2016

The State of Utah, Plaintiff/Appellee, v. Saul Martinez, Defendant/Appellant : Reply Brief

Utah Court of Appeals

No. 20161019-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

SAUL MARTINEZ,
Defendant/Appellant.

Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

Appeal from a final judgment of conviction for Attempted Murder, a first degree felony, in violation of Utah Code § 76-5-203; Possession of a Dangerous Weapon by Restricted Person, a second degree felony, in violation of Utah Code § 76-10-503(2)(A); Aggravated Assault, a third degree felony, in violation of Utah Code § 76-5-103(1); and three counts of Felony Discharge of a Firearm, third degree felonies, in violation of Utah Code § 76-10-508.1, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Richard McKelvie, presiding.

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No. 20161019-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
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Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

INTRODUCTION

As required by rule 24(b), Utah Rules of Appellate Procedure, this reply brief is "limited to responding to the facts and arguments raised in the appellee's ... principal brief." Specifically, it responds to the State's claim that the Tooele residents' out-of-court-statements were non-hearsay. *See* SB at 15-23. It also addresses the State's contention that the legislature expressly prohibits the merger of discharge of a firearm and attempted murder. *See id*. at 31-35. This reply does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

I. This Court should reverse because the trial court admitted the out-of-court statements of unidentified Tooele residents in violation of the rule against hearsay.

In opening, Martinez argues that the Tooele residents' statements were inadmissible hearsay. *See* OB at 15-21. The State counters that the statements were not hearsay, and even if they were, they were not prejudicial. *See* SB at 15-30. Contrary to the State's claim, the Tooele residents' statements were offered for the truth of the matter asserted. The opening brief adequately addresses the State's no-prejudice claim. *See id.* at 21-27.

The record shows that the Tooele residents' statements were offered for their truth. *See id.* at 15-21. In arguing otherwise, the State faults Martinez for incorporating considerations of relevance and detail in his hearsay analysis. *See* SB at 19-23. Moreover, it relies on cases that are distinguishable from this case. *See id.* at 17-18.

First, the State is wrong to suggest that the hearsay determination is neither informed by the relevance of the purported non-truth purpose nor the statement's content or detail. *See id.* at 19-23."Whether a statement is offered for the truth of the matter asserted is a question of law . . . ." *Haltom*, 2005 UT App 348, ¶8, 121 P.3d 42. In answering this question, "[i]t is necessary to look to the real purpose of the offered statement, not the purpose urged by its proponent, to determine if it is offered to prove truth." *State v. Wells*, 522 N.W.2d 304, 308 n.1 (Iowa Ct. App. 1994); *United States v. Edelen*, 561 F. App'x 226, 234 (4th Cir.

2014) ("In order to determine whether an out-of-court statement qualifies as inadmissible hearsay under this Rule, the district court must 'identify [ ] the actual purpose for which a party is introducing' the statement at issue.").

In discerning the real purpose, Utah courts have relied on objective considerations taken in light of all the circumstances. *See, e.g., State v. McNeil*, 2013 UT App 134, ¶49, 302 P.3d 844. For instance, our courts have considered the extent to which the proffered purpose was "an issue" in the case, *see Stratford v. Morgan*, 689 P.2d 360, 364 (Utah 1984); whether the relevance of the statement depends on its truth, *McNeil*, 2013 UT App 134, ¶49; *Francis v. Nat'l DME*, 2015 UT App 119, ¶55, 350 P.3d 615; how the statement was used, *McNeil*, 2013 UT App 134, ¶49; *Francis*, 2015 UT App 119, ¶55; and the content, detail, and specificity of the statements. *State v. Davis*, 2007 UT App 13, ¶24, 155 P.3d 909; *see also Wells*, 522 N.W.2d at 308 n.1 ("By eliciting specific statements, not merely focusing on the fact a conversation occurred, the State attempted to establish the truth of the facts asserted in the conversation."). While no single factor is dispositive, all of these considerations inform whether a statement is offered for its truth. *See Stratford*, 689 P.2d at 364; *Francis*, 2015 UT App 119, ¶55; *McNeil*, 2013 UT App 134, ¶49; *Davis*, 2007 UT App 13, ¶24.

