the Federal brand bullet in his pocket was more prejudicial than probative. Br.Aplt.30-43.

But the evidence showed, among other things, that a person dressed the same or similarly to Defendant was the only person running from police and shot in Tsouras's direction. Police also found a 9mm bullet casing at the scene that was made by the same manufacture as one of the four 9mm bullets found in the truck Defendant had stolen. The truck owner had never owned

a 9mm gun. While the casings found at the scene were not from Federal brand bullets, there were Federal brand bullets in the truck. Finding a Federal brand bullet in Defendant's truck was further circumstantial evidence linking him to the truck where police found a 9mm bullet bearing the same marking as those used to shoot and shoot at Officer Tsouras.

### A. Ample evidence supports Defendant's attempted aggravated murder conviction.[3]

When reviewing the sufficiency of the evidence, this Court gives "substantial deference to the jury." *State v. Ashcraft*, 2015 UT 5, ¶18, 349 P.3d 664 (quotation and citation omitted). This Court "reviews the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Maestas*, 2012 UT 46, ¶177, 299 P.3d 892 (quotation and citation omitted). The existence of "contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict." *State v. Howell*, 649 P.2d 91, 96 (Utah 1982). So reviewed, evidence will not support a jury verdict only when it "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (quotation and citation omitted). Thus, this Court must affirm if "*some*

[3] This Point responds to Defendant's Point I. *See* Br.Aplt.13-30.

evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Maestas*, 2012 UT 46, ¶177 (citation omitted) (emphasis added).

It makes no difference whether the evidence is solely circumstantial. It is "well-settled" that circumstantial evidence alone is sufficient to establish guilt. *State v. MacNeill*, 2017 UT App 48, ¶57, 397 P.3d 626 (citation and quotation omitted). The State may present "a mosaic of circumstantial evidence that considered as a whole constitutes proof beyond a reasonable doubt." *Id.* (quotation and citation omitted). "Circumstantial evidence may even be more convincing than direct testimony." *State v. Housekeeper*, 588 P.2d 139, 140 (Utah 1978).

It is also "well-established" that identification can be proven from circumstantial evidence. *State v. Isom*, 2015 UT App 160, ¶23 n.2, 354 P.3d 791. A "direct, in-court identification, therefore, is not required." *Id.* A "witness need not physically point out a defendant so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime." *Id.* (quotations and citation omitted); *see also United States v. Smith*, 134 F.3d 384, *3, 1998 WL 33862, 98 CJ C.A.R. 548 (10th Cir. Jan. 29, 1998) ("[T]here is no requirement of an in-court identification when other evidence permits the inference that the defendant is the person who committed the

offense."); *United States v. Weed*, 689 F.2d 752, 754 (7thCir.1982) ("[I]dentification can be inferred from all the facts and circumstances that are in evidence.").

Here, more than "*some* evidence" established that Defendant shot and shot at Officer Tsouras. *See Maestas*, 2012 UT 46, ¶177 (emphasis added). Multiple witnesses described and video recordings captured a single person wearing jeans, a dark jacket, bandana, red or maroon shirt, and white shoes; when he was arrested, Defendant was still wearing jeans, a red shirt, and white shoes. R797,855,867,941,973,1198-99,1210; SE12,147.

Defendant, who admits that he was at the business center, was first captured on the business center's surveillance video wearing a bandana, leather jacket, red or maroon shirt, blue jeans, and white shoes. R1310; SE12. Clark, who saw Defendant at the business center, described Defendant as a white male, in his thirties, wearing blues jeans, a bandana, and a leather jacket. R855. The night manager described the person she saw as "taller," with a "pointed nose," "sharp looking …wolf's eyes," wearing dark pants," and a dark jacket—a description that matches Defendant's facial features and clothing. R1195,1198-99; SE120. Tsouras and O'Gwin both described a person dressed the same or similarly to Defendant. Tsouras described the person he saw as wearing a "black jacket," "blue jeans," and "a beanie—skull cap—type

headgear." R797. O'Gwin described the person he saw wearing blue jeans and a dark hoodie. R1210. And although O'Gwin's dash cam did not capture Defendant's face, it captured a person dressed like Defendant—wearing a dark jacket, blue jeans, and white shoes. SE147. Moreover, when Defendant was arrested, he was wearing a red or maroon t-shirt and blue jeans—exactly what he was wearing at the business center. R973; SE12.

