

2006

Utah v. Diaz-Arevalo : Brief of Appellee

Utah Court of Appeals

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Case No. 20060802-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Juan Carlos Diaz-Arevalo,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for murder, a first degree felony, possession or use of a firearm by a restricted person, a second degree felony, and domestic violence in the presence of a child, a third degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Robin W. Reese presiding

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Oral Argument Requested

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IN THE
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State of Utah,
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Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for murder with the use of a dangerous weapon, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (West 2004), possession or use of a firearm by a restricted person, a second degree felony, in violation of Utah Code Ann. § 76-10-503(2)(a) (West 2004), and domestic violence in the presence of a child, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

STATEMENT OF THE ISSUE

Did the trial court abuse its discretion in denying defendant's motion to withdraw his guilty pleas?

Standard of Review. “Challenges to a denial of a motion to withdraw a guilty plea invite multiple standards of review.” *State v. Beckstead*, 2006 UT 42, ¶ 7, 140 P.3d 1288. The appellate court “will overturn a sentencing court’s ruling on a motion to withdraw a guilty plea only when [it is] convinced that the [trial] court has abused its discretion.” *Id.* The Court “will disturb findings of fact made in connection with a ruling on a motion to withdraw a guilty plea only if they are clearly erroneous.” *Id.* However, “the ultimate question of whether the [sentencing] court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” *Id.* at ¶ 8 (quoting *State v. Hittle*, 2004 UT 46, ¶ 4, 94 P.3d 268).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

§ 76-5-203. Murder

* * *

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;
(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;

(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or

immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

* * *

RULE 11. PLEAS

* * *

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

* * *

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

Following the fatal shooting of Lindsey Rae Fawson, defendant was charged with (1) murder using a dangerous weapon, a first degree felony; (2) possession or use of a firearm by a restricted person, a second degree felony; (3) domestic violence in the presence of a child, a third degree felony; and (4) possession of methamphetamine, a third degree felony. R. 44-47. Following a preliminary hearing, defendant was bound over to stand trial on all four counts. R. 52-54, 129. Pursuant to a plea agreement, defendant pled guilty to the first three charges and the State dismissed the methamphetamine charge. R. 66-76. The State also agreed

to dismiss the charges in case numbers 051906480 FS and 05190711 FS.¹ R. 66. Also in exchange for defendant's plea, the United States Attorney's Office agreed "not to charge or seek indictment against [defendant] for the crimes of Aggravated Illegal Reentry and Felon in Possession of a Firearm and/or Ammunition." R. 70, 74. The U.S. Attorney's agreement provided, however, that "should the defendant . . . seek to withdraw his plea or challenge his plea at a later date, the government would no longer be bound by [the] agreement and would seek indictment on said charges." R. 74.

Three days before sentencing, defendant filed a motion to withdraw his guilty plea. R. 85-86. Prior to sentencing, the trial court heard argument from the parties and denied defendant's motion. R. 106. The court thereafter sentenced defendant to consecutive prison terms of six years to life for murder, one-to-fifteen years for possession of a firearm by a restricted person, and zero-to-five years for domestic violence in the presence of a child. R. 106-07. Defendant timely appealed to the Utah Supreme Court. R. 110-11. The supreme court transferred the appeal to this Court pursuant to rule 42(a), Utah Rules of Appellate Procedure. R. 127-28.

¹ The record does not identify the charges in these two cases, but the Court may take judicial notice of the court docket in each case. In Case No. 051906480 FS, defendant was charged with possession of a controlled substance with intent to distribute, a first degree felony, possession of drug paraphernalia, a class A misdemeanor, and two motor vehicle violations. In Case No. 05190711 FS, defendant was charged with damaging jail property, a third degree felony.

B. Statement of Facts²

Defendant, known as “Blue,” began dating Lindsey Rae Fawson in 2005, and the two lived with each other for a couple of months. R. 129: 8. But they frequently fought and the two separated by mid-May. *See* R. 129: 10-11. While they were together, defendant had given Lindsey a car. R. 129: 15. After they separated, the car became a source of contention. Defendant wanted it back, but Lindsey refused. *See* R. 129: 15, 48. Defendant threatened to take the car from Lindsey, but she would remove the fuse so that it would not start. R. 129: 15.

On the morning of May 16, 2005, Lindsey and her sister Stacey rode with Stacey’s boyfriend to a dollar store in Draper, and then to a parking lot in Murray, where the three “got high” smoking crystal methamphetamine. R. 129: 11-13, 34, 55. After smoking the crystal meth, the three drove to Midvale and picked up Lindsey’s son Elijah from school. R. 129: 13. After making a second stop at a dollar store, Stacey’s boyfriend dropped off Stacey, Lindsey, and Elijah at a friend’s home in Draper where they had stayed the night before. R. 129: 13. The three left in Lindsey’s car, drove to McDonald’s, and then dropped Elijah off at his grandmother’s work in Midvale. R. 129: 14-15. Lindsey and Stacey then drove to Stacey’s storage unit, removed some clothes from the trunk, and placed them in Stacey’s storage unit. R. 129: 16.