The State suggests that concerns over relevance and unnecessary detail are the concerns of other rules. *See* SB at 19-23. True, other rules may be offended by unnecessarily detailed statements that are offered to prove a matter that is not in dispute. *E.g.*, Utah R. Evid. Rule 403. But these circumstances also offer objective

evidence of the real purpose for which a statement is offered. *See, e.g.*, *McNeil*, 2013 UT App 134, ¶49.

Moreover, as shown, Utah courts recognize that considerations of detail, content, and relevance have a place in the hearsay analysis. *See Stratford*, 689 P.2d at 364; *Francis*, 2015 UT App 119, ¶55; *McNeil*, 2013 UT App 134, ¶49; *Davis*, 2007 UT App 13, ¶24. And so do courts elsewhere. *E.g.*, *Wells*, 522 N.W.2d at 308 n.1 ("A statement is offered to prove the truth of its assertion if the substance of the statement must be believed by the jury to have true relevance in the case."); *Blount v. State*, 22 N.E.3d 559, 566–67 (Ind. 2014) ("If the fact sought to be proved under the suggested non-hearsay purpose is not relevant, or it is relevant but its danger of unfair prejudice substantially outweighs its probative value, the hearsay objection should be sustained."); *People v. Jura*, 817 N.E.2d 968, 974–77 (Ill. App. Ct. 2004) (rejecting the State's argument that the content of the statement does not matter, and looking to the content and substance of the challenged statement to determine that is was hearsay).[1]

[1] The State says in a footnote that Martinez's "relevance-based arguments are unpreserved." SB at 20 n. 5. This argument is misplaced. Martinez does not argue, and could not argue, that the challenged statements themselves are irrelevant under rule 401. *See* OB at 16-21. Indeed, the statements are relevant—just not for a valid non-truth purpose. *See id.* To the extent Martinez relies on principles of relevance, he does so only to aid in the interpretation of the primary issue on appeal: whether the challenged statements were offered for their truth. *See id.* Martinez was not required to preserve all of his "arguments for or against a particular ruling on an issue raised below." *State v. Fahina*, 2017 UT App 111,

The State also relies on a series of Utah cases for the proposition that "[t]his Court holds that out-of-court statements offered to explain actions are not hearsay." SB at 17. These cases are distinguishable because the various objective factors discussed above demonstrated that the statements were offered for a purpose other than their truth. *See supra* pp. 2-3.

In *State v. Pedersen*, out-of-court statements were offered to explain why a victim advocate reported suspicions of sexual abuse, but the actual substance and content of the statements was not admitted. 2010 UT App 38, ¶¶6, 23-24, 227 P.3d 1264. In this case, by contrast, the hearsay repeated the "definite," detailed allegations of the Tooele residents and identified Martinez as the culprit. *Davis*, 2007 UT App 13, ¶24; OB at 20.

In *State v. Perez*, it was clear from the context that the actual purpose of the statement, "somebody told me the car was stolen," was to explain subsequent action. 924 P.2d 1, 3 (Utah Ct. App. 1996). There, the statement was offered by the defense through the testimony of the defendant, who was charged with theft by receiving a stolen car. *Id.* at 2-3. Under these circumstances, it was evident that the defendant was not offering the statement for its truth because a truth inference actually hurt the proponent/defendant. *See id.* Contrarily, here, the context shows that the statements were offered for their truth because the State

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¶21, 400 P.3d 1177. He only needed to preserve the hearsay "issue," which he did. *Id.*; R.709.

offered them during its case in chief, and a truth inference supported the elements that the State was required prove. *See* R.709; *see also* OB 21-25.

Furthermore, in *In re G.Y.*, 962 P.2d 78 (Utah Ct. App. 1998), and *State v. Loose*, 2000 UT 11, 994 P.2d 1237, the non-truth purposes for which the statements were offered were in "issue." *Stratford*, 689 P.2d at 364. In *G.Y.*, a parental termination case, the DCFS services provided to the appellant/parent were an important factor in the trial court's termination decision. 962 P.2d at 83. Thus, the challenged statements were non-hearsay where they "establish[ed] that sufficient services were offered" and "explain[ed] actions [the DCFS caseworker] took in performing her duties." *Id.* at 86.

