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IN THE SUPREME COURT

OF THE STATE OF UTAH

D. CLARK WILLIAMS, Plaintiff and Respondent, v. MERRILL L. OLDROYD, GERALD CARTER, and JOHN A. CANTO, Defendants and Appellants.	)	Case No. 15313

REPLY BRIEF OF APPELLANTS

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two copies of the Reply Brief of Appellants in the above-entitled matter to William G. Fowler, Roe and Fowler, Attorneys for Respondent, 340 East Fourth South, Salt Lake City, Utah 84111, this 21st day of February, 1978.

V. Pershing Nelson

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LLOYD WILLIAM NORMAN,

Defendant-Appellant.

Case No. 15315

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH, THE HONORABLE THORNLEY K. SWAN, JUDGE

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FILED

MAR 23 1978

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE------------------ 1
DISPOSITION IN THE LOWER COURT----------------------- 1
RELIEF SOUGHT ON APPEAL------------------------------- 2
STATEMENT OF FACTS------------------------------------ 2
ARGUMENT
POINT I: UNDER UTAH STATUTORY LAW, A PERSON MAY BE CHARGED WITH AND CONVICTED OF THE CRIME OF ATTEMPTED MANSLAUGHTER------ 6
POINT II: BECAUSE OF DEFENDANT'S CONVICTION FOR ATTEMPTED MANSLAUGHTER HE NEED NOT BE RETRIED ON THE ORIGINAL CHARGES------------------------------------- 14
POINT III: THE EVIDENCE PRODUCED AT TRIAL WAS SUFFICIENT TO SUSTAIN THE VERDICT RENDERED BY THE TRIAL COURT----------------- 15
CONCLUSION-- 17

CASES CITED

People v. Patterson, 347 N.E.2d 898, 39 N.Y.2d 288, 383 N.Y.S.2d 573 (1976)--------------------- 7
People v. Shelton, 385 N.Y.S.2d 708, 88 Misc.2d 136 (1976)----------------------------------- 7
People v. Berchtold, 357 P.2d 183, 11 Utah 2d 208 (1960)-- 15
State v. Canfield, 18 Utah 2d 292, 422 P.2d 196 (1967)-- 15
State v. Coffey, 564 P.2d 777 (Utah 1977)------------- 15
State v. Romero, 554 P.2d 216 (Utah 1976)------------- 15
State v. Wilson, 218 Or. 575, 364 P.2d 115 (1959)----- 9

STATUTES CITED

Utah Code Ann. § 76-2-102 (1953), as amended---------- 12,17
Utah Code Ann. § 76-2-103(3) (1953), as amended------- 6
Utah Code Ann. § 76-3-402(1) (1953), as amended------- 11
Utah Code Ann. § 76-4-101 (1953), as amended---------- 8,12,14,17
Utah Code Ann. § 76-5-203(b) (1953), as amended------- 1,6
Utah Code Ann. § 76-5-205(1) (1953), as amended------- 6,12

OTHER AUTHORITIES CITED

Arnold, Criminal Attempts--The Rise and Fall of an Abstraction, 40 Yale Law Journal 53 (1931)-- 11

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	:	
-vs-	:	Case No. 15315
LLOYD WILLIAM NORMAN, Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This case resulted from the filing of an information charging defendant, Lloyd William Norman, with attempted criminal homicide in violation of Utah Code Ann. § 76-5-203(b) (1953), as amended (R.7). The information alleged that on or about December 25, 1976, at Clearfield, Utah, the defendant did, intending to cause serious bodily injury to another, commit an act clearly dangerous to human life, in that he shot Clifford D. Daniels.

DISPOSITION IN THE LOWER COURT

On March 3, 1977, following a trial before Honorable Thornley K. Swan, Judge, defendant was found guilty of the crime of attempted manslaughter, a felony of

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the third degree and was committed to the Division of Corrections for a ninety-day evaluation (T.258, R.29). On June 7, 1977, defendant was sentenced to the Utah State Prison for a term of zero to five years (T.268, R. 28).

