

2017

The State of Utah, Plaintiff/Appellee, v. Jeremy Bowden, Defendant/Appellant : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

JEREMY BOWDEN,
Defendant/Appellant.

Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

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

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

JEREMY BOWDEN,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

INTRODUCTION

In the opening brief ("OB") Mr. Bowden makes three arguments: (I) the evidence was insufficient to support the attempted aggravated murder and obstruction of justice charges because it failed to prove identity, (II) the trial court erred by admitting evidence that Mr. Bowden had an unfired cartridge in his pocket when arrested because that evidence violated rules 401, 402, and 403 of the rules of evidence, and (III) the trial court erred by refusing to merge the discharge of a firearm convictions with the attempted aggravated murder conviction.

In the response brief ("SB"), the State responds to the first argument as follows: (1) sufficient evidence supported the attempted aggravated murder and obstruction of justice convictions, and (2) Mr. Bowden did not preserve his claim on appeal that insufficient evidence supported the obstructing justice count.

Regarding the second argument, the State responds that the unfired cartridge

evidence was admissible as intrinsic evidence. Finally, regarding the third argument, the State responds that the trial court correctly denied the merger request because the aggravated murder statute prohibits merger.

This reply brief first provides a clarification of the record facts. It then makes the following points: (I)(A) insufficient evidence supported Mr. Bowden's conviction for attempted aggravated murder; (I)(B) insufficient evidence supported Mr. Bowden's conviction for obstruction of justice; (I)(C) Mr. Bowden preserved his claim that insufficient evidence supported the obstructing justice charge; (II) it was error to admit evidence of the bullet in Mr. Bowden's pocket because that evidence was irrelevant under rules 401 and 402 and unfairly prejudicial under rule 403; and (III) merger was available and appropriate for Mr. Bowden's convictions of firearm discharge.

This reply is "limited to responding to the facts and arguments raised in the appellee's . . . brief." Utah R. App. P. 24(b). Matters not addressed were either adequately addressed in the opening brief or do not merit reply.

CLARIFICATION OF FACTS

The State alleges that Mr. Bowden "stole a truck and 'six or seven' guns from the truck owner's house." SB 5. The State repeats this claim: "[t]he jurors heard testimony that Defendant stole guns and ammunition from the truck owner's home" SB 33. The State refers to "the truck Defendant stole" SB 31. But, there was no testimony that Mr. Bowden stole the truck or anything from the truck owner's home and the State never charged Mr. Bowden with theft or

burglary. R.0001-0005,1119-1130. Thus this Court should disregard these incorrect assertions.

ARGUMENT

I. This Court should reverse and remand with an order to dismiss the attempted aggravated murder and obstruction of justice convictions because there was insufficient evidence to prove identity.

Evidence presented by the State did not support a reasonable inference that Mr. Bowden is the person who shot at Tsouras or the person who hid the gun after the shooting. Mr. Bowden addresses the following points: (A) the State presented insufficient evidence to support Mr. Bowden's conviction for attempted aggravated murder, (B) the State presented insufficient evidence to support Mr. Bowden's conviction for obstruction of justice, and (C) Mr. Bowden preserved his argument that insufficient evidence supported the obstruction of justice charge.

A. The State presented insufficient evidence to support the attempted aggravated murder conviction.

The State argues "that a person dressed the same or similarly to [Mr. Bowden] was the only person running from the police and shot in Tsouras's direction." See SB 19. But this Court should reverse because the evidence supports only the speculative possibility that the witnesses all described the same person or that they had described Mr. Bowden.

"When evidence supports only one possible conclusion, the quality of the inference rests on the 'reasonable probability that the conclusion flows from the proven facts.'" *State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096 (quoting

Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 521 (10th Cir. 1987)).

Where, as here, the evidence supports more than one equally likely conclusion, "the choice of one possibility over another can be no more than speculation." *See id.* The State notes that "'circumstantial evidence alone may be sufficient to establish the guilt of the accused.'" *See* SB 19. Still, circumstantial evidence must support "reasonable inferences drawn from the evidence." *Salt Lake City v. Carrera*, 2015 UT 73, ¶11, 358 P.3d 1067; *see also State v. MacNeill*, 2017 UT App 48, ¶ 57, 397 P.3d 626; *State v. Housekeeper*, 588 P.2d 139, 140 (Utah 1978). "Of course, it does not follow that a court is free to arrest judgment simply because it disagrees with the inferences a jury draws." *State v. Workman*, 852 P.2d 981, 987 (Utah 1993). "But when the inference of guilt does not logically flow from the evidence, it is incumbent on a reviewing court to set the verdict aside." *Id.* As in *Carrera*, Mr. Bowden's appeal depends on "the difference between an inference and speculation" *See Carrera*, 2015 UT 73, ¶ 12. In the instant case, the evidence was insufficient because amounted to speculation.

Unlike in *State v. Howell* (*see* SB 18,22), Mr. Bowden does not argue that the jury "was obligated to believe the evidence most favorable to defendant." 649 P.2d 91, 97 (Utah 1982). In *Howell*, in which a jury convicted the defendant of manslaughter and attempted manslaughter, the defendant "recite[d] a version of the facts which, if believed, would support a defense of self-defense to the murder charges," but that the jury did not believe. *Id.* at 93. Our supreme court upheld

the verdict, reasoning that the *Howell* defendant's reciting evidence that contradicted the verdict did not render the verdict invalid. *Id.* at 97.

