

2000

Utah v. Michael Shawn Casey : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

MICHAEL SHAWN CASEY,

Defendant and Appellant.

Case No. 20000122-CA

Priority No. 2

BRIEF OF APPELLEE

AN APPEAL FROM CONVICTIONS FOR ATTEMPTED MURDER, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-4-101 & § 76-5-203 (1999), AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1999), CHILD ABUSE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-109.1 (1999), AND ENHANCEMENT PENALTIES FOR USE OF A DANGEROUS WEAPON, IN VIOLATION OF UTAH CODE ANN. § 76-3-203 (1999), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE COUNTY, THE HONORABLE ANNE M. STIRBA PRESIDING

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

vs.

MICHAEL SHAWN CASEY,

Defendant and Appellant.

Case No. 20000122-CA

Priority No. 2

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from his convictions for attempted murder, a second degree felony, in violation of Utah Code Ann. § 76-4-101 (1999) and Utah Code Ann. § 76-5-203 (1999), aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1999), child abuse, a third degree felony, in violation of Utah Code Ann. § 76-5-109.1 (1999), and enhancement penalties for each count for the use of a dangerous weapon, in violation of Utah Code Ann. § 76-3-203 (1999). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES

The following issues are presented to the Court for review, together with the respective standards of appellate review:

FIRST ISSUE ON APPEAL. Is attempted murder under the intentional or knowing alternative of the murder statute a cognizable offense under Utah law?

Standard of Review. The interpretation of Utah's attempt statute is a matter of statutory interpretation, reviewed for correctness with no deference to the trial court's conclusions. *State v. Vigil*, 842 P.2d 843, 844 (Utah 1992).

SECOND ISSUE ON APPEAL. Was defendant's conviction for his prior aggravated assault on the victim barred as a lesser included offense of his subsequent and separate act of attempted murder?

Standard of Review. "Whether one crime is a lesser included offense of another is a question of law reviewed for correctness." *State v. Betha*, 957 P.2d 611, 617-18 (Utah App. 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The interpretation of Utah Code Ann. § 76-1-402 (1999) and Utah Code Ann. § 76-4-101 (1999) is relevant to a determination of this case. Those sections provide in relevant part as follows:

Utah Code Ann. § 76-1-402:

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

* * *

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

* * *

Utah Code Ann. § 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.

(3) No defense to the offense of attempt shall arise:

(a) because the offense attempted was actually committed; or

(b) due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged by information with attempted murder, aggravated assault, and child abuse. R. 34-35. Defendant was also charged with enhanced penalties on each count for use of a dangerous weapon in the commission of the crimes. R. 34-35. After holding a preliminary hearing, a magistrate bound defendant over for trial. R. 230: 109-10. Following a two-day trial, a jury found defendant guilty on all three counts as charged, including the enhanced penalties. R. 67, 70-71, 76-77, 112-14, 231-33. Trial counsel moved to withdraw

after defendant expressed dissatisfaction with counsel's performance. R. 120-25. The court granted the motion and appointed new counsel. R. 126, 128-30, 136. Defendant was sentenced to consecutive prison terms of one-to-fifteen years for murder and zero-to-five years each for aggravated assault and child abuse. R. 189-90. The court also imposed a firearm enhancement penalty of one year on the murder conviction and zero-to-five years each on the aggravated assault and child abuse convictions. R. 191.

Defendant moved for a new trial, arguing that (1) the trial court improperly instructed the jury on the mens rea element of attempted murder, and (2) the aggravated assault charge was a lesser included offense of the murder charge. R. 142-44, 168. After hearing argument, the trial court denied the motion. R. 192-96. Defendant timely appealed. R. 202.

SUMMARY OF FACTS

On April 12, 1999, defendant threatened to kill Tresa Franz as he pointed a loaded gun at her in a parked car; her four-year-old boy was sitting in the backseat. R. 232: 146-47, 195, 205.¹ The argument continued as defendant drove down a residential street. Again, defendant pointed the gun at Franz's head, this time pulling the trigger. R. 232: 151, 206-07; *see also* R. 233: 315-16, 322, 363. Fortunately, the gun did not fire. R. 232: 151, 153; R. 233: 316.

* * *

¹Only those facts that are relevant to the issues presented are included. The facts are otherwise recited in a light most favorable to the jury's verdict. *See State v. Brown*, 948 P.2d 337, 339 (Utah 1997).

