

1989

# Utah v. Dorton : Brief of Appellant

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Attorney for Respondent.

Lynn R. Brown; Salt Lake Legal Defender Assoc.; Attorney for Appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff/Respondent, :  
50. 890273 :  
HARVEY DORTON, : Case No. 890273-CA  
Defendant/Appellant. : Priority No. 2

---

BRIEF OF APPELLANT

Appeal from denial of Defendant/Appellant's Motion to Set  
Aside Sentence, Judgment and Commitment in the Third Judicial  
District Court in and for Salt Lake County, State of Utah, the  
Honorable Leonard H. Russon, Judge, presiding.

LYNN R. BROWN  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorney for Appellant

R. PAUL VAN DAM  
ATTORNEY GENERAL  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
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LYNN R. BROWN  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorney for Appellant

R. PAUL VAN DAM  
ATTORNEY GENERAL  
236 State Capitol Building  
Salt Lake City, Utah 84114

Attorney for Respondent

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### JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §77-35-26(2)(b) (1953 as amended) and Utah Code Ann. §78-2-2(3)(j) (1988), whereby a defendant in a district court criminal action may take an appeal to the Utah Supreme Court from an order made, after judgment, affecting the substantial rights of the defendant where the defendant was convicted of a first degree or capital felony. The Supreme Court poured over the case to the Court of Appeals pursuant to its order dated May 5, 1989. The appeal is from the district court judge's denial of Defendant/Appellant's "Motion to Set Aside Sentence, Judgement (sic) and Commitment"; the Honorable Leonard H. Russon, Judge, Third District Court, Salt Lake County, State of Utah, denied Mr. Dorton's motion on October 3, 1988.

STATEMENT OF THE ISSUE

Did the district court judge err in denying Mr. Dorton's Motion to Set Aside Sentence, Judgment and Conviction?

TEXT OF STATUTE

76-1-402. Separate offenses arising out of single criminal episode--Included offenses.--(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

. . . . .

(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.



IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
HARVEY DORTON,	:	Case No. 890273-CA
Defendant/Appellant.	:	Priority No. 2

---

STATEMENT OF THE CASE

On January 19, 1982, a jury convicted Defendant/Appellant, Harvey Dorton, of Aggravated Kidnapping, Aggravated Robbery, and Aggravated Burglary. On July 14, 1982, the Honorable Bryant H. Croft, Judge, Third Judicial District Court, Salt Lake County, State of Utah, entered judgment and conviction (R. 285-6). Defendant/Appellant Dorton timely appealed his convictions to the Utah Supreme Court; on October 3, 1983, the Supreme Court affirmed Mr. Dorton's convictions (R. 660). The Court remitted the case to the Third Judicial District Court on December 9, 1983 (R. 659).

On July 11, 1988, Defendant/Appellant filed pro se the "Motion to Set Aside Sentence, Judgement (sic) and Commitment" at issue in the instant appeal (R. 674) (see Addendum A). On August 24, 1988, the Honorable Leonard H. Russon, Third Judicial District Court, Salt Lake County, State of Utah, reappointed trial counsel to represent Mr. Dorton at the hearing on the motion (R. 690). The State submitted a memorandum in opposition to

Defendant's motion (R. 691), and the trial court held a hearing on the motion on September 26, 1988 (R. 714). The trial court entered its written order denying the motion on October 3, 1988 (R. 719). This appeal arises out of the denial of Defendant/Appellant's Motion to Set Aside Sentence, Judgment and Commitment (R. 719).

#### STATEMENT OF THE FACTS

On December 23, 1980, at approximately 7:00 p.m., two armed men wearing ski masks appeared in the kitchen of a house in Murray, Utah, where Betty and John Thomas were living (R. 441, 443, 444, 464). Garn Edwards was in the house babysitting his grandsons, Chance Pellum and Johnny Thomas (R. 442-3). The men indicated that they wanted to find John Thomas (R. 444, 464, 486). The larger man hit Mr. Edwards in the head with a revolver and fired a shot. Then, Mr. Edwards and the larger man went upstairs to find Betty Thomas' jewelry (R. 446).

The larger man did not take any jewelry. He requested that Mr. Edwards give him the money in his wallet and any other valuables he had (R. 447). The pair then returned downstairs and Mr. Edwards sat with his grandsons (R. 447, 448).