In contrast to *Howell*, Mr. Bowden argues that the State failed to present evidence supporting reasonable inferences identifying him as the shooter. In other words, Mr. Bowden argues that the State presented only the speculative possibility of his guilt, among other equally strong inferences. *See Cristobal*, 2010 UT App 228, ¶ 16; OB 22-27.

Mr. Bowden's argument that insufficient evidence supports his conviction for attempted aggravated murder does not merely point out inconsistencies in witness testimony, as the State argues. *See* SB 24. Instead, Mr. Bowden argues that the evidence did not support one inferred conclusion. *See Cristobal*, 2010 UT App 228, ¶ 16; OB 22-27. Contrary to the State's assertion that "Defendant was the only person in the area running and the only person in the containment area that matched the shooter's description," the video and other evidence described other men in the containment area who matched the shooter's description. *See* SB 23-24; OB 22-27. For example, although Tsouras had the best opportunity to view the shooter during the shooting, he identified a different but similarly dressed man as the shooter. *See* OB 25; R.806-10,830. Contrary to the State's assertion that "[m]ultiple witnesses described and video recordings captured a single person," the Mousepad Video depicts similarly dressed men in the area. *See* SB 20; R.1178-79; State's Ex. 12,191. Tsouras agreed that the shooter could have been someone other than Mr. Bowden and agreed that cars and businesses

were nearby. OB 9, R.823-24. Officer Clark had also expressed concerns about other possible fugitives at the nearby Mouse Pad. OB 5-6. Moreover, the Family Dollar store manager, the taco line bystander, and Officers Clark, Franchow, Lechuga, Walser, and Stilson, had no opportunity to view the shooter during the event and therefore did not testify as to whether there was one man or others in the immediate shooting area. *See* SB 20-23; OB 7-10; R.841-889,897-915,932-954,964-1006,1190-1203.

While the State argues that Mr. Bowden's flight from police is evidence of his involvement in the shooting, Mr. Bowden's running gives rise only to speculation. *See* SB 23-24; OB 18-19; *Cristobal*, 2010 UT App 228, ¶¶ 14,17; *see also Salt Lake City v. Gallegos*, 2015 UT App 78, ¶¶ 7-10, 347 P.3d 842 (holding that defendant's flight, scrapes, and clothing, in area of reported scuffle provided insufficient evidence that defendant fled to avoid arrest). The State also argues that Mr. Bowden "offered no innocent explanation for running from police or for the injuries to his hand." SB 24. Mr. Bowden's conceded connection to the stolen truck explains his running. *See* OB 6,26-27. His climbing over a fence, as Officers Franchow and Lechuga observed, explains injuries to his hands. *See* OB 10. While the State, as it argues, may present "a mosaic of circumstantial evidence," the State must still present non-speculative evidence for every element. *See*, *MacNeill*, 2017 UT App 48, ¶ 57; *Carrera*, 2015 UT73, ¶¶ 10-22; SB 24-25. Here, the State presented only speculative possibilities identifying Mr. Bowden as Tsouras's shooter. *See* OB 13-27.

B. The State presented insufficient evidence to support Mr. Bowden's conviction for obstruction of justice.

The State argues that because Mr. Bowden's insufficiency argument is unpreserved, Mr. Bowden must demonstrate that "the 'insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury'" and that Mr. Bowden cannot meet this burden. SB 26-27, (quoting *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346). As argued *infra*, Point I.C., Mr. Bowden preserved this issue. Alternatively, as argued in the opening brief, the "insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *See id.*; OB 13-28,30. There was insufficient evidence identifying Mr. Bowden as the shooter; *a fortiori*, insufficient evidence identifies him as the person who obstructed justice by hiding the gun.

C. Mr. Bowden preserved his argument that insufficient evidence supported the obstruction of justice charge.

When the trial court ruled that there was sufficient evidence to send the attempted aggravated murder charge to the jury, it also ruled that there was sufficient evidence to send the obstruction of justice charge to the jury. *See* OB 28; R.1226.

Parties preserve an issue when they raise and argue the issue "in such a way that the [trial] court has an opportunity to rule on [it]." *State v. Johnson*, 2017 UT 76, ¶ 18, 416 P.3d 443 (quoting *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828); *see also* SB 25. The person who fired the shots was also the person who discarded the gun. If there was insufficient evidence to prove that Mr.

Bowden was the shooter, there was necessarily insufficient evidence that Mr. Bowden was the person to discard the gun. *See* OB 28.

Even if an issue is raised "indirectly," it is preserved if it is "raised to a level of consciousness such that the trial judge can consider it." *State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993) (quotation marks omitted). Moreover, a claim is preserved for appeal if the trial court considers and rules on the claim. *State v. Matsamas*, 808 P.2d 1048, 1052-53 (Utah Ct. App. 1991); *see also United States v. Williams*, 504 U.S. 36, 41-45 (1992) (holding that certiorari was appropriate where the issue presented was not "pressed" below but was "passed upon" because the lower court had "decided the substantive issue presented").