A Love Triangle

Defendant and Franz had been seeing each other romantically on and off for several months and had lived together for some three months. R. 232: 139-40, 187-88. The relationship began about the same time defendant's relationship with Kammi Wilkerson, the mother of defendant's infant daughter, began to deteriorate. R. 233: 462-64, 473. Defendant renewed his relationship with Wilkerson a few months later, but continued to see Franz. R. 233: 462-63, 473, 484-85. Defendant and Franz broke up a day or two after Easter following an incident in which Franz's brother-in-law and another man jumped defendant and beat him up. R. 232: 139, 165; R. 233: 464-66.

Towing the Truck

Approximately one week later, defendant and his friend Terron Allred drove to Franz's home to tow a truck that had broken down. R. 232: 135, 164, 170, 238-39.² After arriving at Franz's house, they each had a gin and Coke and defendant left for a short period to see Wilkerson. R. 232: 137, 164-65, 174-75. After defendant returned, Allred, Franz, and her four-year-old son Quincy went with defendant to Magna to pick up the truck and tow it to another friend's house. R. 232: 136, 170; R. 233: 309, 489, 497. By the time they left to tow the truck, defendant was very intoxicated. R. 232: 176; R. 233: 499.

Rather than taking Franz and her four-year-old son home after towing the truck, defendant drove around instead. R. 232: 170; *see also* R. 233: 492-93, 501. They first

²Defendant was driving the Geo Tracker which belonged to Latisha Bower, Allred's girlfriend. R. 232: 136; R. 233: 309.

stopped at a liquor store where defendant gave Franz five dollars to buy some rum. R. 232: 137, 139, 175; R. 233: 498. After Franz bought a pint bottle of rum, she and Allred each had a swig and defendant drank the bottle until a third was left. R. 232: 137-38, 175-76; R. 233: 310, 400-01. Affected by the alcohol he had consumed that day, defendant became vulgar and belligerent toward Franz. R. 232: 138-41, 167, 176. When she asked him to take her home, he refused, laughing at her and threatening to kill her. R. 232: 140-41; R. 233: 492. Defendant then drove to Bruce Ribe's house and threatened to have some girls beat her up. R. 232: 142, 170-71, 240.

After parking behind the house, defendant exited the car and spoke with Ribe's friend, Jerry Gonzalez, presumably about some cars. R. 232: 143, 170-71, 242, 260-61; R. 233: 311-12, 340, 467-68, 503. After speaking with Gonzalez for a few minutes, defendant started back to the car, but then walked over to speak with Bruce Ribe's niece, Tiffany, and her cousin Samantha, who sat on a couch on the back porch. R. 232: 142-45, 172, 247-48, 261-63, 285-86, 468-69. As defendant spoke with the two girls, Franz and Allred remained in the car talking. R. 232: 145.

The Aggravated Assault

After speaking with the two girls, defendant returned to the car and told Allred to get out. R. 232: 145, 176, 205, 263, 286; R. 233: 340, 496; *see also* R. 233: 471. Allred exited the car and walked to the couch to speak with Tiffany. R. 232: 146, 248, 264, 286-87. When defendant reached the car, he and Franz began a heated argument. R. 232: 248-49; R. 233: 472, 503. Before stepping into the car, defendant reached behind the seat and pulled out a

loaded handgun from his camera bag, keeping it concealed from Franz's view. R. 232: 146, 177, 194; R. 233: 364. When Franz asked if he was ready to go home, defendant declared, "F___ you, bitch. I'm going to take you home all right." R. 232: 146-47, 205. Defendant then took the gun and pointed it at Franz's neck. R. 232: 147, 195. Franz pleaded with defendant not to shoot her because her baby was in the car. R. 232: 147. Hearing the argument and witnessing defendant point the gun at Franz, Tiffany walked to the car, along with Allred, and told them they needed to leave. R. 232: 147, 195, 249-54, 264, 266-70, 276, 279-80, 287. Allred got back in the car, and after defendant put the gun down and agreed to go, Tiffany returned to the house. R. 232: 149, 251, 254-55, 267, 271, 276.

The Argument Resumes

After Tiffany returned to the house, Franz fled the car into the house, but returned within two or three minutes after realizing that her son was still in the car. R. 232: 149, 195, 254-55, 271, 288; R. 233: 314-15, 345, 474. When she returned, defendant told her to get back into the car. R. 232: 149-50, 202-03, 206; *see also* R. 233: 346. She complied. R. 232: 149-50, 202-03, 206. After a brief pause in the argument, defendant again threatened Franz and rebuked her efforts to appease him. *See* R. 232: 150-51, 255. At that point, Tiffany's uncle emerged from the basement and told defendant to leave. *See* R. 232: 200, 255-56, 274; R. 233: 347. Defendant apologized, backed out of the driveway, and drove down the street. R. 232: 206, 256, 274, 289; R. 233: 347-48, 506.