RELIEF SOUGHT ON APPEAL

Respondent prays the Supreme Court affirm the decision of the lower court.

STATEMENT OF FACTS

On December 24, 1976, the defendant, Lloyd William Norman, was living with Mrs. Lucille Daniels at the Hammond Motel, Clearfield, Utah (T.17,66). Mrs. Daniels was the manager of the motel. The victim, Clifford Daniels, son of Mrs. Lucille Daniels, and his wife and children were also living at the Hammond Motel (T.17).

At trial, the victim testified as to several trips by his family and Mrs. Daniels and the defendant between his apartment and the one occupied by Mrs. Daniels and the defendant for the purposes of eating dinner (T.24,25), exchanging gifts (T.25), and socializing (T.26). Both the defendant and Clifford drank throughout the evening (T.24-27).

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Clifford testified that while at his mother's apartment later in the evening, he made several long distance telephone calls (T.28). Clifford was on the kitchen phone and the defendant was on an extension in the living room. During the course of a conversation with Clifford's brother, Clifford said that he could "beat Bill arm wresting, because he was just an old man." (T.29, lines 6,7). The defendant responded that Clifford "didn't know what a Norman could do." (T.29, line 10). At the conclusion of the call, Clifford testified that he returned immediately to the table where his wife and mother were seated, while the defendant was a few moments in returning from the living room (T.29).

Shortly thereafter Clifford's wife and mother took his younger children home to bed. Upon Mrs. Daniels' return, Clifford and his oldest son, Chris, testified that Chris asked his father if he was ready to go home(T.30). Clifford replied that he was, but the defendant quickly responded, "No, he's going to sit here and we're going to drink some more." (T.30, lines 8,9). The defendant then told his son, Tony, to go with Chris to Clifford's house.

Chris testified that before he and Tony left Mrs. Daniels' home, they placed a new, unrecorded cassette tape in a tape recorder Tony had received for Christmas, turned on the recording mechanism, and without the knowledge

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of Clifford or the defendant placed the recorder in a position to record any subsequent conversation between the two (T.105-113).

Clifford then testified that after his mother had returned, said goodnight and retired to bed, the defendant suddenly struck the table and asked Clifford if he was "fucking with a Norman." (T.31, line 14). Clifford responded "No," but the defendant began to scream and yell at him and quickly proceeded to knock glasses, bottles and a knife from the table (T.31). As Clifford was rising from his chair to leave, the defendant stood, took a gun from under his belt and shot Clifford in the abdomen (T.31,32). Clifford testified that he fell back into the chair as defendant continued to curse and threatened to kill Clifford. Mrs. Daniels returned to the room and the defendant commanded her to get Clifford out of the house (T.32). As Clifford rose from his chair in an attempt to leave, he collapsed and fell to the floor where he remained until the police arrived.

The testimony of the defendant, Lloyd William Norman, presented a different version of the events on December 24, 1976.

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The defendant testified that after Mrs. Daniels had retired, Clifford began to argue with him (T.215). Shortly after calming him down, Clifford picked up a knife from the table, pointed it at the defendant and said he was going to "whip" the defendant (T.215,216).

The defendant testified that he then rose from the table, went to the bedroom where he procured a gun, tucked it under his belt and then returned to the table where Clifford was sitting (T.219). Defendant, without Clifford's knowledge, then removed the pistol from his belt, cocked it and laid it on his lap underneath the table pointing toward Clifford (T.220).

Defendant testified that he next demanded the knife from Clifford. Clifford shoved it toward defendant, who picked it up and threw it against the wall (T.22). Defendant testified that his hands were wet when he reached underneath the table to uncock the hammer of the pistol. He testified that his fingers slipped, the gun discharged and Clifford was struck in the abdomen by a bullet (T.221).

Following this incident, the defendant was charged with attempted criminal homicide (R.7). The defendant was then tried for this offense and convicted of attempted manslaughter from which he now appeals (T.258, R.29).

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ARGUMENT

POINT I

UNDER UTAH STATUTORY LAW, A PERSON MAY BE CHARGED WITH AND CONVICTED OF THE CRIME OF ATTEMPTED MANSLAUGHTER.