Meanwhile, *Loose* was a child sex abuse case where the trial court identified as an issue the "significant amount of time between the dates of the alleged offenses and the date the Defendant was charged." 2000 UT 11, ¶25 (Howe, J., dissenting). Thus, the victim's initial out-of-court disclosures to her therapist were "essential for the jury to understand how these allegations against the Defendant arose . . . ." *Id.* ¶¶3-4, 10. Here, by contrast, the alleged non-truth purpose was not an issue. *See* OB at 19-20. Indeed, there was no issue or dispute regarding why Rafael asked Martinez, "are you looking for me to kill me." *See id.*

The State's case law is thus distinguishable because in those cases, various objective factors indicated that the statements were offered for a valid non-truth purpose. But here, for the reasons stated in opening, the objective circumstances

demonstrate that the statements were offered for their truth. *See id.* at 15-21. Thus, the Tooele residents' statements constituted hearsay.

II. Martinez's discharge of a firearm convictions must be vacated.

In opening, Martinez asks this Court to vacate his discharge convictions under subsection 76-1-402(1)'s single criminal episode doctrine; under subsection 76-1-402(3)'s lesser-included offense doctrine; and under the doctrine of common law merger. *See* OB at 28-44. At the outset, Martinez acknowledges that during the pendency of this appeal, the Utah Supreme Court issued *State v. Wilder*, 2018 UT 17. There, the supreme court "renounce[d] the common-law merger test." *Id.* ¶38. Thus, Martinez's common-law merger argument is no longer in play.

Meanwhile, the State does not challenge Martinez's contention that his convictions arose from the "same act" under subsection 76-1-402(1)'s single criminal episode doctrine. *See generally* SB at 31-39. At this point, then, the primary contested issues are: (1) whether—as the State argues—the legislature expressly prohibits merger of felony discharge and attempted murder, *see* SB at 31-35; and (2) whether discharge and attempted murder share a lesser-greater relationship for purposes of subsection 76-1-402(3). *See id.* at 35-39.

The opening brief adequately addresses the lesser-greater relationship issue. *See* OB at 33-37. This reply addresses the State's contention that the "murder statute explicitly permits both separate convictions and punishments for felony discharge of a firearm and attempted murder." *See id.* at 35. The plain

language of the murder statute defeats this argument in several ways. As shown below, the murder statute's merger exemption does not apply to attempt crimes; it does not apply to knowing/intentional murder; or alternatively, it only negates the application of lesser-included offense merger.

The murder statute describes the various ways a defendant can commit murder. One way to commit murder is to "intentionally or knowingly cause[] the death of another." Utah Code § 76-5-203(2)(a). This was the provision under which the State alleged that Martinez attempted murder. R.1-6.

Another way to commit murder is to kill someone during the commission of a "predicate offense," a.k.a. felony murder. Utah Code § 76-5-203(2)(d). Predicate offense is defined to include a long list of felonies, including discharge of a firearm. Utah Code § 76-5-203(1)(v). Then, subsection § 76-5-203(5) states:

> (5)(a) Any predicate offense described in Subsection (1) that constitutes a separate offense does not merge with the crime of murder.
>
> (b) A person who is convicted of murder, based on a predicate offense described in Subsection (1) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Utah Code § 76-5-203(5).

The State concedes that subsection (5)(b) of the merger exemption applies only to felony murder and thus, "does not apply" here. SB at 33. It contends, however, that subsection (5)(a) applies to all murders—including knowing/intentional murder. *Id*. Thus, in the State's view, subsection (5)(a) allows for separate convictions and punishments for felony discharge of a firearm

and attempted murder. *Id.* Contrary to the State's claim, subsection (5)(a) does not exempt attempted murder and felony discharge from the merger requirements of section 76-1-402.

The Utah Supreme Court has held that the "[l]egislature exempts a statute from the requirements of the merger doctrine only when 'an explicit indication of legislative intent is present.'" *State v. Bond*, 2015 UT 88, ¶70, 361 P.3d 104 (quoting *State v. Smith*, 2005 UT 57, ¶11, 122 P.3d 615). In deciding whether a statute is exempt, the plain statutory language controls. *Smith*, 2005 UT 57, ¶11. Thus, the most obvious problem with the State' argument is that section 76-5-203(5)(a) plainly applies to the crime of *murder*—not attempted murder.