Later in the evening, at anywhere from 9:00 p.m. to 10:30 p.m., Betty Thomas returned home (R. 450, 490). One of the men asked Betty to remove her jewelry and give it to him, which she did (R. 451). Betty gave her son Johnny some medicine, then went upstairs with the smaller man to prepare a bed for Johnny (R. 492, 495, 452, 455). The smaller man performed sexual intercourse and

sodomy with Betty while the two were outside the presence of the larger man and the three remaining persons.

Chance's mother, Barbara, arrived at about 11:00 p.m. and was greeted at the door by both men (R. 496). Barbara and the larger man then walked out to her car to get some cigarettes (R. 454). Several people were waiting for Barbara in the car. A few minutes after going outside, Barbara and the larger man returned to the house, and the larger man told his companion that there were people waiting in the car (R. 455, 457). The larger man then went back outside and returned with Grant Davis and Kevin Taylor (R. 457). Another person, Kimberley Pllum, had left (R. 458).

The men asked Grant Davis for his money, which he gave to them (R. 458). The pair told all five people to lie on the floor, then, at about 11:00 p.m. or 12:00 midnight, they left (R. 459).

The pair kept the ski masks on throughout the incident, but the larger man raised his up to his nose to smoke a cigarette (R. 460, 469, 485). Mr. Edwards tried to avoid looking at the men and purposely did not want to get a good look at them out of fear for himself and his grandchildren (R. 467). Nevertheless, at trial, Mr. Edwards indicated that he "thought" Mr. Dorton might be the taller of the two men (R. 462).

Mr. Dorton presented an alibi defense. David Patch testified that he saw Mr. Dorton in Wendover on the night of the incident at about 12:00 midnight and had drinks with him (R. 342). Dean Buldock testified that he saw Mr. Dorton in Wendover on the night of the incident at about 10:30 p.m. The State's rebuttal

witness, Carl Freeman, testified that he saw Harvey Dorton in Alpine, Utah at about 9:30 p.m. on the night of the incident (R. 373).

The trial court granted Mr. Dorton's motion to dismiss the charge of Aggravated Sexual Assault (R. 340). The jury convicted Mr. Dorton of Aggravated Kidnapping, Aggravated Robbery, and Aggravated Burglary (R. 424).

#### SUMMARY OF THE ARGUMENT

The trial court erred in denying Defendant/Appellant's Motion to Set Aside Sentence, Judgment and Conviction. Mr. Dorton was convicted of three charges arising out of a single act during a single criminal episode. Pursuant to Utah Code Ann. § 76-1-402 (1953 as amended), a defendant cannot be convicted of separate offenses arising out of a single act nor can he be convicted of multiple offenses which are lesser included offenses of one another.

#### ARGUMENT

##### POINT. THE TRIAL COURT ERRED IN SENTENCING MR. DORTON TO MORE THAN ONE OF THE OFFENSES CHARGED.

Utah Code Ann. § 76-1-402 (1952 as amended) allows the State to prosecute a defendant only for separate offenses arising out of a single criminal episode. That statute provides in pertinent part:

76-1-402. Separate offenses arising out of single criminal episode--Included offenses.--(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(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.

(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.

In State v. Hill, 674 P.2d 96 (Utah 1983), the Utah Supreme Court discussed the relationship of lesser included offenses. The court pointed out that while a defendant can be convicted of an offense which is charged, he or she cannot also be convicted of a lesser included offense of that offense. Id.

In determining whether an offense is a lesser included of some other offense, both a principal and secondary test must be applied. Under the principal test, the statutory elements of both offenses are compared to see whether one of the offenses "is established by proof of the same or less than all of the facts required to establish the commission of the offense charged . . . " Id. at 97.

The secondary test is required due to the multiple variations inherent in some offenses. The secondary test involves a consideration by the court of the evidence "to determine whether the greater-lesser relationship exists between the specific variations of the crime actually proved at trial." Id. In Hill, the Court held that Theft was a lesser included offense of Aggravated Robbery and reversed the Theft conviction and vacated the sentence thereon. See also State v. Johnson, 745 P.2d 456 (Utah 1987) (Court reversed Theft conviction where Theft was lesser included offense of Aggravated Robbery); State v. Pitts, 728 P.2d 113, 115-16 (Utah 1986) (Theft is a lesser included offense of Burglary in this context); State v. Shaffer, 725 P.2d 1301, 1313-14 (Utah 1986) (Aggravated Robbery is lesser included offense of First Degree Murder under the circumstances).