The defendant, Lloyd William Norman, was charged with the crime of attempted criminal homicide in violation of Utah Code Ann. § 76-5-203(b) (1953), as amended. Following trial, defendant was convicted of the crime of attempted manslaughter (T.258, R.29). By way of this appeal defendant argues that there is no such crime as attempted manslaughter and urges that his conviction be reversed.

Utah Code Ann. § 76-5-205(1) provides:

> "Criminal homicide constitutes manslaughter if the actor:
> (a) Recklessly causes the death of another; or
> (b) Causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. . . ."

Utah Code Ann. § 76-2-103(3)(1953), as amended, states that one acts:

> ". . . [r]ecklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the

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> result will occur. The risk must
> be of such a nature and degree that
> its disregard constitutes a gross
> deviation from the standard of care
> that an ordinary person would exercise
> under all the circumstances as viewed
> from the actor's standpoint."

The Utah Criminal Code does not define "under the influence of extreme mental or emotional disturbance" but case law provides definitions of similar phrases which may be useful. "Extreme emotional disturbance" has been defined in People v. Shelton, 385 N.Y.S.2d 708, 717, 88 Misc.2d 136 (1976), as:

> ". . . the emotional state of
> an individual, who:
> (a) has no mental disease or
> defect . . .; and
> (b) is exposed to an extremely
> unusual and overwhelming stress; and
> (c) has an extreme emotional
> reaction to it, as a result of which
> there is a loss of self-control and
> reason is overborne by intense feelings,
> such as passion, anger, distress,
> grief, excessive agitation, or other
> similar emotions."

People v. Patterson, 347 N.E.2d 898, 39 N.Y.2d 288, 383 N.Y.S.2d 573 (1976), supplies a further definition. "Extreme emotional disturbance" results where:

> ". . . a significant mental
> trauma has affected a defendant's
> mind for a substantial period of time,
> simmering in the unknowing subconscious
> and then inexplicably coming to the
> fore." 347 N.E.2d at 907.

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Hence, under Utah law, a person commits manslaughter when he (1) is conscious of a risk, which if ignored would be a substantial deviation from the standard of care exercised by the average man, and disregards it, resulting in the death of another person, or (2) is under the influence of exceptionally unusual and overwhelming stress which causes him to loose self-control, resulting in the death of another.

The Utah Criminal Code deals with attempt at Section 76-4-101:

> "(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.
>
> (2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense."

A careful reading of Section 76-4-101(1) reveals that a person has committed an attempt when (1) he acts with "the kind of culpability otherwise required for the commission" of the substantive offense, and (2) his conduct constitutes "a substantial step toward commission of the offense."

Appellant contends that there is no such crime as attempted manslaughter. He argues that the term

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"culpability," as used in the attempt statute, means the mens rea inherent to the substantive criminal offense (Appellant's Brief, page 4). He states that culpability does not refer to reckless actions or actions which are the result of "extreme mental or emotional disturbance" and concludes that since there is no mens rea associated with the crime of manslaughter, there can be no crime of attempted manslaughter (Appellant's Brief, page 5).

Respondent excepts to appellant's reasoning and conclusion and asserts that, under Utah statutory law, a person may be charged with and convicted of the crime of attempted manslaughter.

The function of the law of criminal attempt is to permit courts to adjust penalties in cases where the conduct of the defendant falls short of the conduct required to constitute a completed offense. State v. Wilson, 218 Or. 575, 364 P.2d 115 (1959). Criminal attempt laws allow a court to adjust penalties in light of specific facts and circumstances to more accurately reflect the criminal responsibility and guilt of the defendant. Professor Arnold offers this analysis:

> "Suppose we say that the law of criminal attempts is not a classified set of rules describing the elements of any crime or covering any given conduct. When we talk about