The Attempted Murder

Before reaching the end of the block, defendant again pointed the gun at Franz's face, but this time pulled the trigger. R. 232: 151, 206-07; *see also* R. 233: 315-16, 322, 363. The gun misfired, failing to discharge. R. 232: 151, 153; R. 233: 316. Defendant then successfully fired the gun at Franz's feet, but the bullet missed Franz and lodged in the floorboard. R. 232: 153-54; R. 233: 323, 368, 402-03; *see also* R. 233: 511. Defendant pushed the barrel of the gun into Franz's head, but before he could pull the trigger, Franz pushed defendant's arm into the air and jumped out of the moving truck. R. 232: 154, 208-10, 212; R. 233: 389, 479-80; *see also* R. 233: 324. As she jumped from the car, the gun discharged a second time. R. 232: 154; R. 233: 317. During the altercation, a total of three shots were successfully fired, one of which accidentally hit defendant's hand. R. 233: 323-25, 352, 367, 512.

After the Shooting

After Franz jumped from the moving car and began running down the street, defendant stopped while Allred put Franz's son out of the car. R. 232: 154, 210-11; R. 233: 327, 356, 513. After retrieving her son, Franz ran to a house and asked to use the telephone to report the incident to police. R. 232: 155-56; R. 233: 300-03. Although officers responded to the general location, Franz avoided contact with them, instead, hitching a ride home with one of Tiffany's friends. R. 232: 158, 215, 278; R. 233: 383-84.

Meanwhile, defendant drove to Allred's apartment to pick up Kammi Wilkerson and the two babies she was tending. R. 233: 331-32, 358, 481. Defendant remained in the car

while Allred left to get Kammi. R. 233: 331-32. When Allred returned, the gun was no longer in the car. R. 233: 332. Defendant drove to West Valley Hospital to receive medical attention for his hand. R. 233: 334, 359, 483-84. When he was not attended to quickly enough, he drove to Jordan Valley Hospital. R. 233: 334, 359, 483-84. At Jordan Valley Hospital, defendant fabricated a story with Allred to give police. R. 233: 334-35. Defendant then gave the fabricated story to police when they questioned him at the hospital. He told police that Franz had set him up by sending him to a house in Magna to pick up the truck, but when he had knocked on the door, someone shot him from inside. R. 233: 387, 515-17.

The gun used by defendant was later found, together with four shell casings and one unspent round, in a hallway storage unit near Allred's apartment. R. 233: 369-75, 417, 419. Testing at the Utah State Crime Lab revealed that the unspent round had misfired from the gun and that all four shell casings had been discharged from the gun. R. 233: 443-45.

Later, while awaiting the preliminary hearing, defendant wrote Franz a letter asking her to help him "get out of this shit" and asking her not to come to court or otherwise make a statement about him. R. 233: 523-24. After the preliminary hearing was rescheduled because Franz failed to appear, defendant advised her to hide from police and gave her someone's name to assist her. R. 233: 525-28.

Defendant's testimony at trial was equally damaging. Although he admitted pulling the gun from Franz's purse as they drove away, he denied having the gun at all while they were parked behind the house. R. 233: 475, 506-07. Yet, Tiffany, a disinterested witness, confirmed Franz's account that defendant pointed a gun at Franz then. R. 232: 249-54, 266-

68, 279-82. And although Allred testified that Franz simply ran back out of Ribe's house after she fled from the car, R. 232: 345-46, defendant testified that he told Allred to go in after her and that he did so. R. 233: 505-06. However, neither Tiffany, nor her cousin, testified that Allred came after Franz. *See* R. 232: 254-55, 273-74, 288-90.

SUMMARY OF ARGUMENT

In *State v. Maestas*, 652 P.2d 903 (Utah 1982), the Utah Supreme Court recognized the crime of attempted murder for an intentional or knowing attempt to cause the death of another. Although the Supreme Court's decision in *State v. Vigil*, 842 P.2d 843 (Utah 1992), rejected one of the rationales posited in *Maestas*, it left undisturbed the central holding based on the second rationale cited in *Maestas*. Accordingly, the trial court properly denied defendant's motion for a new trial.