The business center's surveillance video and O'Gwin's dash cam match the witnesses' descriptions. The videos and Defendant's post-arrest photo also show the same person. SE12,120,151-153. The witness descriptions are consistent and match what Defendant was wearing at different points in his crime spree. At the beginning of his crime spree, Defendant was wearing exactly what Clark, the night manager, Tsouras, and O'Gwin described and the business center and O'Gwin's videos captured. At his arrest, Defendant was wearing the same red or maroon t-shirt, blue jeans, and white shoes that he wore at the business center, on O'Gwin's dash cam video, and that the arresting officer described. Merely because Defendant started at the business center wearing a bandana, jacket, blue jeans, red or maroon shirt, and white shoes, but was arrested without the bandana or jacket, but still wearing blue jeans, a red or maroon shirt, and white shoes does not materially undermine the identification. It would have been reasonable for the jury to infer that

Defendant discarded his jacket and bandana as he ran. *See Ashcraft*, 2015 UT 5, ¶18 (reasonable inferences may be drawn from circumstantial evidence). As the arresting officer explained, when suspects run from the police they often discard items and items like hats are easily lost. R985.

The identification was also not materially undermined by Midgely's testimony that he "thought" the person he saw running from police was wearing a light-colored jacket, not a dark jacket like the other witnesses described. R952-53. *See Brown,* 948 P.2d at 343 (variation in witnesses testimony does not make it "sufficiently inconclusive" or "inherently improbable.") (quotation and citation omitted); *Howell*, 649 P.2d at 96 ("existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict") (quotation and citation omitted). As Midgely explained, he was not focused on what Defendant was wearing, but on what he was doing. R952-53. Midgely's vantage point and the lighting also explain the difference in his description—he was the furthest away and watching Defendant run at night through parking lots. R938-942; SE13 (taco bell across the street from shooting site),145. And the remaining witnesses were materially consistent with each other.

O'Gwin's dash cam video also supports the identification of Defendant as the shooter. As stated, the dash cam did not capture Defendant's face. But

it did capture a person dressed in the same clothes that Defendant wore at the business center firing his gun in the direction that Tsouras retreated when Defendant started shooting. R804-05,1211-13,1221-23, SE12,142,147.

The bullet casings found at the scene and the ammunition found in truck Defendant had stolen also linked him to the crimes. Defendant admitted at trial that he was connected to the stolen truck. SE73. Indeed, Defendant's identification and Ipad were found inside. R1105; SE73,160. And the stolen truck connects Defendant to the shooting. One of the bullet casings found at the scene matched one of the four 9 mm bullets found in the stolen truck. R1147-48. The truck's owner testified that the 9 mm bullets were not his, and that he had never owned a 9 mm gun. R1130. The stolen truck also contained various calibers of Winchester ammunition—the other type of 9 mm ammunition used in the shooting. R110, SE173-175. And like the .45 caliber Federal bullet in Defendant's pocket, the stolen truck contained Federal bullets. R1112; SE175,176,179,186,189.

Additionally, Defendant's flight from police is evidence that he was the one who shot Tsouras. *State v. Franklin*, 735 P.2d 34, 38-39 (Utah 1987) (*overturned on other grounds by State v. Robertson,* 2017 UT 27); *State v. Bales*, 675 P.2d 573, 574 (Utah 1983). Defendant was the only person in the area running and the only person in the containment area that matched the

shooter's description. R795,940,1162-63,1195,1214; SE147. Defendant was arrested only twenty-two minutes after the shooting, in the containment area, near the shooting site, with bloodied hands and a bullet in his pocket. R980,1002,1160,1164; SE121,122.