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the law of criminal attempts in general suppose we refer to it as a power or discretion that has been given to the courts either by the legislature or by common law precedent to extend the limits of prohibitions against certain kinds of conduct to conduct which does not quite fall within the terms of those prohibitions. We immediately recognize that this power is very similar to the power which courts have given themselves in that vague field known as common law crimes. This is a most useful logical device and, while it may seem vague, no one considers it confused. For example, suppose that a careless legislature omits the penalty in a criminal statute. The device of common law crimes provides a way out of the dilemma. A sketchy criminal code omits to prohibit an obviously dangerous kind of conduct. The power to punish for common law crimes gives the court freedom to act without appearing to encroach upon the legislature. We are content to define this power in terms which are broad enough to cover any case which might arise. The vagueness of our definition, however, does not bother us because we do not regard the law against common law crimes as a law which must be enforced, such as the prohibition law or the law against murder. Instead, we regard it as a useful device under which courts are free to fill up omissions in criminal codes.

The law of criminal attempts is exactly the same kind of a thing. Considered apart from any particular crime it simply means that courts are permitted to fill in the gaps which a set of definitions inevitably leave when applied to human conduct. The

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> power to interpret statutes performs a similar function, but the rules of statutory interpretation of criminal statutes are never considered as definitions of crimes. The power to punish for criminal attempts gives the court power to extend a criminal statute without distorting its language. It is necessary to our criminal system. To treat this power as the definition of a substantive crime is either to destroy it or hopelessly to confuse it." Arnold, Criminal Attempts--The Rise and Fall of an Abstraction, 40 Yale Law Journal 53, 74, 75 (1931). (Emphasis added.)

This general statement of the policy and philosophy of the law of criminal attempt has been codified by the Utah Legislature. Utah Code Ann. § 76-3-402(1) (1953), as amended, provides:

> "If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes that it would be unduly harsh to record the conviction as being for that category of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may enter a judgment of conviction for the next lower category of offense and impose sentence accordingly."

Thus, the law of criminal attempt is a flexible law provided to aid a court in more fairly and equitably arriving at a punishment which correctly reflects the guilt of the defendant. Courts should be allowed broad

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discretion in its application, taking into consideration all facts and circumstances surrounding the defendant's criminal acts.

Again, the Code provides that a person is guilty of an attempt when (1) he acts with "the kind of culpability otherwise required" for the commission of the substantive offense, and (2) his conduct constitutes a "substantial step toward commission of the offense." Utah Code Ann. § 76-4-101 (1953), as amended. The Criminal Code defines "culpable mental state" in Utah Code Ann. § 76-2-102 (1953), as amended:

> "Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state, intent, knowledge, <u>or recklessness shall suffice to establish criminal responsibility</u>." (Emphasis added.)

Section 76-2-102 states that recklessness will supply the criminal responsibility or culpability when the offense does not involve strict liability and the statutory definition of the crime does provide a culpable mental state. Section 76-5-205(1), the code definition of manslaughter, does not set forth a culpable mental state. Therefore, Section 76-2-102 applies and provides that "recklessness" will establish the culpable mental state.

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Once "recklessness" has been adopted as the culpable mental state of manslaughter, the crime of attempted manslaughter is then possible.

Both requirements of the attempt statute, when applied to the crime of manslaughter--a culpable mental state and a substantial step toward commission of the offense--are fulfilled in the instant case. The defendant testified that he obtained a pistol from the bedroom, placed it on his lap underneath the table aimed in Clifford's direction and cocked it, all without Clifford's knowledge (T.219,220). The defendant further testified that he was not in fear of his life or frightened by Clifford (T.229). As defendant later attempted to uncock the pistol, the hammer slipped from his wet fingers, the pistol discharged and the bullet struck clifford in the abdomen (T.221). The defendant's actions in secretly aiming a loaded pistol, hammer cocked and cartridge in the chamber, at the victim during the course of a heated conversation after an evening of heavy drinking constituted recklessness in that it was conduct which disregarded the standard of care exercisable by an ordinary person. An ordinary person, neither fearful nor frightened, would not aim a loaded pistol at another in such an awkward and clumsy manner. Thus, the first element of the crime

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of attempted manslaughter, recklessness under circumstances which could result in the death of another, is fulfilled.

