

2001

Utah v. Casey : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
	:	PETITIONER'S REPLY
Plaintiff/Respondent,	:	BRIEF
v.	:	
MICHAEL SHAWN CASEY,	:	Case No. 20010622-SC
	:	(Priority No. 13)
Defendant/Petitioner.	:	

On a petition for certiorari from an opinion by the Utah Court of Appeals affirming petitioner's judgment and conviction for Attempted Murder, a second degree felony, in violation of Utah Code Ann. §§ 76-5-203(1)(a) (1999) and 76-4-101 (1999); Domestic Violence in the Presence of a Child, a third degree felony, in violation of Utah Code Ann. § 76-5-109.1 (1999); and Aggravated Assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1999), in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Anne M. Stirba, presiding.

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UTAH SUPREME COURT

MAR 29 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. <u>The terms “intentionally” and “knowingly” as used in Utah’s murder statute are not “functional equivalents”</u>	1
II. <u>Harmless error analysis does not cure the defect in the jury instruction, and Casey is entitled to a new trial on the charge of attempted murder</u>	5
A. <i>The state has not previously raised harmless error in this case and has thus waived that ground as a basis to affirm the attempted murder conviction</i>	5
B. <i>Harmless error is not available when a conviction is based on a legally invalid theory</i>	6
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Cases

<u>Bott v. DeLand</u> , 922 P.2d 732 (Utah 1996)	5
<u>Cambelt Int'l Corp. v. Dalton</u> , 745 P.2d 1239 (Utah 1987)	6
<u>State v. Bell</u> , 785 P.2d 390 (Utah 1989)	4
<u>State v. Haston</u> , 846 P.2d 1276 (Utah 1993)	7, 8
<u>State v. Howell</u> , 649 P.2d 91 (Utah 1982)	4
<u>State v. Johnson</u> , 821 P.2d 1150 (Utah 1991)	6, 7
<u>State v. Norman</u> , 580 P.2d 237 (Utah 1978)	4
<u>State v. Tillman</u> , 750 P.2d 546 (Utah 1987)	7
<u>State v. Vigil</u> , 842 P.2d 843 (Utah 1992)	3, 4, 7

Statutes

Utah Code Ann. § 76-2-103	1, 2, 3, 4
Utah Code Ann. § 76-2-104	2
Utah Code Ann. § 76-5-105	3
Utah Code Ann. § 76-5-107	2
Utah Code Ann. § 76-5-109	3
Utah Code Ann. § 76-5-111	3
Utah Code Ann. § 76-5-202	7

Utah Code Ann. § 76-6-521	2
Utah Code Ann.-§ 76-8-1205	3
Utah Code Ann. § 76-9-301	3
Utah Code Ann. § 76-9-306	3

ARGUMENT

- I. The terms “intentionally” and “knowingly” as used in Utah’s murder statute are not “functional equivalents”.

The state has argued that Utah’s murder statute, Utah Code Ann. § 76-5-203(1)(a), treats the terms “intentionally” and “knowingly” as “functional equivalents.” (Resp. Brief at 12) This argument is premised upon a structural analysis of the mens rea component of the statute. Specifically, the state argues that because the terms “intentionally” and “knowingly” are linked together (disjunctively) in the same subsection, the terms mean the same thing. The state also suggests that this construction of the statute is warranted since the “intentionally or knowingly” language is separate from the other mens rea alternatives provided in the statute.

First of all, this argument ignores the plain meaning of Utah Code Ann. § 76-2-103, in which the legislature clearly provided different meanings for “intentionally” and “knowingly.” In fact, the synonyms given for “intentionally” in subsection (1) are “with intent or willfully.” Likewise, the definition of “knowingly” in subsection (2) does not provide “intentionally” as a synonym. The legislature has clearly not given the terms “intentionally” and “knowingly” the same legal meaning, nor is there any ambiguity in the statutory definition of either term. Moreover, simply joining the terms in the same subsection does not make them functionally equivalent. Subsection (a) of the murder statute is the only mens rea subsection that identifies mental states that are defined elsewhere in Title 76. The reason the other mental states require separate explanation is that those mental states are either unique to the murder statute or combine a pre-

defined mental state with a factual circumstance, such as recklessly causing the death of a peace officer. The state's argument also ignores Utah Code Ann. § 76-2-104, which explains that proof of certain higher mental states will also constitute proof of certain lesser mental states:

(1) If acting with criminal negligence is sufficient to establish the culpable mental state for an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly.

(2) If acting recklessly is sufficient to establish the culpable mental state for an element of an offense, that element is also established if a person acts intentionally or knowingly.

(3) If acting knowingly is sufficient to establish the culpable mental state for an element of an offense, that element is also established if a person acts intentionally.