The State tries to explain away this problem by citing to the Utah Supreme Court case, *State v. Casey*, 2003 UT 55, 82 P.3d 1106. But *Casey* does not address merger or the applicability of the merger exemption to attempted murder. *See generally id*. Nor does it state that legislative references to "murder" necessarily include "attempted murder." *Id.* On the contrary, *Casey* recognizes that attempted murder requires "different elements" than murder. *Id.* ¶15. *Casey*, therefore, does not help the State.

The plain language of section 76-5-203(5)(a)'s merger exception is even more fatal to the State's argument. The provision omits any reference to "attempted murder," indicating that the exemption apply only to "murder" charges. Utah Code § 76-5-203(5)(a). Moreover, the explicit reference to "attempted murder" in the immediately preceding paragraph demonstrates that

the omission was purposeful. Utah Code § 76-5-203(4)(c) ("This affirmative defense reduces charges only from . . . *attempted murder* to attempted manslaughter." (emphasis added)); *see also Phillips v. Dep't of Com., Div. of Sec.*, 2017 UT App 84, ¶22, 397 P.3d 863 ("Because '[this court] presume[s] that the expression of one term should be interpreted as the exclusion of another,' [this court] 'seek[s] to give effect to omissions in statutory language by presuming all omissions to be purposeful.'"). Indeed, had the legislature intended to exempt "attempted murder" as well, "it would have said so." *Johansen v. Johansen*, 2002 UT App 75, ¶8, 45 P.3d 520. Thus, in the absence of an "explicit indication" otherwise, section 76-1-402's merger principles apply to attempted murder and felony discharge. *Bond*, 2015 UT 88, ¶70.

In any event, the plain language and structure of the murder statute suggest that the merger exemption does not apply to knowing/intentional attempted murder—only felony murder. The murder statute's merger exemption applies to "murder" and "[a]ny predicate offense described in Subsection (1) . . . ." Utah Code § 76-5-203(5)(a). Subsection (1) defines predicate offense. Utah Code § 76-5-203(1). Specifically, it states "[a]s used in this section, 'predicate offense' means . . .," and then it goes on to enumerate a list of felonies—among them, felony discharge. *Id.* Yet "[a]s used" in the murder section," the notion of a "predicate offense" is unique to the definition of felony murder; in felony murder, it is the "predicate offense" that provides a basis for the murder charge. Utah Code § 76-5-203(1), (2)(d). Indeed, "'[p]redicate' means 'to base or establish (a

statement or action, for example).'" *Phillips v. Com.*, 694 S.E.2d 805, 810 (Va. Ct. App. 2010) (quoting *The American Heritage Dictionary of the English Language* 1382 (4th ed. 2006)). Moreover, a "predicate offense" is commonly understood as "[a]n earlier offense that can be used to enhance a sentence levied for a later conviction." *Black's Law Dictionary* 1188 (9th ed. 2004). Consistent with this definition, Utah courts have held that predicate felonies are enhancing factors that are used to enhance an otherwise unintentional killing to murder. *State v. McCovey*, 803 P.2d 1234, 1238 (Utah 1990).

By using the word "predicate," the statute indicates that the enumerated felonies must form the "base" for something else, i.e. murder. *See* Utah Code § 76-5-203(1), (2), (5). While enumerated felonies provide a base for felony murder, they do not form the base for the other variations of murder. *See* Utah Code § 76-5-203(1), (2). Thus, for purposes of felony murder, the enumerated felony offenses operate as predicates for murder, making them "predicate offenses" that are subject to the merger exemption. *See* Utah Code § 76-5-203(1), (2), (5). But when a defendant is charged with another variation of murder, the enumerated offenses are not predicates for murder. *See* Utah Code § 76-5-203(1), (2). Under these circumstances, they are not "predicate offenses" to which the merger exemption attaches. *See* Utah Code § 76-5-203(1), (2), (5).

In this case, Martinez was charged with attempted knowing/intentional murder. R.1-6. While felony discharge is included in subsection (1)'s list of enumerated felonies, it does not form the base of knowing/intentional murder.

See id. Thus, in this prosecution for attempted knowing/intentional murder, felony discharge is not a true "predicate offense," and thus, the merger exemption does not apply. *See id.*

Martinez recognizes that this Court must give meaning to both subsections of the merger exemption so as to avoid superfluity. *Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶11, 368 P.3d 846. The State attempts to do so by interpreting subsection 5(a) to apply to *all* variations of murder and subsection 5(b) to apply to felony murder alone. *See* SB at 33. But holding that both subsections apply to felony murder does not render any provision superfluous.