Last, Defendant offered no innocent explanation for running from police or for the injuries to his hand. *Compare* SE12,151-153 *with* 120-122.

Thus, the evidence—the surveillance and dash cam videos, the witness testimony identifying a person wearing the same or similar clothing, that one of the 9 mm bullets at the scene was made by the same manufacteur as one of the four 9 mm bullets found in the truck Defendant stole, that Defendant was the only person in the area, Defendant's flight from police, Defendant's own admissions, and that Defendant was arrested with bloody hands, a bullet in his pocket, and close in time and proximity to the shooting scene—established that Defendant shot Tsouras.

Regardless, Defendant argues that the evidence was insufficient because there were some inconsistencies in the witnesses' testimony describing Defendant. Br.Aplt.22-27. Inconsistencies are not enough to disturb the jury's verdict—the inconsistencies must be improbable with no other circumstantial or direct evidence supporting the verdict. *State v. Prater*, 2017 UT 13, ¶¶32,42 392 P.3d 398. But Defendant's argument focuses only on

alleged inconsistencies and ignores the totality of the evidence supporting his identification. *See MacNeill*, 2017 UT App 48, ¶57 (To prove guilt, the State may present "a mosaic of circumstantial evidence."). And as explained, ample evidence supports Defendant's identification. Thus, Defendant's claim fails.

### B. The trial court did not plainly err by not sua sponte taking the obstruction of justice charge from the jury.

For the first time on appeal, Defendant challenges his obstruction of justice conviction, arguing that there was insufficient identification evidence to show that he discarded the gun. Br.Aplt.27-30. Defendant's claim fails because he cannot show plain error—obvious, prejudicial error.

#### 1. Defendant's claim is unpreserved.

Defendant argues that his claim was preserved by his trial counsel's directed verdict motion. Defendant is mistaken.

A party generally cannot raise an issue on appeal that it did not properly preserve in the trial court. *Oseguera v. State*, 2014 UT 31,¶10, 332 P.3d 963. To preserve an issue for appeal, a party must present the issue in "'the district court in such a way that the court has an opportunity to rule on [it].'" *Id.* (*quoting Gressman v. State,* 2013 UT 63, ¶45, 323 P.3d 998). In other words, a party's objection must be both timely *and specific*. *See id.* The specificity requirement prevents a party from raising an issue on one ground but

arguing another ground on appeal. *See id.* (party objecting "on one ground does not preserve any alternative grounds for objection for appeal") (*quoting State v. Low*, 2008 UT 58, ¶17, 192 P.3 867).

In his directed verdict motion, Defendant argued that "there's not sufficient evidence for a reasonable jury to find beyond a reasonable doubt that [Defendant] is, in fact, the person that fired at the officer that day." R1225. Defendant did not argue, as he does on appeal, that there was insufficient evidence to prove that he was the person who discarded the gun—the evidentiary basis for the obstruction charge. Br.Aplt.27-30. Defendant did not present this issue to the trial court, and the trial court did not have the opportunity to rule on it. *See Oseguera*, 2014 UT 31,¶10. Defendant's claim is thus unpreserved. *See id.*

**2. Defendant has not shown—and cannot show—that the trial court should have taken the obstruction of justice charge from the jury on its own motion.**

To prevail on a preserved insufficiency claim on appeal, Defendant must show that the "evidence…is sufficiently inconclusive" or "inherently improbable that reasonable minds must have entertained reasonable doubt." *State v. Mead*, 2001 UT 58, ¶65, 27 P.3d 1115 (citations and quotations omitted). When, as here, Defendant's claim is unpreserved, Defendant's burden is even higher. Defendant must also show that the "insufficiency was so obvious and

fundamental that the trial court erred in submitting the case to the jury." *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346.