In the instant case, the trial court erred in allowing the conviction for more than one offense to stand. Aggravated Kidnapping is a lesser included offense of Aggravated Robbery since, in all robberies, a person must be detained or restrained. Aggravated Robbery under the circumstances of this case is a lesser


included offense of Aggravated Burglary, which was charged as an entry into a dwelling "with the intent to commit a theft, assault or felony" (R. 18). Here, where the facts establish that the entry was done with intent to commit a felony, the separate felony cannot also sustain a conviction. See Pitts, 728 P.2d at 115-6.

In the instant case, Defendant/Appellant was convicted of committing one continuous act. Utah Code Ann. § 76-1-402 (1953 as amended) prohibits punishment for separate crimes based on a single act. Under the circumstances of this case, Mr. Dorton should have been sentenced on only one of the first degree felonies arising out of this single criminal episode.

#### CONCLUSION

Based upon the foregoing, Mr. Dorton respectfully requests that this Court reverse the district court's denial of his Motion to Set Aside Sentence, Judgment and Conviction and remand the case with an order that the sentence on two of the charges be vacated and that judgment and conviction on only a single charge arising out of this criminal episode be entered.

Respectfully submitted this 19 day of June, 1989.

  
LYNN R. BROWN  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LYNN R. BROWN, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 19 day of June, 1989.

  
LYNN R. BROWN

DELIVERED by \_\_\_\_\_  
this \_\_\_\_\_ day of June, 1989.

\_\_\_\_\_



## ADDENDUM A

Harvey Dorton  
Attorney Pro Se  
Post Office Box 250  
Draper, Utah 84020

JUL 11 1988

By Byron Stark  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE

STATE OF UTAH

---ooo0ooo---

STATE OF UTAH, : MOTION TO SET ASIDE SENTENCE,  
Plaintiff; : JUDGEMENT AND COMMITMENT

vs. : Criminal Case No. CR-81-310

HARVEY DORTON, :  
Defendant. :

---ooo0ooo---

Comes now the Defendant, Harvey Dorton, by and through himself, attorney pro se, and hereby requests this Honorable Court to grant Defendant's motion to set aside his prior sentence, judgement and commitment as prayed for, and for the reasons as hereinafter submitted to this Court for its consideration.

1. That on the 14th day of July, 1982, before the Honorable Bryant H. Croft, appeared James S. Housley, the attorney for the State of Utah, and the Defendant appeared in person and by counsel, Lynn R. Brown.

2. That on the 14th day of July, 1982, the Court held that the Defendant was found guilty by a jury in abstentia of the offenses of aggravated burglary, a felony of the first degree; aggravated kidnapping, a felony of the first degree; and aggravated robbery, a felony of the first degree.

1                   3. That the mandate of the Utah Code of Criminal  
2 Procedures, 1987-1988, with respect to Section 76-1-402,  
3 only allows for separate offenses arising out of single criminal  
4 episode-included offenses as follows:

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

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

23                   [A] The offenses are within the  
24 jurisdiction of a single court, and

25                   [B] The offenses are known to the  
26 prosecuting attorney at the time the  
27 defendant is arraigned on the first information  
28 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 lessor included offense.

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

7 (5) If the district court on motion after  
8 verdict of judgement, or an appellate  
9 court on 'appealor certiorari', shall  
10 determine that there is insufficient  
11 evidence to support a conviction for  
12 the offense charged but that there is  
13 evidence to support a conviction for  
14 an included offense, and the trier of  
15 fact necessarily found every fact required  
16 for conviction of that included offense,  
17 the verdict or judgement of conviction  
18 may be set aside or reversed and a judgement  
19 of conviction entered for the included  
20 offense, without necessity of new trial,  
21 if such relief is sought by the defendant.

22 4. The Defendant submits the following criminal  
23 case citings are in reference to the instant case presently  
24 before this court for review:

25 (A) Wash. App. 1977. In ascertaining  
26 existence of lessor included offense,  
27 court must look for identity of elements  
28 between two crimes, as established mainly  
by definitions of crimes in criminal  
codes, and often with reference to particular  
evidentiary facts; to show that there  
exists lessor included offense, more  
is usually required than showing that  
two crimes are similar or that in proving  
offense charged state inevitably proved  
lessor offense. State v. Dennis, 561  
P. 2d 219, 16 Wash. App. 939.

(B) Ariz. 1978. If a jury finds defendant  
guilty of two charges arising from same  
transaction and there are not sufficient  
independent facts to support the elements  
of both crimes, trial judge should then  
set aside the lessor conviction. A.R.S.  
13-1641, in State v. Bowie, 580 P. 2d  
1282, 1190, 119 Ariz. 336.