Moreover, defendant was also properly convicted of both the aggravated assault and the attempted murder. While Utah law forbids punishing a defendant twice for a single act, a defendant may be convicted for offenses arising out of separate acts. Here, defendant was convicted of aggravated assault based on an act separate and apart from the act upon which his attempted murder conviction was based.

ARGUMENT

I.

DEFENDANT WAS PROPERLY CONVICTED OF ATTEMPTING TO INTENTIONALLY OR KNOWINGLY CAUSE THE DEATH OF TRESA FRANZ

Defendant first argues that Utah law does not recognize a knowing attempt to cause the death of another and that the trial court therefore erred in charging defendant with intentionally or knowingly attempting to cause the death of Tresa Franz. Aplt. Brf. at 12-23. Defendant's claim fails.

State v. Maestas, 652 P.2d 903 (Utah 1982), controls this case. Like defendant here, the defendant in *Maestas* argued that the crime of attempted murder requires a stronger showing of intent than the crime of an "intentional or knowing" murder. *Maestas*, 652 P.2d at 904. The Utah Supreme Court rejected that claim and held that Utah law recognizes the crime of attempted murder for "intentionally *or knowingly*" attempting to cause the death of another. *Id.* at 904-05 (emphasis added).

The *Maestas* court based its holding on two rationales. First, the court observed that the defendant's theory rested on the "common law rule that intent is a necessary element of every 'attempt' crime even where the corresponding completed crime does not require intent as an element." *Id.* In rejecting that argument, the Supreme Court noted that common law crimes are no longer recognized in Utah; rather, crimes are now defined by statute. *See id.* The court then examined Utah Code Ann. § 76-4-101 which provides in relevant part as follows:

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.

Utah Code Ann. § 76-4-101(1) (1999). The court concluded that section 76-1-401 does *not* impose intent as an element of every attempt, but “requires only ‘the kind of culpability otherwise required for the commission of the [completed] offense.’” *Maestas*, 652 P.2d at 904 (*quoting* Utah Code Ann. § 76-4-101(1)) (brackets in original).

As a second basis for its holding that Utah recognizes an intentional or knowing attempt to cause the death of another, the *Maestas* court observed:

Th[e] rule [that intent is a necessary element of every attempt] differentiates between the intent requirements for an attempted and a completed crime *only where the completed crime may be committed without the intent to commit that crime in particular*, as in the case of felony murder. Where an intent to commit the particular crime is an element of the completed crime, the same intent requirement applies to the corresponding ‘attempt’ crime, even at common law. Thus, Utah’s first degree murder statute, which does contain such an intent requirement, would not fall within the rule cited by defendant even under common law principles.

Maestas, 652 P.2d at 905 (emphasis added). This rationale is consistent with logic and common sense. To “attempt” means “[t]o try to do, make, or achieve,” Webster’s II New Riverside University Dictionary 136 (1988), or “to endeavour,” Oxford English Dictionary (2d ed. 1989). A person can knowingly attempt, try, or endeavor to cause the death of another. On the other hand, a person does not attempt, try, or endeavor to act negligently, recklessly, or with depraved indifference *to cause* the death of another.

As the Supreme Court observed in *State v. Pearson*, 680 P.2d 406, 408 (Utah 1984) (per curiam), section 76-4-101 “adopts the definition of an ‘attempt’ employed in the Model Penal Code, §§ 5.01, purposed on drawing the line further away from the final act and enlarging the common law concept.” The commentaries to the Model Penal Code provide that the “attempt provision requires *either intentional conduct or the belief that the actor’s conduct will result in the proscribed act.*” *State v. Vigil*, 842 P.2d 843, 847 (Utah 1992) (citing 1 Amer.L.Inst., Model Penal Code and Commentaries § 5.01, 303 (1985)) (emphasis added). Therefore, the recognition of the crime of attempted murder for an intentional or knowing attempt to cause the death of another is consistent with the Model Penal Code after which section 76-4-101 was fashioned.³ In holding that attempted murder “can be knowingly committed,” the Arizona Court of Appeals observed that while “the drafters of the Model Penal Code agreed that there should be no attempt crime for negligent or reckless homicide[,] [t]he Code goes on to state:

“When, on the other hand, a person actually believes that his behavior will produce the proscribed result, it is appropriate to treat him as attempting to cause the result, whether or not that is his purpose.