Defendant has shown no obvious and fundamental insufficiency of the evidence. O'Gwin testified that, and his dash cam captured, Defendant, shooting his gun toward Tsouaras, then jumping the retaining wall between the tire store and the Park Station Apartments. R1213-14; SE147. Defendant's gun and magazine were found practically next to where he jumped the retaining wall. R912-13; SE144.

And as explained, Defendant's identification is supported by the surveillance and dash cam videos, the seven witnesses descriptions of Defendant, that he was the only person in the area, he fled from police, he had access to and familiarity with guns and ammunition, and that he was arrested near the shooting scene only twenty-two minutes after the shooting, his hands bloodied and a bullet in his pocket. R795,797,855,941,953-54,972-73,1002,1105-14,1160,1162-64,1195,1210-13; SE12,121-122,147,151-153,158160-189. Given this evidence, the trial court did not err—plainly or otherwise—by not sua sponte taking the charge from the jury.

Regardless, Defendant argues that this evidence is insufficient to prove that Defendant discarded the gun. Br.Aplt.31-32. But direct evidence of Defendant discarding the gun was not required. *See MacNeill*, 2017 UT App

48, ¶57 (circumstantial evidence alone sufficient to prove guilt). The totality of the circumstantial evidence was more than enough to prove Defendant's identity. *See id*. And the jury agreed. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses." *Mead*, 2001 UT 58, ¶67. That is exactly what the jury did here. *See State v. Johnson,* 2015 UT App 312, ¶12, 365 P.3d 730 (a jury is not obligated to believe Defendant's version of events). Thus, Defendant cannot show that the evidence was insufficient, let alone obviously and fundamentally so. *See Holgate*, 2000 UT 74, ¶17.

### C. The trial court acted well within its discretion when it denied Defendant's motion to exclude the Federal bullet because the bullet was evidence that linked Defendant to the crimes.[4]

Defendant argues that the trial court erred by not excluding the Federal bullet found in his pocket when he was arrested. He argues that the bullet was inadmissible under rule 404(b) as evidence of another crime. He argues that the bullet was evidence of his proclivities. Br.Aplt.30-44. Defendant's claim fails because rule 404 does not apply to evidence that is intrinsic to the

[4] This Point responds to Defendant's Point II. *See* Br. Aplt. 30-44.

charged crime. And the Federal bullet was intrinsic, not extrinsic, to Defendant's crimes.[5]

Rule 404(b), Utah Rules of Evidence, provides that evidence "of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Utah R. Evid. 404(b)(1). To determine whether a defendant's other bad acts are admissible under rule 404(b), the trial court must determine whether the evidence is offered for a genuine, noncharacter purpose; whether the evidence is relevant under rule 402 to a contested issue; and whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice under rule 403. *See State v. Lucero*, 2014 UT 15,¶¶14, 17, 328 P.3d 841 (*abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016).

But it is "well-settled" that rule 404(b) applies to the admissibility of evidence *extrinsic* to the charged offenses and does not apply to "evidence that is intrinsic to the crime charged." *United States v. Parker*, 553 F.3d 1309,1314 (10th Cir. 2009) *accord United States v. Green*, 175 F.3d 822,831 (10th

[5] Below, the State argued that the bullet was admissible under Utah R. Evid. 404(b). R955-64. This Court can affirm any on basis apparent in the record. *Bailey v. Bayles,* 2002 UT 58, ¶13, 52 P.3d 1158.

Cir. 1999). *See also Lucero*, 2014 UT 15, ¶14 n.7 (explaining that "rule 404(b) applies only "'to evidence that is extrinsic to the crime charged'") (quoting *United States v. Mower*, 351 F.Supp.2d 1225, 1230 (D. Utah 2005)); *State v. Burke*, 2011 UT App 168, ¶65, 256 P.3d 1102 (same). Evidence is extrinsic "[w]hen the other crimes or wrongs occur at different times and under different circumstances from the offense charged." *Burke*, 2011 UT App 168, ¶65. Evidence is intrinsic if it is "directly connected to the factual circumstances of the crime," *Parker*, 553 F.3d at 1314 (citation omitted); "necessary to complete the story of the crime," *United States v. McKinley*, 647 Fed. Appx. 957,962 (11thCir. 2016); "inextricably intertwined with the evidence of the crime charged," *Burke,* 2011 UT App 168, ¶65 (quotation and citation omitted); or provides "contextual or background information to the jury." *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011).