(C) Ariz. 1977. Where separate acts  
give rise to separate crimes, defendant

1 can be convicted of both crimes consistent  
2 with statute prohibiting double punishment.  
3 A.R.S. 13-1641 in State v. Arnold, 565  
P. 2d 1282, 115 Ariz. 421.

4 (D) Okl. Cr. 1970. A series of criminal  
5 charges cannot be based on the same criminal  
6 act or transaction; a single criminal  
7 act cannot be split up or subdivided  
into two or more distinct offenses and  
8 prosecuted as such. 63 O.S. 1961, 451,  
9 in Heldenbrand v. Mills, 476 P. 2d 375.

10 (E) Utah 1978. Though crimes of robbery  
and kidnapping arose out of same criminal  
episode, conviction of defendant for  
both offenses was prohibited by statute.  
U.C.A. 1953, 76-1-401, 76-1-402, 76-1-402(1)  
in State v. Eichler, 584 P. 2d 861.

11 5. That the Utah Supreme Court held the following  
12 in State v. Hill, case number 18180, on November 1, 1983:

13 **STATE of Utah, Plaintiff and**  
14 **Respondent,**

15 **v.**

16 **Wendell Irving HILL, Defendant**  
17 **and Appellant.**

18 **No. 18180**

19 **Supreme Court of Utah**

20 **Nov. 1, 1983.**

21 Defendant was convicted in the Third  
22 District Court, Salt Lake County, Christine  
23 M. Durham, J., of theft and aggravated  
24 robbery, and defendant appealed, challenging  
25 conviction and sentence for theft. The  
Supreme Court, Oaks, J., held that under  
circumstances of case, crime of theft  
was lesser included offense of aggravated  
robbery.

26 Conviction of theft reversed, and  
27 sentence thereon vacated; and all other  
28 respects, affirmed.

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**2. Criminal Law - 29, 984(2)**

### 3. Criminal Law - 29, 984(2)

#### 4. Indictment and Information - 191(9)

## 5. Criminal Law - 886

David L. Wilkinson, Atty. Gen.,  
Robert N. Parrish, Asst. Atty. Gen.,  
Salt Lake City, for plaintiff and respondent.

1 OAKS, Justice:

2 This case turns on whether theft  
3 is a lesser included offense of aggravated  
4 robbery on the facts of this case.

5 [1] The relationship of lesser included  
6 offenses is significant for two purposes.  
7 "A defendant [1] may be convicted of  
8 an offense charged [2] but may not be  
9 convicted of both the offense charged  
10 and the included offense." U.C.A., 1953,  
11 76-1-402(3). In other words, conviction  
12 of a lesser included offense (1) is permitted  
13 as an alternate to the charged offense,  
14 but (2) is not permitted as an addition  
15 to it. This case involves the second  
16 issue—conviction and sentence for theft  
17 in addition to aggravated robbery.

18 The prosecution's evidence showed  
19 that defendant and a companion forced  
20 their way into the manager's apartment  
21 at the Stratford Hotel in downtown Salt  
22 Lake City. Defendant held a pistol.  
23 After threatening to kill the manager  
24 and a guest, the intruders bound and  
25 gagged the two occupants. They took  
26 a tape recorder, a TV, several items  
27 of radio equipment, and about \$70 in  
28 cash from a desk. A few minutes later,  
defendant and his companion were arrested  
several blocks away in an automobile  
containing some currency, all the items  
taken from the apartment, and the pistol  
used in the crime. As a result of this  
episode, defendant was charged with and  
convicted of four crimes, including aggravated  
robbery of the manager and theft from  
the manager. The court sentenced defendant  
to 5 years to life on aggravated robbery  
and to a concurrent lesser sentence on  
theft. On appeal, defendant challenges  
Only the conviction and sentence for  
theft, contending that it is improper  
in addition to the conviction for aggravated  
robbery because theft is a lesser included  
offense of aggravated robbery.

29 We conclude that for purposes of  
30 the prohibition against conviction "of  
31 both the offense charged and the included  
32 offense," 76-1-402(3), the greater-lesser  
33 relationship must be determined by comparing  
34 the statutory elements of the two crimes

1 as a theoretical matter and, where necessary,  
2 by reference to the facts proved at trial.