In this case, Mr. Bowden's sufficiency of the evidence argument regarding the obstruction of justice charge is preserved. *See* SB 25. As required by *Brown* and *Johnson*, Mr. Bowden's motion for directed verdict concerning the identity of the person who shot the gun necessarily preserved the issue of the identity of the person who hid the gun by raising the issue "to a level of consciousness such that the trial court [could] consider it." *See Brown*, 856 P.2d at 361; *Johnson*, 2017 UT 76, ¶ 18; R.1224-1226. The State referred to the obstruction of justice evidence in its argument against directed verdict. R.1225-26. The State argued "[h]e's seen on a dash cam video . . . firing at this officer and then going northbound, housing¹ his gun." R.1226. Moreover, the trial court considered and ruled on the directed

¹ "[H]ousing" is probably a transcription error. The prosecutor probably said "losing," referring to "lose" as meaning- "to free oneself from." <https://www.merriam-webster.com/dictionary/lose>, last visited 5/31/18.

verdict motion "for each of the counts as charged." *See* R.1226; *Matsamas*, 808 P.2d at 1052-53; *Williams*, 504 U.S. at 41-45. Thus, the issue was preserved. But, if this Court disagrees, it should reverse for plain error. *See* OB 30.

II. This Court should reverse and remand for a new trial because admission of the evidence of the unfired bullet in Bowden's pocket was irrelevant and prejudicial.

Mr. Bowden argues on appeal that the evidence of the unfired cartridge "should have been excluded under Rules 401, 402, and 403 of the Utah Rules of Evidence." *See* OB 30. The State does not challenge Mr. Bowden's relevance argument except to claim that the unfired cartridge linked Mr. Bowden to the stolen truck and thus Mr. Bowden "was familiar with and had access to weapons." SB 31,33. Instead, the State argues that (1) the evidence is admissible because it is intrinsic; (2) rule 404(b) is an alternate ground for affirmance; (3) the evidence was not substantially more unfairly prejudicial than probative; and that (4) Mr. Bowden did not show that admitting the evidence of the bullet prejudiced Mr. Bowden. SB 28-34. The State's arguments fail. First, rules 401-403 do not consider intrinsic-ness— that is a 404(b) question. To the degree that "intrinsic" applies, the evidence was not intrinsic. Second, rule 404(b) is not an alternate ground for affirmance. Finally, without the bullet evidence there was a reasonable likelihood of a more favorable outcome for Mr. Bowden.

A. The evidence was irrelevant, unfairly prejudicial, and not intrinsic.

Rules 401-403 do not consider whether evidence is intrinsic or extrinsic. Intrinsic versus extrinsic are questions for 404(b) issues. To the extent that the

intrinsic or extrinsic nature of the evidence matters here, the evidence was not intrinsic.

The State's argument, that the evidence was admissible as intrinsic evidence, fails because rules 401-403 are not concerned with the intrinsic nature of evidence. *See* SB 28-31. Instead rule 402 asks whether the evidence "has any tendency to make a fact" that is "of consequence in determining the action," any "more or less probable than it would be without the evidence. Utah R. Evid. 402 (attached at Addendum A); OB 31. Rule 401 allows admission for only relevant evidence. Utah R. Evid. 401 (attached at Addendum A); OB 31. Rule 403 provides for exclusion of relevant evidence where the probative nature is "substantially outweighed by a danger of . . . unfair prejudice." Utah R. Evid. 403 (attached at Addendum A); OB 35-36.

Rather, rule 404(b) considers whether evidence is intrinsic. Cases that the State cites concerning intrinsic evidence only discussed evidence contested under rule 404(b). *See* SB 29-31; *United States v. Parker*, 553 F.3d 1309, 1313-14 (10th Cir. 2009); *State v. Lucero*, 2014 UT 15, ¶ 14 n.7, 328 P.3d 841 (abrogated on other grounds, *State v. Thornton*, 2017 UT 9, 391 P.3d 1016); *State v. Burke*, 2011 UT App 168, ¶ 65, 256 P.3d 1102; *United States v. McKinley*, 647 Fed.Appx. 957, 962 (11th Cir. 2016); *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011). Moreover, while this Court mentioned "intrinsic" evidence in *Burke*, this Court did not determine whether the evidence disputed in *Burke* was intrinsic or

whether rule 404(b) should apply to intrinsic evidence because that defendant did not brief that issue. *See Burke*, 2011 UT App 168, ¶ 66.

To the degree that it matters here whether the evidence of the unfired bullet was intrinsic, it was not intrinsic. While evidence that is relevant may be considered "intrinsic," labeling evidence "intrinsic" does not make it relevant. For example, in *Parker*, the uncharged "intrinsic" other acts were relevant because they provided direct evidence of the defendant's participation in the charged crimes. *See Parker*, 553 F.3d at 1314. Similarly, in *Irving*, the Tenth Circuit considered evidence intrinsic where the evidence explained the defendant's motives. *See Irving*, 665 F.3d at 1212-14. Likewise, in *McKinley*, the evidence explained "the context, motive, and set-up of the crime." *See McKinley*, 647 Fed.Appx. at 963. Evidence of the defendant's attacking someone with a brick was relevant to explain the victim's testimony regarding the defendant's coercion and use of force. *Id.* The federal courts in these cases considered the evidence intrinsic because it was relevant.