Here, the Federal bullet was intrinsic, not extrinsic, to Defendant's crimes. It was not another crime or wrong that occurred at a different time and circumstance from the offenses charged. It was part of Defendant's crimes. *See Burke*, 2011 UT App 168, ¶65.

Twenty-two minutes after Defendant shot Tsouras, police found the bullet in Defendant's pocket when they arrested and searched him. R1002,1160. Various calibers of the same brand of ammunition were found in

the truck Defendant stole and parked at the business center. R1105-14,1136-40; SE160-189. This evidence ties Defendant to the business center, where he ran from Clark, just before shooting Tsouras. R854; SE11. The bullet also links him to the stolen truck and the guns and ammunition inside of it. One of the 9 mm bullets found inside of the truck matched one of the bullets fired at Tsouras. R1146-48; SE189. And the truck contained various calibers of Winchester ammunition, the same manufacturer of the other five bullets shot at Tsouras. R1110; SE173-176. By linking Defendant to the guns and ammunition in the truck, the State provided further proof that it was Defendant who shot at Tsouras.

Additionally, because Defendant had the bullet in his pocket and the truck he stole was filled with guns and ammunition proved that he had access to guns and was familiar with them. Defendant's access and familiarity is further proof his identity as the shooter. Thus, the Federal bullet was directly connected to the factual circumstances of Defendant's crimes, "inextricably intertwined" with the evidence, and provided the jury with contextual information. *See Irving*, 665 F.3d 1184; *Parker*, 553 F.3d at 1314; *Burke,* 2011 UT App 168, ¶65; *McKinley*, 647 Fed. Appx. at 962.

Defendant also argues that the trial court should have excluded the evidence under rule 403. But he has not shown that the potential for *unfair*

prejudice substantially outweighed the bullet's probative value. As argued, finding the bullet in Defendant's pocket was evidence linking him to the crime. The "prejudice," then, was that it was further evidence of his guilt—it helped establish his familiarity with firearms, and more importantly, it was further proof linking him to the truck where police found other ammunition that more directly tied Defendant to the shooting. Evidence of guilt is not unfairly prejudicial.[6] *United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir.2001) ("evidence is not unfairly prejudicial simply because it is detrimental to a party's case").

Defendant also has not shown that admitting the bullet prejudiced him. To prove prejudice, Defendant must show that there was a reasonable likelihood of a different result had the trial court not admitted the bullet. *State v. Courtney*, 2017 UT App 172, ¶22, --P.2d --. Given the totality of the evidence,

[6] Defendant's argument looks to the Shickles factors. Br.Aplt.37-39. He says that State did not need the evidence because other evidence linked him to the truck and the bullet had the potential to lead the jury into "overmastering hostility." *Id*. But the Shickles factors have been disavowed as the standard for determining admissibility under rule 403. *State v. Lucero*, 2014 UT 15, ¶32, 17, 328 P.3d 841 (*abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016). And the supreme court has expressly rejected the "overmastering hostility" inquiry. *State v. Cuttler*, 2015 UT 95, ¶20, 367 P.3d 981

the admission of the bullet did not create a reasonable likelihood of a more favorable outcome.