Subsection (1)(b) provides that when causing a particular result is an element of the crime, as in homicide offenses or criminally obtaining property, an actor commits an attempt when he does or omits to do anything with the purpose of causing ‘or with the belief that it will cause’ such result without further

³*But see Vigil*, 842 P.2d at 846-47 (citing Loren Martin, Utah Criminal Code Outline 169 (1973), which notes that the Utah attempt statute was modeled after the 1971 Proposed Federal Criminal Code, and citing 1 National Commission on Reform of Federal Criminal Laws, *Working Papers of the National Commission on Reform of Federal Criminal Laws* 354 & n.6, which states that the attempt provision requires intentional conduct).

conduct on his part. Thus, a belief that death will ensue from the actor's conduct, or that property will be obtained, will suffice, as well as would a purpose to bring about those results. If, for example, the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder even though it was no part of his purpose that the inhabitants of the building would be killed.

State v. Nunez, 769 P.2d 1040, 1042-43 (Ari. App. 1989) (citing Model Penal Code §§ 5.01.2, at 301 (1985)).

In *Vigil*, ten years after *Maestas*, the Supreme Court revisited the issue in the context of depraved indifference murder. In concluding that Utah law does not recognize depraved indifference homicide, the court re-examined Utah's attempt statute, and in particular, the effect of the second paragraph, which reads:

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.

Utah Code Ann. § 76-4-101. Contrary to *Maestas*, the court in *Vigil* determined that the "culpability" referred to in the first paragraph refers not to the actor's mental state, but "to the attendant circumstances, if any, of the underlying offense." *Vigil*, 842 P.2d at 845-46. On the other hand, the court concluded, the second paragraph "limit[s] the attempt statute to offenses with a mental state of 'intent.'" *Id.* at 846. In other words, the court re-interpreted the statute in a manner consistent with the common law crime of attempt. The *Vigil* court observed that the "culpability" rationale relied on in *Maestas* conflicted with its decisions refusing to recognize attempted reckless manslaughter and attempted murder under the

felony murder alternative. *Id.* at 847-48 & n.5.⁴ Thus, the court in *Vigil* expressly rejected the “culpability” rationale adopted in *Maestas*, holding that it was “incorrect” and “inconsistent” with its decisions in *Vigil* and other cases. *Id.* at 848 n.5.

However, the *Vigil* court left undisturbed the central holding of *Maestas*, concluding that the second rationale was “still good law.” *Id.* at 848 n.5. While rejecting *Maestas*’s culpability rationale, the *Vigil* court expressly “note[d] that *Maestas* is still good law insofar as it authorizes prosecution for attempted aggravated murder under the *intentional or knowing* formulation of section 76-5-202(1) or attempted murder under the *intentional or knowing* formulation of section 76-5-203(1)(a).” *Vigil*, 842 P.2d at 848 n.5 (emphasis added). Therefore, contrary to defendant’s claim on appeal, *Vigil* does *not* support the proposition that one cannot be convicted of attempted murder for intentionally *or* knowingly attempting to cause the death of another. Indeed, *Vigil* left undisturbed its holding in *Maestas*.

Nor does the Court’s decision in *State v. Haston*, 846 P.2d 1276 (Utah 1993), compel a different conclusion as defendant contends. Aplt. Brf. at 16. In *Haston*, the jury was allowed to consider three alternative theories of attempted murder, including the knowing

⁴See *State v. Bell*, 785 P.2d 390, 393 (Utah 1989) (holding that “[t]he crime of attempted murder does not fit within the felony-murder doctrine because an attempt to commit a crime requires proof of an intent to consummate the crime”); *State v. Norman*, 580 P.2d 237, 239 (Utah 1978) (holding that an attempt under reckless manslaughter is not cognizable because that alternative simply requires the mental state of recklessness, whereas “[a]n attempt to commit a crime is an act done with the intent to commit that crime”); see also *State v. Howell*, 649 P.2d 91, 94 (Utah 1982) (recognizing the crime of attempted manslaughter under the imperfect legal justification alternative because the killing must be intentional).

or intentional alternative and the depraved indifference alternative. *Haston*, 846 P.2d at 1277. The court reversed only because defendant could have been convicted under the depraved indifference alternative. *Id.* The court expressed no concern whatsoever that the defendant could have been convicted under the intentional or knowing alternative. *See id.*⁵