Far from serving to equalize the definitions of the different mental states under Utah law, this statute simply explains that, in the hierarchy of the different mental states under Utah law, when the prosecution proves a higher mental state, such evidence also satisfies the proof required for the lesser mental state necessary for conviction under a particular criminal statute. The statute does *not* say that proof of the lesser mental state also satisfies the higher mental state, yet this would be the practical result if the state's interpretation of Utah's murder statute were to be adopted. Section 76-5-203(1)(a) simply establishes the *floor* of permissible mental states for a murder conviction among the common mental states defined in section 76-2-103. See, e.g., Utah Code Ann. §76-6-521(1)(d) (insurance fraud can be committed "intentionally, knowingly, or recklessly"); Utah Code Ann. § 76-5-107.5(1) (hazing can be committed

“intentionally, knowingly, or recklessly”; Utah Code Ann. § 76-8-1205 (public assistance fraud can be committed “intentionally, knowingly, or recklessly”). When the legislature describes the alternative culpable mental states for a particular crime, and places those terms in a disjunctive sentence structure as in the murder statute and the statutes just cited, the result is not to make the definitions of those terms identical. The state has not provided any authorities on statutory construction that would support its analysis and interpretation.

The structure of section 76-5-203, grouping the disjunctive “intentionally or knowingly” in one subsection but separating those terms from other alternative mental states, is not unique to the murder statute. The legislature has used the same structure in the stalking statute (Utah Code Ann. § 76-5-105), the child abuse statute (Utah Code Ann. 76-5-109), the elder abuse statute (Utah Code. Ann. 76-5-111), the animal cruelty statute (76-9-301), and the injury to police service animals statute (Utah Code Ann. § 76-9-306). There is nothing in any of these statutes to suggest that the legislature intended to abandon the definition of “knowingly” set out in section 76-2-103, and instead make “knowingly” synonymous with “intentionally.”

Finally, the state’s brief does not address the phrase “conscious objective or desire to cause the death of another,” State v. Vigil, 842 P.2d 843, 848 (Utah 1992), which Casey contends was the crux of the statutory analysis in Vigil. There is no attempt to reconcile the explicit holding in Vigil with the very different definition of

"knowing" under Utah law. Indeed, the state appears to be advocating an analysis that was expressly rejected in Vigil:

At bottom, the State seeks to replace the word "intent" in paragraph (2) of the attempt statute with, as it says, "intent or a mental state that is equivalent thereto" and to modify or reject the holdings of [State v.]Bell [785 P.2d 390 (Utah 1989)], [State v.]Norman [580 P.2d 237 (Utah 1978)], and [State v.]Howell [649 P.2d 91 (Utah 1982)]. Although it may make sense to allow attempt for homicide offenses that are presumably equal in culpability to intentional murder, we believe that the most reasonable approach, in light of the statutory language and our cases, is to read the word "intent" in paragraph (2) of the attempt statute as that word is defined in section 76-2-103(1).

Id. The Vigil court concluded: "Articulating the various mental states required for the various crimes in the Code is difficult enough without giving multiple meanings to the word 'intent.'" Id. The state's reasoning, whereby knowingly and intentionally would mean the same thing only for purposes of the crime of attempted murder, is counter-intuitive and violates the one-meaning principle set forth in Vigil.

In sum, the terms "intentionally or knowingly" as used in section 76-5-203(1)(a) are not functionally equivalent. Each term has a precise and distinctive definition under Utah law, and to conclude that the terms have the same meaning would simply ignore the plain language of section 76-2-103 and this Court's prior decisional law.

II. Harmless error analysis cannot cure the defect in the jury instruction, and Casey is entitled to a new trial on the charge of attempted murder.

- A. *The state has not previously raised harmless error in this case and has thus waived that ground as a basis to affirm the attempted murder conviction.*

This Court granted the petition for certiorari on the single issue about the mental state required to convict a person of attempted murder. In its reply brief on certiorari review, the state has argued that, should this Court hold that jury instruction describing the required mental state was faulty, then harmless error analysis should be applied in order to affirm the attempted murder conviction.

A review of the state's brief before the Utah Court of Appeals shows that the state did not raise harmless error on direct appeal. Failing to brief an issue on appeal constitutes waiver of that issue. Bott v. DeLand, 922 P.2d 732, 741 (Utah 1996) ("Where an appellant fails to brief an issue on appeal, the point is waived"). Moreover, the court of appeals did not rely on the harmless error doctrine to affirm Casey's conviction.

Accordingly, not only has harmless error analysis been waived, but the state now requests this Court to analyze the jury instruction issue in a manner that exceeds the scope of the grant of certiorari. Under the procedural posture of this case, this Court should decline to decide whether harmless error analysis is even applicable to Casey's attempted murder conviction.

B. Harmless error is not available when a conviction is based on a legally invalid theory.

At trial, the state's theory on the crime of attempted murder was premised on two separate theories with respect to the required mental state. First, the jury was permitted to determine whether Casey acted intentionally. Second, the jury was allowed to consider whether Casey acted knowingly. Because each of the mental states set out in the instruction are defined differently and require different proof, and further because attempted murder under a knowingly theory is legally deficient, this case is not subject to harmless error analysis.