The jurors heard from 18 witnesses over three days and reviewed 191 exhibits. R760-1364; SE1-191. The jurors heard testimony that Defendant stole guns and ammunition from the truck owner's home, many of the guns and ammunition in the stolen truck were not the truck owner's, the truck owner never owned 9 mm ammunition—the caliber of ammunition used to shoot and shoot at Tsouras—and did not own the 9 mm ammunition in the truck. R1122-1130. Along with the guns and ammunition in the truck, Defendant's identification and Ipad were in the truck. R1104-05; SE73. Thus, the jury could reasonably infer that Defendant owned the guns and ammunition not owned by the truck owner and Defendant was familiar with and had access to weapons. *See Ashcraft*, 2015 UT 5, ¶18 (jury can draw reasonable inferences from circumstantial evidence).

Of the exhibits, the jurors heard the dispatch recording of Tsouras calling out "shots fired," saw photos and video surveillance of Defendant at the business center, the dash cam video of Defendant firing a gun towards Tsouras and running from O'Gwin, 19 photos of bullet casings, 62 photos of Tsouras's bullet-ridden patrol car, 36 photos of guns and ammunition, photos of Defendant's bloodied hands, photos of Tsouras' bullet damaged uniform,

the bullet-pierced Kevlar plate from Tsouras's bulletproof vest, and numerous bullets and casings recovered from the shooting and stolen vehicle scene. SE11-189.

Given this evidence, Defendant cannot show prejudice. And, the exclusion of one more bullet found in Defendant's pocket at the time of his arrest did not create a reasonable likelihood of a more favorable outcome. Thus, Defendant's claim fails.

## II.

### THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO MERGE HIS FOUR FELONY DISCHARGE OF A FIREARM CONVICTIONS WITH HIS ATTEMPTED AGGRAVATED MURDER CONVICTION BECAUSE THE AGGRAVATED MURDER STATUTE EXPLICITLY PROHIBITS MERGER. [7]

Below, Defendant argued that all five of his felony discharge of a firearm convictions should merge with his attempted aggravated murder conviction. R435. The State argued in the alternative that if any counts merge, one count could merge based on the State's closing argument. R448-51. The trial court agreed with the State and merged one of Defendant's felony discharge of a firearm convictions with his attempted murder conviction. R490-91. On appeal, Defendant argues that the trial court erred when it did not merge his four remaining felony discharge of a firearm convictions with his attempted aggravated murder conviction. Br.Aplt.44-54. Defendant's claims fail. [8]

The aggravated murder statute expressly precludes felony discharge of a firearm from merging. The aggravated merger statute states that:

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[7] This point responds to Defendant's Point III. *See* Br. Aplt. 44-54

[8] As explained below, merger is inapplicable, thus, Defendant received a windfall when the trial court partially granted his motion.

> Any aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense does not merge with the crime of aggravated murder. A person who is convicted of aggravated murder, based on an aggravating circumstance . . . that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Utah Code Ann. § 76-5-202(5)(West 2015).

Subsection (1)(j) lists, among other crimes, felony discharge of a firearm as an aggravating circumstance. *Id*. (j)(xvii). Felony discharge of a firearm is a separate offense from aggravated murder. *See* Utah Code Ann. §76-10-508.1 (West 2017). Thus, under the plain language of the statute, Defendant's convictions cannot merge.

And the Utah Supreme Court agrees. In *State v. Bond*, 2015 UT 88, ¶67, 361 P.3d 104, Bond sought to merge his aggravated kidnapping and aggravated murder convictions. The supreme court held that under the aggravated murder statute, the offenses did not merge because the statute exempted aggravated kidnapping from merging. *Id*. at ¶¶69-70. The court explained that the "plain language" of the aggravated murder statute "can leave no doubt" that an aggravating circumstance "does not merge with the homicide conviction." *Id*. at ¶71.

Like *Bond*, here, Defendant's crimes did not merge because felony discharge of a firearm, like aggravated kidnapping, is listed as an aggravating circumstance in the aggravated murder statute. *See* Utah Code Ann. §76-5-

202(1)(j)(v), (1)(j)(xvii). Thus, like *Bond*, the aggravated murder statute precludes felony discharge of a firearm from merging with aggravated murder.