² The facts are taken from the preliminary hearing.

After dropping off the clothes, Lindsey and Stacey drove to a friend's house in Murray, where the friend "fronted Lindsey a . . . teener of [crystal meth]." *See* R. 129: 17-18, 33-34, 122. Defendant, who happened to be in the neighborhood, saw Lindsey's car at the friend's house. R. 129: 99. As the sisters visited their friend, defendant grabbed his sawed-off shotgun, loaded it, and crawled inside the trunk of Lindsey's car. R. 129: 99. Lindsey and Stacey returned to the car soon after, drove to their father's house, where they picked up Lindsey's three-year-old son Isaiah, and then returned to their friend's house in Draper. R. 129: 19-20.

After arriving at the house in Draper, Lindsey opened the trunk to get a pair of pants. R. 129: 20-21, 36-37. When she did so, defendant jumped out of the trunk with the shotgun and pointed it at Lindsey. R. 129: 21. When Lindsey fled at the sight of the shotgun, defendant got into the driver's seat of the car exclaiming that he wanted his "f—ing car." R. 129: 21-22, 37-38. When defendant started the engine, Stacey, who was still sitting in the front passenger seat, removed the keys from the ignition and they dropped to the floor. R. 129: 22-23, 36, 40. At that point, Lindsey returned, confronted defendant, and managed to get back into the driver's seat. R. 129: 23, 39. Defendant repeatedly yelled that he wanted his "f—ing car" and told Lindsey that he was "going to f—ing kill" her. R. 129: 23, 38. As he did so, he was pointing the shotgun at Lindsey. R. 129: 24.

As Lindsey's three-year-old boy cried in the backseat, Stacey exited the car, went around to the driver's side, and tried to convince Lindsey to let defendant have the car. R. 129: 24-25, 39, 40, 49-50. Lindsey refused. R. 129: 25. Defendant tried to pull Lindsey out of the car, but she pushed him away. R. 129: 50-51. Then, holding the gun with two hands, defendant pointed it at Lindsey and said he was "going to f---ing kill' her," if she did not give him back his car. R. 129: 24, 49, 52-53. Stacey, whose head was turned, then heard Lindsey cry, "No, Blue" and the sound of a shotgun blast. R. 129: 25. Lindsey died almost immediately from the single close range shotgun blast to her face. R. 129: 55-58.

Upon seeing her sister shot in the face, Stacey cried, "Oh, my God, Blue! What did you do? What have you done?" R. 129: 41. Defendant turned to Lindsey in a "scared" look and then shot at Stacey as she ran to the back of the car, assumed a fetal position on the ground, and pleaded, "No." R. 129: 25-26, 42-43. After defendant missed, Stacey got up and ran towards a man who had emerged from his backyard to find out what had happened. *See* R. 129: 26, 43-44. As Stacey ran toward the man, defendant shot at them both, but missed, and the two immediately went to the ground. R. 129: 26, 44. Defendant then ran away. R. 129: 26. Stacey was transported to Alta View Hospital, but released after medical personnel concluded she was uninjured. R. 129: 27-28. She then went to the Draper City police station to submit a report. R. 129: 27.

Police apprehended defendant the following morning. A search dog alerted on defendant in a thicket of bushes next to a shed located near the murder scene. R. 129: 71-73, 79. When the dog attacked defendant, his shotgun fired, but after the dog bit defendant, he surrendered. R. 129: 71-74, 79, 85-86. A search of defendant at the Draper City police station uncovered an unexpended shotgun shell and crystal meth. R. 129: 93-95, 108.

Defendant was transported to the West Valley City police station for questioning. R. 129: 95. After defendant waived his *Miranda* rights, police interviewed him about the shooting. R. 129: 95-97. Defendant complained that Lindsey had stolen his personal belongings, his meth, and his car. R. 129: 97-98. He admitted that when he saw the car parked at a friend's house in Murray, he grabbed his sawed-off shotgun, loaded it with three shells, and crawled inside the trunk. R. 129: 99-102. He said he brought the shotgun because he had previously tried to get his things back from Lindsey, but was unsuccessful. R. 129: 101-03. He said that when Lindsey opened the trunk, he jumped out with his sawed-off shotgun and demanded that she return his car and other things. R. 129: 100-02. He said that when he got into the car and tried to start it, Lindsey began hitting him and trying to get him out of the car. R. 129: 102-03. Defendant yelled at Stacey that he wanted his things back. R. 129: 012-03. He admitted that he held the shotgun in both hands and pointed it at Lindsey before the gun fired. R. 129: 103-04.

SUMMARY OF ARGUMENT

In his motion to withdraw his guilty plea, defendant did not allege a rule 11 or due process violation. His motion was instead based on his post-plea conclusion that he would not risk additional prison time on federal charges if he went to trial in this case and faced the charges by the U.S Attorney's Office. Accordingly, defendant cannot prevail on his rule 11 and due process claims on appeal unless he shows plain error. He has not done so.