The second element of attempted manslaughter, an act which constitutes a substantial step toward the death of another, was fulfilled as the defendant attempted, while his hands were wet, to release the hammer of a loaded and cocked pistol held in an awkward position. Trying to release the hammer of a loaded pistol in such a clumsy manner is a substantial step toward the commission of manslaughter when coupled with recklessness.

Therefore, both elements of the attempt statute having been complied with; the defendant's actions under the stated circumstances amount to the crime of attempted manslaughter.

POINT II

BECAUSE OF DEFENDANT'S CONVICTION FOR ATTEMPTED MANSLAUGHTER HE NEED NOT BE RETRIED ON THE ORIGINAL CHARGES.

The defendant was convicted of attempted manslaught a criminal offense under Utah law as defined by Utah Code Ann. § 76-4-101(1) (1953), as amended. There is, therefore, no reason or need for the defendant to be retried for the original offense.

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POINT III

THE EVIDENCE PRODUCED AT TRIAL WAS SUFFICIENT TO SUSTAIN THE VERDICT RENDERED BY THE TRIAL COURT.

Defendant argues that if this Court sustains his conviction for attempted manslaughter, he is none-theless entitled to reversal and release in that the evidence produced at trial was insufficient to sustain the verdict.

Respondent contends that even when the evidence is viewed in a light most favorable to the defendant, it is sufficient to sustain a conviction of attempted manslaughter. This Court has consistently maintained that on appeal it will not "weigh the evidence nor say what quantum is necessary to establish a fact beyond a reasonable doubt so long as the evidence given is substantial." State v. Romero, 554 P.2d 216, 218 (Utah 1976). On appeal, the evidence will be examined in "the light most favorable to the verdict." State v. Canfield, 18 Utah 2d 292, 422 P.2d 196, 199 (1967). See also State v. Coffey, 564 P.2d 777 (Utah 1977); State v. Berchtold, 357 P.2d 183, 11 Utah 2d 208 (1960).

Viewing the evidence in a light most favorable to the verdict, it is clear that the evidence taken at trial was sufficient to support the verdict of guilty of

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attempted manslaughter. Appellant testified that he and Clifford sat at the kitchen table while Clifford held a knife and challenged him (T.214,215). The defendant then left the table to procure a gun from the bedroom, whereupon he returned but hid the gun under his belt (T.216,217). Once he was seated, the defendant secretly took the gun from under his belt, cocked the hammer and placed the gun on his lap aimed in the victim's direction (T.219,220). Defendant then asked Clifford for the knife whereupon Clifford provided him with the same which he promptly picked up and threw against the wall (T.220). While his hands were wet, the defendant tried to uncock the gun but the hammer slipped from his fingers, the gun discharged and the bullet struck Clifford in the abdomen (T.220-222).

It is apparent that this, the defendant's version of the facts, clearly supports the conviction of attempted manslaughter. The defendant's actions in secretly aiming a loaded pistol, hammer cocked and cartridge in the chamber, at the victim during the course of a heated conversation after an evening of heavy drinking constituted recklessness which could result in the death of another. The defendant's further action of attempting to release the hammer of a loaded and cocked pistol while his hands were wet and slippery constituted a substantial step toward

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the death of another. Thus, the evidence produced at trial was of a weight sufficient to support a verdict of guilty of attempted manslaughter.

CONCLUSION

Respondent asserts that defendant was properly convicted of the crime of attempted manslaughter. Utah Code Ann. § 76-4-101(1) (1953), as amended, provides that a person is guilty of attempt when (1) he acts with "the kind of culpability otherwise required for the commission" of the substantive offense, and (2) his conduct constitutes "a substantial step toward commission of the offense." In the case of manslaughter, the culpable state of mind is "recklessness." Utah Code Ann. § 76-2-102 (1953), as amended. Thus, where the defendant's actions are reckless under circumstances which could result in the death of another and he further acts in a manner which constitutes a substantial step toward the death of another, the defendant is guilty of attempted manslaughter.

Respondent further contends that the evidence produced at trial was sufficient to support and fulfill each element of the crime.

Respectfully submitted,

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