3 [2] The principal test involves  
4 a comparison of the statutory elements  
5 of each crim. Subsection 76-1-402(3)(a)  
6 provides the definition of lesser included  
7 offenses that is applied for this purpose:  
8 an offense is lesser included when "[i]t  
9 is established by proof of the same or  
10 less than all the facts required to establish  
11 the commission of the offense charged . . ."  
12 Thus, where the two crimes are "such  
13 that the greater cannot be committed  
14 without necessarily having committed  
15 the lesser," State v. Baker, Utah, 671  
16 P. 2d 152, 156 (1983), then as a matter  
17 of law they stand in the relationship  
18 of greater and lesser offenses, and the  
19 defendant cannot be convicted or punished  
20 for both. So it is with robbery and  
21 theft, which are generally acknowledged  
22 to occupy the greater-lesser relationship.  
23 State v. Elliott, Utah, 641 P. 2d 122,  
24 123 (1982); People v. Cole, 31 Cal. 3d  
25 568, 582, 645 P. 2d 1182, 1191, 183 Cal.  
26 Rptr. 350, 359 (1982).

15 [3] The secondary test is required  
16 by the circumstance that some crimes  
17 have multiple variations, so that a greater-  
18 lesser relationship exists between some  
19 variations of these crimes, but not between  
20 others. E.g., State in Interest of L.G.W.,  
21 Utah, 641 P. 2d 127, 130-31 (1982) (forcible  
22 sexual abuse and lewdness). A theoretical  
23 comparison of the statutory elements  
24 of two crimes having multiple variations  
25 will be insufficient. In order to determine  
26 whether a defendant can be convicted  
27 and punished for two different crimes  
28 committed in connection with a single  
criminal episode, the court must consider  
the evidence to determine whether the  
greater-lesser relationship exists between  
the specific variations of the crimes  
actually proved at trial. The multiple  
variations of the crime of aggravated  
robbery involved in this case show why  
this is necessary.

Aggravated robbery is committed  
by using a firearm in one of three circum-  
stances: "[1] in an attempt to commit,  
[2] during the commission of, or [3] in



1 the immediate fight after the attempt  
2 or commission of a robbery." 76-6-302(1)  
3 and (3). As the district court concluded,  
4 according to a theoretical comparison  
5 of the statutory elements of each crime,  
6 theft is not a lesser included offense  
7 of aggravated robbery because theft is  
8 not "established by proof of the same  
9 or less than all the facts required to  
10 establish the commission of [one variation  
11 of] the offense charged." 76-1-402(3)(a).  
12 This is because the obtaining or exercising  
13 of unauthorized control over the property  
14 of another (an element of theft) is not  
15 an element of the first variation of  
16 aggravated robbery (use of a gun in an  
17 attempt to commit a robbery). In contrast,  
18 the greater-lesser relationship does  
19 exist between theft and the second variation  
20 of aggravated robbery (use of a gun during  
21 the commission of a robbery).

12 [4] In this case, the only evidence  
13 before the jury showed a completed robbery,  
14 with property taken from the person of  
15 the manager by use of a firearm, and  
16 the crime of theft as part of that same  
17 criminal episode. As to this variation  
18 of aggravated robbery, the crime of theft  
19 is a lesser included offense. Consequently,  
20 on the facts of this case, 76-1-402(3)  
21 clearly bars this defendant's being convicted  
22 and punished for theft in addition to  
23 aggravated robbery.

19 [5] When a defendant has been improperly  
20 convicted of both a greater and a lesser  
21 offense, it is appropriate to regard  
22 the conviction on the lesser offense as  
23 mere surplusage, which does not invalidate  
24 the conviction and sentence on the greater  
25 offense. United States v. Howard, 507  
26 F. 2d 559 (8th Cir. 1974).

23 The conviction for theft is reversed,  
24 and the sentence thereon is vacated.  
25 In all other respects, the judgments  
26 of conviction and the related sentences  
27 are affirmed.

26 HALL, C.J., STEWART AND HOWE, JJ.,  
27 and ERNEST F. BALDWIN, Jr., District  
28 Judge, concur.

DURHAM, J., having disqualified

1 herself, does not participate herein;  
2 ERNEST F. BALDWIN, Jr., District Judge,  
3 sat.