Subsections 5(a) and 5(b) of the merger exemption target the distinct merger provisions of subsection 76-1-402. *See* Utah Code §§ 76-5-203(5); 76-1-402(1), (3). As explained in opening, section 76-1-402 provides two independent grounds for vacating Martinez's discharge convictions: (1) they violate the single criminal episode doctrine of subsection 76-1-402(1); and (2) they violate the lesser-included offense doctrine of subsection 76-1-402(3). *See* OB at 28-37. Both subsections of the merger exemption target felony murder, but subsection 5(a) negates the application of the lesser-included offense doctrine, and subsection 5(b) negates the application of the single criminal episode doctrine. *See* Utah Code §§ 76-5-203(5); 76-1-402(1), (3).

This is born out by the statutory language. Subsection 5(b) expressly allows a defendant to be "punished for" both murder and a predicate offense. Utah Code § 76-5-203(5)(b). Section 76-1-402(1)'s single criminal episode doctrine is also

concerned with "punish[ment]," prohibiting multiple punishments for different offenses that are based on "the same act of a defendant." Utah Code § 76-1-402(1).

Meanwhile, unlike subsection 5(b), subsection 5(a) does not expressly allow for multiple punishments and omits reference to "punish[ment]" altogether. Utah Code § 76-5-203(5); *see also Biddle v. Washington Terrace City*, 1999 UT 110, ¶14, 993 P.2d 875 ("[O]missions in statutory language should 'be taken note of and given effect.'"). Instead, subsection 5(a) states that a predicate offense "does not *merge* with the crime of murder." Utah Code § 76-5-203(5)(a) (emphasis added). While the word "merger" is often used as a shorthand (including in this brief), "merger" is a legal term of art which, in criminal law, is defined as "[t]he absorption of a *lesser included offense* into a more serious offense when a person is charged with both crimes." *Merger*, Black's Law Dictionary (10th ed. 2014) (emphasis added); *see also State v. Richter*, 402 P.3d 1016, 1025 n.11 (Ariz. Ct. App. 2017) ("The merger doctrine only 'applies to lesser-included offenses.'"). By using a term associated with lesser-included offense merger and omitting reference to "punish[ment]," it is evident that the legislature intended for subsection 5(a) to negate the application of subsection 76-1-402(3)'s lesser-included offense doctrine. *See* Utah Code §§ 76-5-203(5); 76-1-402(1), (3). Thus, the statutory language suggests that subsections 5(a) and 5(b) work to negate the distinct provisions of the merger statute in the context of a felony murder prosecution. *See id*.

Finally, even if subsection 5(a) does—as the State argues—apply to Martinez's knowing/intentional attempted murder conviction, this Court should still vacate Martinez's discharge convictions. *See* Utah Code §§ 76-5-203(5); 76-1-402(1), (3). As argued above, subsection 5(a) precludes the application of lesser-included offense merger. *See id*. But unlike subsection 5(b), it does not allow for multiple "punish[ments]" so as to preclude the application of the single criminal episode doctrine. *See id.* Accordingly, Martinez's discharge convictions should be vacated because he was punished twice for the "same act" in violation of section 76-1-402(1)'s single criminal episode doctrine. *See* OB at 28-33.

In short, the merger exemption of subsection 5(a) does not apply in this case because Martinez was convicted of *attempted* murder. Still, it does not apply because Martinez was convicted of attempted knowing/intentional murder, and the exemption applies only to felony murder. Alternatively, the exemption does not negate the application of section 76-1-402(1)'s single criminal episode doctrine. Thus, this Court may apply the provisions of section 76-1-402 to vacate Martinez's discharge convictions. *See id.* at 28-37.

CONCLUSION

For the reasons here and in opening, Martinez respectfully asks this Court to reverse his convictions and remand for a new trial. Alternatively, he asks this Court to vacate his convictions for discharge of a firearm.

SUBMITTED this 17th day of July 2018.

ALEXANDRA S. MCCALLUM
Attorney for 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 3,445 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.

ALEXANDRA S. McCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 17th day of July 2018.

ALEXANDRA S. McCALLUM

DELIVERED this _____ day of July 2018.

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