The Supreme Court's recognition in *Maestas* and *Vigil* of the crime of attempted murder under the intentional or knowing formulation is consistent with pronouncements of both this Court and the Supreme Court, before and after *Vigil*. *See, e.g., State v. Gardner*, 947 P.2d 630, 642 (Utah 1997) (comparing the penalty for aggravated assault by a prisoner with that for "attempted murder, which also requires an intent to kill or a knowledge that one's acts would result in death if carried out"); *State v. Dumas*, 721 P.2d 502, 504 (Utah 1986) (holding that in order to convict defendant, "the State must have adduced evidence that would have allowed the jury to find beyond a reasonable doubt that defendant intentionally

⁵Moreover, contrary to defendant's suggestion on appeal, a murder under the depraved indifference alternative is not equivalent to knowingly causing the death of another. In this regard, Justice Maughan observed that "it was the intention of the drafters of the Model Penal Code (and hence our Legislature which substantially adopted it) to leave to the finder of fact the determination of whether a defendant's reckless conduct is so extreme as to be equivalent to purpose or knowledge (i. e., intent) from the circumstances surrounding the creation of the risk of death. Since an intentional or knowing homicide is second degree murder under subsection (a) of the statute, I do not believe that the Legislature intended that 'depraved indifference to human life' under subsection (c) should be measured by the same 'awareness' of the certainty that the risk would result in death as the word 'knowing' would entail. Instead, the greatness of the risk, and the lack of justification for the creation of that risk are the tests." *State v. Nicholson*, 585 P.2d 60, (Utah 1978) (Maughan, J., concurring); *see also State v. Thurman*, 911 P.2d 371, 373-74 (Utah 1996).

or knowingly attempted to cause [the victim's] death"); *State v. Johnson*, 821 P.2d 1150, 1157 (Utah 1991) (upholding attempted murder conviction because "[t]he jury could certainly [have] infer[red] from [defendant's] statements . . . that [defendant] administered the [poison] with the necessary intent or knowledge"); *State v. White*, 880 P.2d 18, 23 (Utah App. 1994) (observing that where defense counsel conceded that defendant stabbed the victim and the victim was seriously injured, "the only remaining question for the jury to determine was whether [defendant] had the intentional or knowing state of mind required for conviction of attempted murder"). It is also consistent with decisions in other states. *See, e.g., Bartlett v. State*, 711 N.E.2d 497, 499 (Ind. 1999) (observing that "[t]o sustain an attempted murder conviction, the State must prove that the defendant took a substantial step towards the intentional or knowing killing of another"); *People v. Gonzalez*, 926 P.2d 153, 155 (Colo. App. 1996) (holding that "attempted second degree murder requires an awareness that death is practically certain to result"); *Gentry v. State*, 881 S.W.2d 35, 40 (Tex. App. 1994) (holding that "[t]o convict appellant of attempted murder, the State had to prove that appellant intentionally or knowingly intended to cause the death of the complainant"); *Nunez*, 769 P.2d at 1042-43 ("conclud[ing] that attempted first degree murder can be knowingly committed"); *Free v. State*, 455 So.2d 137, 147 (Ala. App. 1984) (observing that "[a]ttempted murder is a specific intent crime" and therefore "[o]ne must intentionally or knowingly attempt to commit murder"); *State v. Feliciano*, 618 P.2d 306, 308 (Haw. 1980) (holding that "[a]ttempted murder is established when a defendant intentionally or knowingly

attempted to cause the death of another through an act which is a substantial step in the course of conduct intended to culminate in the crime of murder”).⁶

Defendant also contends that the evidence supported knowing conduct rather than intentional conduct. Aplt. Brf. at 21-22. As discussed above, the distinction is irrelevant where Utah recognizes attempted murder for the intentional or knowing attempt to cause the death of another. Moreover, contrary to defendant’s claim, the evidence is much more corroborative of a specific intent to kill notwithstanding defendant’s inebriation. *See* R. 232: 141 (defendant declaring, “F___ you, bitch. I’ll f___ing kill you”), 151 (victim testifying that defendant put gun to her face and pulled the trigger), 197-99 (Tiffany Ribe telling victim that defendant was going to kill her); R. 233: 303 (neighbor testifying that victim’s son told him defendant was going to kill his mother); *see also Dumas*, 721 P.2d at 504-05 (evidence showed intent to kill where defendant threatened to kill the victim and took steps to accomplish that purpose).⁷

In summary, *Maestas* conclusively recognizes the crime of attempted murder for an intentional or knowing attempt to cause the death of another. *Vigil* did not upset that holding. Accordingly, the trial court properly denied defendant’s motion for a new trial.