Utah courts have not found otherwise inadmissible evidence admissible as "intrinsic." For example, in *State v. High*, a case involving aggravated assault, the State argued that evidence of the defendant's prior fights with rival gangs was "intrinsic" to the crime charged and "inextricably intertwined" with the charged assault. *High*, 2012 UT App 180, ¶¶ 1, 7, 10-12, 15, 20-22. This Court rejected that argument because there was no evidence that the victims were rival gang

members. *Id.* ¶¶ 22,48-49. Thus the evidence was not relevant as "intrinsic" or "intrinsically intertwined," and was less probative than prejudicial. *Id.* ¶¶ 48-49.

Moreover, Utah courts have not considered evidence "intrinsic" to the State's narrative where the evidence is offered to prove an uncontested fact. If a defendant offers to stipulate to a fact, "the prosecution retains wide discretion to reject such an offer, which it might legitimately do, for example, to preserve the right to present evidence with broad 'narrative value' beyond the establishment particular elements of a crime." *State v. Verde*, 2012 UT 60, ¶ 28, 296 P.3d 673 (abrogated on other grounds, *Thornton*, 2017 UT 9, ¶¶ 38-41). But if the prosecution lacks a legitimate explanation for refusing a defendant's offer to stipulate, such "rejection . . . reinforce[s] the conclusion that the prosecution's purpose was not to tell a legitimate narrative . . . but instead to present an improper one." *Id.* ¶ 30. "[A]n avowed proper purpose may be rejected as a pretext or 'ruse.'" *Thornton*, 2017 UT 9, ¶ 59. "That would be appropriate, for example, where the proper purpose put forward by the prosecution is addressed to an issue that is not actually disputed, and where the court concludes that the only real effect is to suggest likely action in conformity with bad character." *Id.*

Here, evidence that Mr. Bowden carried the unfired Federal cartridge that would not have fit into the 9 mm Ruger which shot at Officer Tsouras was irrelevant and not intrinsic. Although the State argues that evidence of the bullet in Mr. Bowden's pocket was relevant to link Mr. Bowden to the stolen truck, Mr. Bowden conceded his connection to the stolen truck. SB 30-31; OB 38; see *Verde*,

2012 UT 60, ¶¶ 28-30; *Thornton*, 2017 UT 9, ¶ 59; R.780-81,957,1104-06,1183,1311. Moreover, the State did not reject Mr. Bowden's offer to stipulate to the fact that he was in possession of the stolen truck but relied upon it as fact when arguing for admission of the evidence of the bullet in Mr. Bowden's pocket. *See Verde*, 2012 UT 60, ¶¶ 28-30; R.956. Thus the similarity of the pocketed Federal cartridge to ammunition found in the stolen truck did not "address[] . . . an issue that [was] . . . actually disputed" *See Thornton*, 2017 UT 9, ¶ 59; SB 30-31. Thus, it was not relevant.

Nor was evidence of the pocketed bullet relevant for other purposes, as federal cases consider "intrinsic" evidence. *See Parker*, 553 F.3d at 1315; *Irving*, 665 F.3d at 1212-14; *McKinley* 665 F.3d at 1188-91, 1210-14. Where the Federal cartridge could not have fit into the Ruger, evidence of the cartridge cannot be relevant to illustrate Mr. Bowden's participation in shooting the Ruger. *See Parker*, 553 F.3d at 1315. Although Mr. Bowden may have possessed the cartridge at the same time as the shooting took place, it was not the contemporaneous nature of events in *Parker* that made them "intrinsic," but their relevance in illustrating the defendant's participation in the charged crimes. *See id.* at 1312-1315. Unlike in *Irving*, Mr. Bowden's possessing the Federal cartridge did not illustrate a "motive, opportunity, plan, knowledge, identity, absence of mistake or accident . . ." connected to shooting at Tsouras. *See Irving*, 665 F.3d at 1212-14. Unlike in *McKinley*, evidence of the large bullet in Mr. Bowden's pocket did not

explain or provide context for Officer Tsouras's testimony. *See McKinley*, 647 Fed.Appx. at 963.

Evidence of the bullet in Mr. Bowden's pocket was irrelevant to any proper purpose. The State did not need the evidence to "link[] [Mr. Bowden] to the guns and ammunition in the truck," because Mr. Bowden never contested his connection to the truck. *See* SB 31; *Thornton*, 2017 UT 9, ¶ 59; *Verde*, 2012 UT 60, ¶¶ 25-30; R.780-81,957,1104-06,1183,1311. Thus, "linking [Mr. Bowden] to the guns and ammunition in the truck" was not "of consequence in determining the action." *See* SB 31; Utah R. Evid. 401(b). Although the State argues that the Federal bullet, demonstrating Mr. Bowden's "access and familiarity" with ammunition, "is further proof [of] his identity as the shooter," the State is incorrect for two reasons. *See* SB 31. First, Mr. Bowden's access to the truck was never contested. Second, if, as the State argued in trial, possessing the Federal cartridge equates to "familiarity," comfort, or an interest in firearms, such is irrelevant proclivity evidence. *See* SB 31; *State v. Fedorowicz*, 2002 UT 67, ¶ 32, 52 P.3d 1194; R.961-63. Moreover, the unfired Federal bullet does not demonstrate Mr. Bowden's familiarity with 9 mm bullets or make Mr. Bowden more likely to have shot the Ruger. *See* SB 31. Nor was the evidence intrinsic or relevant to any other purpose.