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

In sum, the trial court did not err by not merging Defendant's attempted aggravated murder and felony discharge of a firearm convictions because the statute explicitly prohibits it.

## CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on May 15, 2018.

SEAN D. REYES
Utah Attorney General

*/s/ Lindsey Wheeler*

Assistant Solicitor General
Counsel for Appellee

## CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 8,123 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

*/s/ Lindsey Wheeler*

Assistant Solicitor General

## CERTIFICATE OF SERVICE

I certify that on May 15, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Andrea Garland
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

*/s/ Melanie Kendrick*

# Addenda

# Addendum A

## Rule 401. Definition Of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

## Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

## Rule 403. Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Utah R. Evid. 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

**(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

**(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

**(c) Evidence of similar crimes in child molestation cases.**

(1) In a criminal case in which the accused is charged with child molestation, evidence of the commission of other acts of child molestation may be admissible to prove a propensity to commit the crime charged provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(2) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(3) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

**Utah Code Annotated § 76-1-402**

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

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

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

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

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

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

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

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

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

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

**Utah Code Annotated § 76-4-101**

(1) For purposes of this part, a person is guilty of an attempt to commit a crime if he:
(a) engages in conduct constituting a substantial step toward commission of the crime; and
(b)(i) intends to commit the crime; or
(ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.
(2) For purposes of this part, conduct constitutes a substantial step if it strongly corroborates the actor's mental state as defined in Subsection (1)(b).
(3) A defense to the offense of attempt does not arise:
(a) because the offense attempted was actually committed; or
(b) due to factual or legal impossibility if the offense could have been committed if the attendant circumstances had been as the actor believed them to be.

**Utah Code Annotated § 76-5-202**

(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;

(ii) by means of any weapon of mass destruction as defined in Section 76-10-401; or
(iii) to target a law enforcement officer as defined in Section 76-5-210;
(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.

**Utah Code Annotated § 76-8-306**

(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.

**Utah Code Annotated § 76-10-508.1**

(1) Except as provided under Subsection (2) or (3), a person who discharges a firearm is guilty of a third degree felony punishable by imprisonment for a term of not less than three years nor more than five years if:
(a) the actor discharges a firearm in the direction of any person or persons, knowing or having reason to believe that any person may be endangered by the discharge of the firearm;
(b) the actor, with intent to intimidate or harass another or with intent to damage a habitable structure as defined in Section 76-6-101, discharges a firearm in the direction of any person or habitable structure; or
(c) the actor, with intent to intimidate or harass another, discharges a firearm in the direction of any vehicle.
(2) A violation of Subsection (1) which causes bodily injury to any person is a second degree felony punishable by imprisonment for a term of not less than three years nor more than 15 years.
(3) A violation of Subsection (1) which causes serious bodily injury to any person is a first degree felony.
(4) In addition to any other penalties for a violation of this section, the court shall:
(a) notify the Driver License Division of the conviction for purposes of any revocation, denial, suspension, or disqualification of a driver license under Subsection 53-3-220(1)(a)(xi); and
(b) specify in court at the time of sentencing the length of the revocation under Subsection 53-3-225(1)(c).
(5) This section does not apply to a person:
(a) who discharges any kind of firearm when that person is in lawful defense of self or others;
(b) who is performing official duties as provided in Section 23-20-1.5 or Subsections 76-10-523 (1)(a) through (e) or as otherwise authorized by law; or
(c) who discharges a dangerous weapon or firearm from an automobile or other vehicle, if:
(i) the discharge occurs at a firing range or training ground;
(ii) at no time after the discharge does the projectile that is discharged cross over or stop at a location other than within the boundaries of the firing range or training ground described in Subsection (5)(c)(i);
(iii) the discharge is made as practice or training for a lawful purpose;
(iv) the discharge and the location, time, and manner of the discharge are approved by the owner or operator of the firing range or training ground prior to the discharge; and

(v) the discharge is not made in violation of Subsection (1).

# Addendum B

**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 C

**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 D

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.