⁶For jurisdictions which have not recognized a knowing attempt, *see* Aplt. Brf. at 20-21; *see also Huitt v. State*, 678 P.2d 415, 420 (Alaska App. 1984) (holding that the mental state of “knowingly” is insufficient to establish attempted murder).

⁷Defendant has not argued that he did not take a substantial step toward the commission of the attempted murder. Indeed, the act of pointing the gun at the victim and pulling the trigger, though a misfire, constitutes a substantial step. *See People v. Files*, 632 N.E.2d 1087, 1096 (Ill. App. 1994); *State v. Turner*, 587 A.2d 1050, 1053 (Conn. App.), *cert. denied*, 591 A.2d 812 (Conn. 1991).

II.

DEFENDANT WAS PROPERLY CONVICTED OF AGGRAVATED ASSAULT AND ATTEMPTED MURDER.

Distilled to its essence, defendant's second claim on appeal is that the attempted murder of Tresa Franz was simply the culmination of a single act by defendant to assault her with a firearm. *See* Aplt. Brf. at 23-36. He thus argues that his aggravated assault conviction is a lesser-included offense of his attempted murder conviction and that the two merge. Aplt. Brf. at 27-30. This claim lacks merit because defendant's aggravated assault conviction was based on an act entirely different than and separate from the act upon which his attempted murder conviction was based.

The first paragraph of section 76-1-402 provides:

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

Utah Code Ann. § 76-1-402(1) (1999). The third paragraph of section 76-1-402 states that “[a] defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense.” Utah Code Ann. § 76-1-402(3). The intent of these provisions is clear. A defendant may be prosecuted and punished for all crimes committed within a single criminal episode so long as they each arise from a

separate act. On the other hand, “[a] defendant may not be punished twice for a single act.” *State v. O’Brien*, 721 P.2d 896, 900 (Utah 1986) (referring to the first paragraph).

Defendant argues that because the two acts were part of the same criminal episode, consisting of the same criminal objective, he cannot be convicted of both offenses. Aplt. Brf. at 30-33. However, section 76-1-402 and the merger doctrine only forbid punishing a defendant twice for the same act. *See* Utah Code Ann. § 76-1-402. They do not forbid punishing a defendant for multiple acts committed in a single criminal episode. *Id.*

Because defendant was convicted of two different offenses for two distinct and separate acts, the merger doctrine for greater and lesser included offenses does not apply. The first assault occurred behind Tiffany Ribe’s house when defendant threatened Franz and pointed a gun at her. The second assault, which amounted to attempted murder, occurred nearly a block away five to ten minutes later when defendant pointed the gun at Franz and fired at her at least twice, though one was a misfire. Each assault was a separate and distinct “voluntary bodily movement” or act. *See* Utah Code Ann. § 76-1-601(1) (1999); *accord State v. Mane*, 783 P.2d 61, 63 (Utah App. 1989). “As a result, section 76-1-402(1) permits separate charging and convictions for each of these separate acts, although they were committed within the same criminal episode.” *Mane*, 783 P.2d at 63.

Defendant asserts that “[a]ccording to the prosecutor, the only fact that distinguished the charges was the fact that Casey allegedly pulled the trigger, thereby transforming the single act of pointing the gun at Tresa into two separate crimes of aggravated assault and attempted murder.” Aplt. Brf. at 30. That characterization of the State’s argument at trial

mischaracterizes the State's theory and the evidence it presented to prove the two crimes. The State did not allege that defendant committed aggravated assault when he pointed the gun at Franz in the instant before he fired the gun at her as they drove down the road. Rather, the State consistently alleged, and proved at trial, that defendant committed the first aggravated assault when he pointed the gun at Franz earlier when they were parked in the driveway behind the house. R. 232: 119 (opening statement of prosecutor); R. 233: 536 (prosecutor's closing argument). As stated, the aggravated assault and the much later attempted homicide were separate acts.

Moreover, the acts charged and proved were separated by time, place, and intervening circumstances. As defendant concedes, the two acts occurred five to ten minutes apart. Aplt. Brf. at 26. The threat occurred in the driveway behind the house, while the attempt to shoot Franz occurred about four houses away as defendant drove down the road. A number of intervening circumstances also separated the two acts. After Franz pleaded with defendant not to shoot her in the presence of her son and after Tiffany intervened, defendant put the gun down. R. 232: 147-49, 195, 249-55, 264-71, 276, 279-80, 287. Franz then ran into the house where she apparently remained for several minutes. R. 232: 149, 195, 254-55, 271, 288; R. 233: 314-15, 345, 474. There was an apparent pause in the argument once she returned to the car. R. 232: 150-51, 255. When the argument again ensued and Tiffany's uncle emerged from the basement to ask them to leave, defendant apologized and left. *See* R. 232: 200, 206, 255-56, 274, 289; R. 233: 347-48, 506. In other words, defendant's threat to Franz was completed in the driveway and constituted a separate act.