Moreover, evidence of the unfired bullet was substantially more unfairly prejudicial than probative. *See* Utah R. Evid. 403; OB 35-39. The State argued that the Federal cartridge could not have been unfairly prejudicial because it was

"further evidence of [Mr. Bowden's] guilt." SB 32. The State argued that the bullet provided evidence of guilt by providing "further proof linking him to the truck where police found other ammunition that more directly tied [Mr. Bowden] to the shooting." SB 32. But, as argued in the opening brief and *supra*, Mr. Bowden's conceding his connection to the truck made his possession of the Federal cartridge less probative than prejudicial. See OB 35-39. Although the State cites *State v. Magleby*, that case does not apply here. See 241 F.3d 1306, 1315; SB 32. In *Magleby*, victims' reactions to a racially-motivated cross-burning were probative of the defendant's intent. *Id.* at 1308, 1315-16. But, in the instant case, the evidence is irrelevant to any fact "of consequence in determining the action." See Utah R. Evid. 401(b); *supra*; OB 30-35.

"A proper rule 403 analysis . . . requires a district court to look first, and primarily, to the language of rule 403." *State v. Ring*, 2018 UT 19, ¶ 23, ___ P.3d ___. Evidence is inadmissible "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403. Although the State argues at SB 32, n.6 that factors for determining unfair prejudice in *State v. Shickles* have been "disavowed," our supreme court recently clarified that "to the extent" that this Court "finds it helpful to consider a factor set forth in *Shickles* – or any other factor – it may do so." *Ring*, 2018 UT 19, ¶23; see *Shickles*, 760 P.2d 291, 295-96 (Utah 1988) (abrogated on other grounds, *State v. Doporto*, 935 P.2d 484 (Utah

1997)). As Mr. Bowden argued in the Opening Brief, considering evidence according to the *Shickles* factors² indicates that the danger of unfair prejudice outweighs the probative value of the evidence. See OB 37-39.

Evidence of the unfired Federal bullet was unfairly prejudicial. While "relevance is a low bar," it was irrelevant that Mr. Bowden had an unfired Federal cartridge in his pocket. See *Thornton*, 2017 UT 9, ¶ 61; OB 31-35; *supra*. The evidence improperly invited unwarranted speculation concerning Mr. Bowden's proclivities, interests, and skill with firearms. See OB 35-39. Thus, its "probative value" was easily outweighed by the "danger of . . . unfair prejudice" See Utah R. Evid. 403; OB 35-39.

B. Rule 404(b) is not a proper alternative ground for affirmance.

The State argues that this Court can affirm "on any basis apparent in the record" and urges this Court to determine that evidence of the Federal bullet was admissible under rule 404(b). SB 29 n.5. But, 404(b) does not provide alternate grounds for affirmance where rules 402 and 403 limit 404(b) admissibility. Moreover, alternate grounds are not supported by the trial court findings or evidence in the record.

² As the State points out, "overmastering hostility" is no longer an appropriate consideration. See SB 32 n.6; *State v. Cuttler*, 2015 UT 95, ¶ 20, 367 P.3d 981. Therefore, Mr. Bowden's possessing the unfired bullet did not need to meet the requirement of causing "overmastering hostility," but was unfairly prejudicial because it allowed the jury to speculate about a personal interest in firearms from what was otherwise mere access. See OB 38-39.

Rule 404(b) cannot provide alternate grounds for affirmance because rules 402 and 403 limit the admissibility of evidence under 404(b). Evidence is admissible under rule 404(b) only if it meets three requirements. *State v. Balfour*, 2018 UT App 79, ¶ 28, 418 P.3d 79. First, it must be "offered for a proper, noncharacter purpose." *Id.*, (quoting *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 18, 6 P.3d 1120) (internal quotation marks omitted). "Second, the court must determine whether the bad acts evidence meets the requirements of rule 402, which permits admission of only relevant evidence." *Id.* (internal quotation marks omitted). "Finally, the trial court must determine whether the bad acts evidence meets the requirements of rule 403." *Id.* (internal quotation marks omitted). Thus, evidence that is inadmissible under rules 402 and 403, as is the case here, is also inadmissible despite rule 404(b).