In State v. Johnson, 821 P.2d 1150 (Utah 1991), this Court held unanimously that a general jury verdict cannot be affirmed where the jury was instructed on separate theories for the same offense when one theory was valid and the other invalid. Thus in Johnson the defendant's conviction for attempted first degree murder was reversed where the jury was permitted to consider two aggravating circumstances: (1) attempting to kill by administration of poison, and (2) attempting to kill for pecuniary gain. This Court held that while there was sufficient evidence that the defendant acted for pecuniary gain, the evidence was not sufficient to support a verdict on the use of poison. Accordingly, the conviction for attempted first degree murder had to be reversed. The rule was expressed as follows:

In a civil case, we will affirm a general verdict so long as there is one legally valid theory among those upon which the case went to the jury and sufficient evidence to support a verdict on that theory. See Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1241-42 (Utah 1987). However, in a criminal case the rule is to the contrary. A majority of this court has stated

that a jury must be unanimous on all elements of a criminal charge for the conviction to stand. See Tillman, 750 P.2d at 585-88 (Durham, J., concurring & dissenting); id. at 591 (Zimmerman, J., concurring & dissenting); id. at 577-80 (Stewart, J., concurring in the result). From this premise, it follows that a general verdict of guilty cannot stand if the State's case was premised on more than one factual or legal theory of the elements of the crime and any one of those theories is flawed or lacks the requisite evidentiary foundation. In such circumstances, it is impossible to determine whether the jury agreed unanimously on all of the elements of a valid and evidentially supported theory of the elements of the crime.

In the present case, the jury returned a general verdict of guilty on each count of attempted first degree murder. No special verdicts were given that would indicate upon which aggravating circumstance the jury based the conviction. Because we cannot determine whether the jury was unanimous on the elements of the offense based on section 76-5-202(1)(f) alone, the insufficiency of the evidence to support the State's proof of the section 76-5-202(1)(n) aggravating circumstance makes it impossible for us to affirm on the alternative pecuniary gain theory. Therefore, we must reverse the attempted first degree murder conviction on count III.

Id. at 1159.

The rule in Johnson was applied by this Court in State v. Haston, 846 P.2d 1276 (Utah 1993), where the defendant was improperly convicted of attempted depraved indifference murder. The jurors in Haston had been instructed they could consider depraved indifference *and* the intentional and knowing¹ alternatives. In a short per curiam opinion, this Court reversed the conviction and ordered a new trial without analyzing whether the evidence supported the statutorily valid mens rea. Id. at 1277.

¹ The defendant in Haston, unlike Casey, did not challenge the validity of a "knowing" attempted murder in light of the explicit requirement in State v. Vigil, 842 P.2d 843 (Utah 1992), that the accused can only be convicted of attempted murder upon proof of a conscious objective to kill.

Moreover, the facts in Haston were more egregious than the facts in this case: the “[d]efendant shot the victim, Tate, in the chest at close range during a drunken quarrel. The shot did not kill Tate, though it caused considerable damage to his right lung, his spleen, and his diaphragm, and Tate was in surgery for six hours.” Id. at 1277 n.1.

The lesson of Haston is that the facts of the case do not matter if the jury was instructed on alternative states of mind, one of the alternatives was legally defective, and the jury returned a general verdict. Under such circumstances harmless error analysis is not applicable. Under the federal and state constitutions, Casey was entitled to a jury trial on the crime of attempted murder. By simply guessing upon which mental state the jury might have reached a unanimous verdict deprives Casey of his right to a jury trial.²

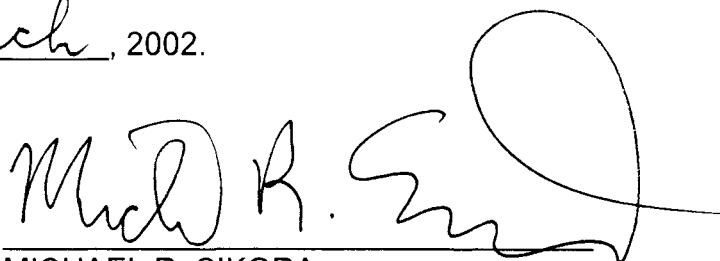
Accordingly, since jury returned a general verdict of guilty against Casey on the crime of attempted murder, upon submission of one valid and one invalid mental state, it is irrelevant whether the evidence *might* have supported a verdict of guilt with respect to the legally sufficient mens rea.

² Of course, this is one of the difficulties presented when the state waits to raise harmless error at this late date. The constitutionality of a patchwork jury verdict, under state or federal law, is not properly before this Court since the petition was granted only as to the statutory construction issue on the mental state required for attempted murder. However, under the facts of this case Casey’s right to a jury trial, and pursuant to state law his right to a unanimous verdict, cannot be separated from the harmless error issue.

CONCLUSION

Based upon the foregoing facts and argument and the facts and argument presented in the opening brief, Casey requests this Court to reverse his conviction for attempted murder and remand the case to the district court for a new trial.

DATED this 29 day of March, 2002.



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CERTIFICATE OF SERVICE

I certify that two (2) true and correct copies of the foregoing **Petitioner Reply Brief** were hand-delivered or mailed on the 29 day of March, 2002 to:

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