4 6. The Defendant submits that other state courts  
5 have held in favor of defendants when charged with multiple  
6 crimes arising out of the same criminal episode:

7 (A) Alaska 1985. Four factors to consider  
8 in deciding whether statute describes  
single offense or multiple offenses are:

9 Language of statute itself,

10 Legislative history,

11 Nature of proscribed conduct,

12 And appropriateness of multiple  
13 punishment for conduct charged in indictment.

14 SEE: State v. James, 698 P. 2d 1161.

15 (B) Utah 1986. Theft was lesser included  
16 offense of aggravated robbery, and therefore,  
17 conviction and sentence for theft, after  
18 defendant was convicted of aggravated  
robbery, were improper. U.C.A. 1953,  
76-1-402(3), in State v. Shaffer, 725  
P. 2d 1301.

19 (C) Utah 1983. Conviction of lesser  
20 included offense is permitted as alternative  
21 to charged offense, but is not permitted  
in addition to it. SEE: State v. Hill,  
674 P. 2d 96.

22 (D) Utah 1980. The general test as to  
23 whether there are separate offenses or  
24 one offense is whether the evidence discloses  
one general intent or discloses separate  
25 and distinct intents; the particular  
facts and circumstances determine this  
question.

26 If there is but one intention,  
27 One general impulse, and  
One general plan,

28 Even though there is a series of transactions  
there is but one offense. SEE: State  
v. Kimbel, 620 P. 2d 515.

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CERTIFICATE OF MAILING


I, Harvey Dorton, Defendant above named, hereby  
certify that I have mailed a true and correct photocopy of  
the foregoing **MOTION TO SET ASIDE SENTENCE, JUDGEMENT AND**  
**COMMITMENT**, postage prepaid, to the following on this 8th  
day of July, 1988.

(1) **DAVID YOUKUM**

Salt Lake County Attorney  
Salt Lake County Attorney's Office  
431 South 300 East  
Salt Lake City, Utah 84111

(2) **LYNN BROWN**

Attorney at Law  
c/o Salt Lake Legal Defenders Association  
333 South 200 East  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
HARVEY DORTON/Defendant  
Attorney Pro Se  
Post Office Box 250  
Draper, Utah 84020

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A D D E N D U M S

TED. CANNON  
Salt Lake County Attorney  
By: ROGER S. BLAYLOCK  
Deputy County Attorney  
431 South 300 East, Suite 300  
Salt Lake City, UT 84111  
Telephone: 363-7900

COPY

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

---

THE STATE OF UTAH	)	
Plaintiff	)	
vs	)	JUDGMENT AND COMMITMENT
	)	
HARVEY DORTON	)	Case No. CR-81-310
Defendant	)	

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On the 14th day of July, 1982, before the Honorable Bryant H. Croft, appeared James S. Housley, the attorney for the State of Utah, and the defendant appeared in person and by counsel, Lynn R. Brown.

The Court having asked if the defendant has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty of the offenses of Aggravated Burglary, a first degree felony; Aggravated Kidnapping, a first degree felony; and Aggravated Robbery, a first degree felony.

IT IS ADJUDGED that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of not less than five years and which may be for life, and is not fined as provided by law for the crime of Aggravated Burglary; and that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of not less than five years and which may be for life and is not fined as provided by law for the crime of Aggravated Kidnapping; and that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of not less than five years and which may be for life and is not fined as provided by law for the crime of Aggravated Robbery. Said sentences shall run concurrently. Commitment ordered for 10 days.

IT IS ORDERED that N. D. Hayward, Sheriff of Salt Lake County, of Utah, take the said defendant, Harvey Dorton, and deliver said defendant without delay to the Utah State Prison, Draper, Utah, where said defendant shall then and there be confined and imprisoned in accordance with judgment and Commitment.

DATED this 26 day of July, 1982.

BY THE COURT

ATTEST  
W. STERLING EVANS  
CLERK  
BY [Signature]  
Deputy Clerk

[Signature]  
Bryant H. Croft, Judge

Pursuant to the provisions of Section 77-18-5, Utah Code Annotated, as amended 1980, and in accordance with the guidelines developed jointly between the Courts and the Board of Pardons, I recommend that the defendant serve ~~90~~ 60 months prior to release or parole.

Imprisonment is ordered in deviation from the guidelines because:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Comments, including mitigating or aggravating circumstances:

Case involves 3 first degree felony cases in which defendant & co-defendant held several people in a house for 4 hours and robbed them. Defendant absconded during trial and the trial was concluded in absentia. He was located in Texas and brought back to Utah.

DATED this 26 day of July, 1982.

BY THE COURT

ATTEST  
W. STERLING EVANS  
CLERK  
BY [Signature]  
Deputy Clerk  
[Signature]  
Bryant H. Croft, Judge