Moreover, the record reflects no evidence or trial court findings of fact that would justify admitting the evidence on 404(b) grounds. "[T]he 'affirm on any ground' rule of appellate review . . . is a tool available only in limited circumstances." *Bailey v. Bayles*, 2002 UT 58, ¶ 13 n.3, 52 P.3d 1158. Even "[w]hen an alternative theory is apparent on the record, the court of appeals must then determine whether the facts as found by the trial court are sufficient to sustain the decision of the trial court on the alternate ground." *Id.* ¶ 20. In determining whether the alternate theory is factually sustainable, this Court "is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the new legal theory or alternate ground." *Id.*

Findings of fact by the trial court "were not required where the facts were 'undisputed' and 'unequivocally reveal[ed]' the grounds supporting the alternate theory." *Richardson v. Hart*, 2009 UT App 387, ¶ 14, 223 P.3d 484 (quoting *Baker v. Stevens*, 2005 UT 32, ¶¶ 14-15, 114 P.3d 580).

Here, the State proposes an alternate ground for affirmance that rests on disputed evidence. The State argues as facts to support its theory that police arrested Mr. Bowden twenty-two minutes after the shooting and that "various calibers of the same brand of ammunition were found in the truck Defendant stole."³ SB 30-31. Then, because the truck was full of guns and ammunition, the State argues that this proved Mr. Bowden's access to and familiarity with guns, thereby providing "further proof of his identity as the shooter." SB 31.

Affirming on this alternate ground would require this Court to "assume the role of weighing evidence and making its own findings of fact," because the trial court made no factual findings. *See Bailey*, 2002 UT 58, ¶20; R.964. To affirm on that alternate ground would "exceed[] [the] proper role" of this Court, and require this Court to weigh evidence on factually "[d]isputed" matters that are not "unequivocally reveal[ed]" by the record. *See Richardson*, 2009 UT App 387, ¶ 14. Factually disputed matters include, for example, who stole the truck, Mr. Bowden's intentions concerning the truck and its contents, who else had access to the truck, and whether Mr. Bowden had personal familiarity with firearms (as

³ *See supra*, Clarification of Facts, where Mr. Bowden explained the lack of trial evidence support the State's claim that jurors heard testimony that Mr. Bowden stole the truck, guns, and ammunition.

opposed to mere access). *See id.*; *Bailey*, 2002 UT 58, ¶ 22; SB 31; OB 34; Clarification of Facts, *supra*.

This Court should decline the State's invitation to affirm on the alternate ground of Utah Rule of Evidence 404(b).

C. Without the evidence of the unfired bullet, there was a reasonable likelihood of better outcome for Mr. Bowden.

The State argues that "[g]iven the totality of the evidence the admission of the bullet did not create a reasonable likelihood of a more favorable outcome." SB 32-33. The State then recounts the evidence⁴, that it argues supports the verdicts. SB 33-34. The State does not contest that it discussed the unfired bullet evidence in closing argument at trial. *See* SB 32-34; OB 39-40. The State does not contest that admission of the evidence of the unfired cartridge allowed the jury to speculate as to Mr. Bowden's familiarity and competence with firearms. *See* SB 32-34; OB 40-41. Much of the admissible evidence that the State points to, such as the dispatch recording, photographs of bullet casings, guns, ammunition, and bullet-holes, was not relevant to the identity of the shooter. *See supra*, Points II.A. and II.B.; OB 30-39; SB 33-34. Where the evidence presented to establish the shooter's identity was weak, irrelevant evidence that allowed the jury to speculate as to Mr. Bowden's familiarity and competence with firearms was prejudicial. *See supra*, Points I, II.A. and II.B.; OB 13-41. Without the irrelevant

⁴ *See supra*, Clarification of Facts, where Mr. Bowden explained the lack of trial evidence supporting the State's claim that jurors heard testimony that Mr. Bowden stole the truck, guns, and ammunition. *See* SB 33.

and unfairly prejudicial evidence, Mr. Bowden had a reasonable likelihood of a more favorable outcome.

III. The trial court erred in failing to merge Mr. Bowden's convictions for felony discharge of a firearm because merger was available and appropriate here.

Mr. Bowden argued that his convictions for felony discharge of a firearm should merge because each conviction involved a single act and each discharge was necessarily proven by the evidence used to prove attempted aggravated murder. OB 44-55. The State does not challenge that each discharge was necessarily proven by the same or less evidence than that used to prove attempted aggravated murder. SB 35-37. Instead, the State argues that the aggravated murder statute explicitly prohibits merging felony discharge of a firearm with attempted aggravated murder. SB 35-37. The State's argument fails because the plain language of the aggravated murder statute does not prohibit felony discharge of a firearm from merging with attempted aggravated murder unless the discharge is a prior conviction used to enhance the murder. *See* Utah Code § 76-5-202, attached as Addendum B.

The aggravated murder statute's plain language precludes merger only of "previous" convictions for felony discharge of a firearm, specifically when they constitute the circumstances aggravating the charged offense. Utah Code § 76-5-202. Statutory plain language dictates whether criminal offenses merge. *State v. Wilder*, 2018 UT 17, ¶ 22, ___ P.3d ___. "[T]he legislature exempts a statute from the requirements of the merger doctrine only when 'an explicit indication of

legislative intent is present in the specific offense statute.'" *State v. Bond*, 2015 UT 88, ¶ 70, 361 P.3d 104. Moreover, any statutory ambiguity should be resolved "in favor of lenity toward the person charged with criminal wrongdoing." See *State v. Rasabout*, 2015 UT 72, ¶ 22, 356 P.3d 1258. "Thus, . . . 'doubt [must] be resolved against turning a single transaction into multiple offenses." *Id.*, (quoting *Bell v. U.S.*, 349 U.S. 81, 84 (1955)).