Defendant's argument might have had merit if the act while driving the car, i.e., pulling the trigger and firing the gun, could not have been committed "without also necessarily committing the other" act, i.e., threatening Franz in the driveway. *See State v. Young*, 780 P.2d 1233, 1239 (Utah 1989). Such would be the case had the State charged defendant with an aggravated assault for his actions while driving the car down the road. That, however, was not the case. Clearly, defendant cannot be convicted for the second assault which occurred down the road in the instant before he pulled the trigger.⁸ That assault would clearly merge with the attempted murder conviction.

On the other hand, the assault that took place five to ten minutes earlier in the driveway was not incidental to the attempted murder, but was "separate and independent therefrom." *State v. Finlayson*, 2000 UT 10, at ¶19, 994 P.2d 1243. As discussed above, it was separated by time, place, and intervening circumstances. Indeed, as stated, the aggravated assault behind Tiffany's house was fully completed before Franz ever returned to the car. In short, defendant still could have attempted the murder without having committed the aggravated assault in the driveway. *See Young*, 780 P.2d at 1239; *cf. State v. Jolivet*, 712 P.2d 843, 844 (Utah 1986) (upholding conviction and sentencing for aggravated kidnapping and sexual assault because they were separate acts).

⁸At trial, the prosecutor never argued that this conduct constituted the aggravated assault and the jury could not have been confused on that issue. The prosecutor clearly stated that defendant was being charged with aggravated assault "for pointing a gun at Tresa [Franz's] head while they were parked behind Tiffany Ribe's house." R. 232: 119. He reiterated that fact in closing. R. 233: 536. Significantly, defendant did not object to the instructions as given. *See R. 233: 449-52, 529-32.*

Defendant cites to *State v. Kimbel*, 620 P.2d 515 (Utah 1980), and *State v. Crosby*, 927 P.2d 638 (Utah 1996), in support of his claim that the two separate assaults were one. Those cases, however, involved thefts committed under a continuing scheme. The *Kimbel* test has not been extended beyond theft or embezzlement cases. See *State v. Patience*, 944 P.2d 381, 390 (Utah App. 1997). In *Patience*, this Court refused to apply the *Kimbel* test to forgery cases even if the forgeries were committed in the course of a continuous transaction, holding instead that a defendant could be convicted for each document forged. *Id.* Indeed, while the Supreme Court in *Crosby* required the theft charges to be consolidated, it did not preclude the separate conviction of the lone forgery charge, even though it appears the objective was the same, i.e., to misappropriate company funds. See *Crosby*, 927 P.2d at 645-46. In short, the *Kimbel* test is in effect a narrow exception to section 76-1-402 which allows the prosecution of “all separate offenses arising out of a single criminal episode.” Utah Code Ann. § 76-1-402(1). Defendant has not demonstrated that that test applies here.

In summary, defendant’s convictions for aggravated assault and attempted murder were not based on a single act, but on two separate acts. Accordingly, defendant was appropriately convicted of both offenses under section 76-1-402.⁹


⁹Even if the two convictions did merge, the appropriate remedy would not be to vacate the attempted murder conviction as suggested by defendant. Aplt. Brf. at 33. The law is well-established that where, as here, “the greater crime is proven, then the lesser crime merges into it.” *State v. Shaffer*, 725 P.2d 1301, 1313 (Utah 1986) (citing Utah Code Ann. § 76-1-402(3)). Moreover, because defendant requested that the aggravated assault conviction be set aside in his motion to vacate, he waived any claim on appeal that the attempted murder conviction should instead be vacated. R. 143A.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted this 9th day of March, 2001.

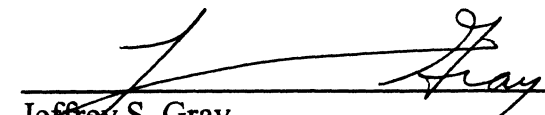
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 2001, I served two copies of the attached Brief of Appellee upon the defendant/appellant, MICHAEL SHAWN CASEY, by causing them to be [] hand delivered [☒] mailed, via first class mail, postage prepaid, to his/her counsel of record, as follows:

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