The statutory plain language does not preclude merger. The statute says: "Any aggravating circumstance described in Subsection (1) or (2) that constitutes a separate offense does not merge with the crime of aggravated murder." Utah Code § 76-5-202(5)(a). "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 § 76-5-202(5)(b). Aggravating circumstances may include that "the actor was previously convicted of . . . "felony discharge of a firearm." Utah Code § 76-5-202(1)(j)(xvii). "Previously" means "before the present time or the time referred to." Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/previously> (last visited June 8, 2018). Thus, felony discharge of a firearm is only "an aggravating circumstance described in Subsection (1)" if it refers to a previous conviction (i.e., a conviction for felony discharge of a firearm that happened before the instant charges). See §§ 76-5-202(5); 76-5-202(1)(j)(xvii); Cambridge Dictionary, *supra*.

Here, the statute does not preclude felony discharge of a firearm from merging with aggravated murder because the felony discharge is not an aggravating circumstance based on a previous conviction. See Utah Code §§ 76-5-202(5)(a); 76-5-202(1)(j)(xvii). First, the felony discharge of a firearm convictions are not aggravating circumstances based on previous convictions because they did not happen "before . . . the time referred to" in the Information. See § 76-5-202(1)(j)(xvii); Cambridge Dictionary, *supra*; R.1-3,35-37. Second, Mr. Bowden was not previously convicted of felony discharge of a firearm. R.531-533. Third, the State did not charge Mr. Bowden with having previously been convicted of felony discharge of a firearm. R.1-3,35-37. Mr. Bowden is not "[a] person convicted of [attempted] aggravated murder, based on" having been "previously convicted of: . . . felony discharge of a firearm." See Utah Code §§ 76-5-202(5)(b); 76-2-202(1)(j)(xvii); R.1-3,35-37,531-533. Contrary to the State's argument, Mr. Bowden's convictions for felony firearm discharge are free to merge "because felony discharge of a firearm . . . is" not "listed as an aggravating circumstance in the aggravated murder statute." See SB 36.

Contrary to the State's argument, this is not a case, as was *Bond*, where the legislature exempted from merger the conviction that the defendant sought to merge. See SB 36; *Bond*, 2015 UT 88, ¶¶ 67-72. In *Bond*, the statute exempted aggravated kidnapping from merging with aggravated murder because aggravated kidnapping was the circumstance that enhanced the *Bond* defendant's conviction to aggravated murder. *Id.* ¶¶ 67-71. Unlike in *Bond*, the statute did not

exempt Mr. Bowden's felony discharge of a firearm convictions from merger because, as current charges and not previous convictions, they were not aggravating circumstances. See Utah Code §§ 76-5-202(5)(a); 76-5-202(1)(j)(xvii); *c.f.*, *Bond*, 2015 UT 88, ¶¶ 1, 66, 71; R.1-3,35-37.

To the extent this Court finds any ambiguity in the aggravated murder statute, this Court should resolve such in favor of assuming the legislature intended that merger be available for aggravated murder cases involving discharge of a firearm where the discharge is not for a prior conviction aggravating circumstance. See *Rasabout*, 2015 UT 72, ¶ 22; Utah Code § 76-5-202(1)(j).

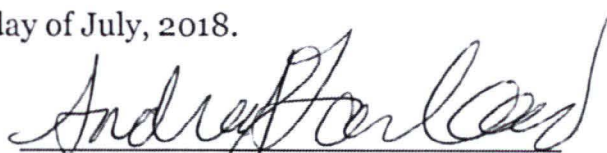
Finally, because the aggravated murder statute does not exempt felony discharge of a firearm from merger and the State has not challenged that the same evidence proving the attempted aggravated murder also proved felony firearm discharge, this Court should assume that the trial court should have merged the felony firearm discharges into the attempted aggravated murder conviction. See *Broderick v. Apartment Mgmt. Consultants, L.L.C.*, 2012 UT 17, ¶¶ 19-20; *State v. Roberts*, 2015 UT 24, ¶ 19, 345 P.3d 1226. Alternatively, for the reasons stated in the opening brief, this Court should reverse the trial court's refusal to merge the felony discharge of a firearm conviction.

CONCLUSION

For these reasons and for the reasons stated in Mr. Bowden's opening brief, Mr. Bowden respectfully asks this Court to reverse and remand with an

order to dismiss the attempted aggravated murder and obstruction of justice convictions. Second, Mr. Bowden asks this Court to reverse and remand for a new trial on all counts because of the admission of the irrelevant evidence. Finally, Mr. Bowden requests that this Court reverse the trial court's erroneous ruling on merger and remand for resentencing.

SUBMITTED this 12th day of July, 2018.


ANDREA J. GARLAND
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 5,871 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.


ANDREA GARLAND

CERTIFICATE OF DELIVERY

I, ANDREA GARLAND, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courttofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 12th day of July 2018.


ANDREA GARLAND

DELIVERED this _____ day of July 2018.

ADDENDUM A

Utah R. Evid. 401

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

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

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

Utah R. Evid. 402

Rule 402. General Admissibility of Relevant Evidence

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

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

Irrelevant evidence is not admissible.

Utah R. Evid. 403

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

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

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

ADVISORY COMMITTEE NOTE

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

Utah R. Evid. 404

Rule 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.

Advisory Committee Note B Rule 404 is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of *State v. Doporto*, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

ADDENDUM B

Utah Code § 76-5-202 (2015)

§ 76-5-202. Aggravated murder

- (1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:
- (a) the homicide was committed by a person who is confined in a jail or other correctional institution;
 - (b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;
 - (c) the actor knowingly created a great risk of death to a person other than the victim and the actor;
 - (d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping;
 - (e) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which the actor committed the crime of abuse or desecration of a dead human body as defined in Subsection 76-9-704(2)(e);
 - (f) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;
 - (g) the homicide was committed for pecuniary gain;
 - (h) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;
 - (i) the actor previously committed or was convicted of:
 - (i) aggravated murder under this section;
 - (ii) attempted aggravated murder under this section;
 - (iii) murder, Section 76-5-203;
 - (iv) attempted murder, Section 76-5-203; or
 - (v) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(i);
 - (j) the actor was previously convicted of:
 - (i) aggravated assault, Subsection 76-5-103(2);
 - (ii) mayhem, Section 76-5-105;
 - (iii) kidnapping, Section 76-5-301;
 - (iv) child kidnapping, Section 76-5-301.1;
 - (v) aggravated kidnapping, Section 76-5-302;

- (vi) rape, Section 76-5-402;
- (vii) rape of a child, Section 76-5-402.1;
- (viii) object rape, Section 76-5-402.2;
- (ix) object rape of a child, Section 76-5-402.3;
- (x) forcible sodomy, Section 76-5-403;
- (xi) sodomy on a child, Section 76-5-403.1;
- (xii) aggravated sexual abuse of a child, Section 76-5-404.1;
- (xiii) aggravated sexual assault, Section 76-5-405;
- (xiv) aggravated arson, Section 76-6-103;
- (xv) aggravated burglary, Section 76-6-203;
- (xvi) aggravated robbery, Section 76-6-302;
- (xvii) felony discharge of a firearm, Section 76-10-508.1; or
- (xviii) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime listed in this Subsection (1)(j);
- (k) the homicide was committed for the purpose of:
 - (i) preventing a witness from testifying;
 - (ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;
 - (iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or
 - (iv) disrupting or hindering any lawful governmental function or enforcement of laws;
- (l) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;
- (m) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;
- (n) the homicide was committed:
 - (i) by means of a destructive device, bomb, explosive, incendiary device, or similar device which was planted, hidden, or concealed in any place, area, dwelling, building, or structure, or was mailed or delivered; or
 - (ii) by means of any weapon of mass destruction as defined in Section 76-10-401;
- (o) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;
- (p) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;
- (q) the victim was a person held or otherwise detained as a shield, hostage, or for

ransom;

(r) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death;

(s) the actor dismembers, mutilates, or disfigures the victim's body, whether before or after death, in a manner demonstrating the actor's depravity of mind; or

(t) the victim, at the time of the death of the victim:

(i) was younger than 14 years of age; and

(ii) was not an unborn child.

(2) Criminal homicide constitutes aggravated murder if the actor, with reckless indifference to human life, causes the death of another incident to an act, scheme, course of conduct, or criminal episode during which the actor is a major participant in the commission or attempted commission of:

(a) child abuse, Subsection 76-5-109(2)(a);

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

(c) rape of a child, Section 76-5-402.1;

(d) object rape of a child, Section 76-5-402.3;

(e) sodomy on a child, Section 76-5-403.1; or

(f) sexual abuse or aggravated sexual abuse of a child, Section 76-5-404.1.

(3)(a) If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony.

(b) If a notice of intent to seek the death penalty has not been filed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

(c)(i) Within 60 days after arraignment of the defendant, the prosecutor may file notice of intent to seek the death penalty. The notice shall be served on the defendant or defense counsel and filed with the court.

(ii) Notice of intent to seek the death penalty may be served and filed more than 60 days after the arraignment upon written stipulation of the parties or upon a finding by the court of good cause.

(d) Without the consent of the prosecutor, the court may not accept a plea of guilty to noncapital first degree felony aggravated murder during the period in which the prosecutor may file a notice of intent to seek the death penalty under Subsection (3)(c)(i).

(e) If the defendant was younger than 18 years of age at the time the offense was committed, aggravated murder is a noncapital first degree felony punishable as provided in Section 76-3-207.7.

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

b) The reasonable belief of the actor under Subsection (4)(a) shall be determined

from the viewpoint of a reasonable person under the then existing circumstances.

(c) This affirmative defense reduces charges only as follows:

(i) aggravated murder to murder; and

(ii) attempted aggravated murder to attempted murder.

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

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

Credits

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