In 2003, section 77-13-6 was amended, providing that a guilty plea may be withdrawn only upon leave of court and a showing that the plea was not knowingly and voluntarily made. This amendment effectively abolished the strict compliance rule, which arose from the statute's previous provision that a guilty plea could be withdrawn upon a showing of "good cause." Defendant has not demonstrated that his plea was not knowingly and voluntarily made.

Although the trial court did not advise defendant of the mens rea element of depraved indifference murder in its recitation of the elements (that defendant knowingly engaged in conduct which created a grave risk of death to another), the record demonstrates that he understood the nature and elements of the offense. Defendant agreed with the State's factual basis, which provided that "defendant used a sawed-off shotgun and aimed it at the victim, Lindsey Fawson, pulled the trigger, and it caused her death." R. 130: 8-9. Defendant therefore admitted to facts

that not only supported a knowing mental state, but an intentional mental state as well. Based on this factual basis, the court could infer that defendant understood that the State would be required to prove, at least, that he knew his conduct created a grave risk of death to another. Given the factual basis for the plea, defendant's letter acknowledging that he knew he was wrong in pulling out the gun during the altercation, and defendant's admission to police that he aimed the gun at Lindsey, it cannot be said that the trial court clearly erred in finding that defendant understood the nature and elements of the offense. Certainly, any error was not obvious.

Even assuming *arguendo* there was obvious error, defendant has not established harm, i.e., but for the court's omission, he would not have pled guilty. An examination of defendant's motion to withdraw and his argument on that motion reveals that he pled guilty based on his trial counsel's advice that he would avoid additional prison time arising from the federal charges. He only moved to withdraw when a different attorney told him that he would not serve more prison time on the federal charges. In short, the plea was all about avoiding additional consequences, not the elements of the offense, which the evidence overwhelmingly established. Even had the issue been preserved, rule 11 requires the same prejudice showing as plain error.

ARGUMENT

THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA

Defendant pled guilty to criminal homicide under the depraved indifference alternative of section 76-5-203 of the Utah Code. Under that section, a person commits depraved indifference murder if, “acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another.” Utah Code Ann. § 76-5-203(2)(c) (West 2004). In reciting the elements, the plea affidavit tracked this language almost verbatim, R. 67, as did the trial court at the plea hearing when it informed defendant of the elements of the offense, R. 130: 6-7. In addition, defendant agreed with the State’s factual basis for the plea, i.e., “defendant used a sawed-off shotgun and aimed it at the victim, Lindsey Fawson, pulled the trigger, and it caused her death.” R. 130: 8-9.

Because the statute does not identify the mens rea for depraved indifference murder, neither the plea affidavit nor the plea colloquy referred to a mens rea element when reciting the elements of the offense. But in *State v. Fontana*, the Utah Supreme Court “superimposed” a mens rea requirement for depraved indifference murder, holding that “the defendant [must have] acted with knowledge that his conduct created a grave risk of death to another.” 680 P.2d 1042, 1046-47 (Utah

1984); accord *State v. Standiford*, 769 P.2d 254, 263-64 (Utah 1988).³ Defendant argues that because this element was not identified in either the plea affidavit or the plea colloquy, the trial court clearly erred in finding that defendant “underst[ood] the nature and elements of the offense to which the plea [was] entered,” as required under rule 11 of the Utah Rules of Criminal Procedure. Aplt. Brf. at 13-17, 23-27. Defendant also argues that the court’s failure to expressly identify the mens rea element for depraved indifference murder violated his due process right to understand the true nature of the charge against him. Aplt. Brf. at 28-35. Defendant’s claims fail.

A. Defendant must show plain error because he did not preserve his rule 11 and due process claims below.

In his motion to withdraw, defendant did not claim that he did not understand the elements and nature of the crime, in violation of rule 11 and due process. Instead, he made vague complaints about his trial counsel’s representation:

When a guilty plea is entered, the defendant must be “fully informed of his rights prior to pleading guilty” in order for the plea to be knowing and voluntary.” [Defendant] believes that his interests have not been adequately represented by counsel throughout the proceedings. He does not feel as though counsel has substantially represented his position. Hence, Defendant believes his plea was not

³ In its last session, the Utah Legislature amended the depraved indifference murder alternative to require that “the actor *knowingly* engage[] in conduct which creates a grave risk of death to another.” 2007 Utah Laws ch. 340. The amendment went into effect less than 30 days ago. *Id.* (effective April 30, 2007).

“knowingly” made. [Defendant] has further expressed his concerns in a letter filed with the court.

R. 85-86 (internal citations omitted).

Defendant shed light on these vague complaints when he spoke to the motion prior to sentencing. He stated that he moved to withdraw his plea because he wanted to “clear [him]self up,” that “what happened was an accident.” R. 132: 5.⁴ He said that he took the plea deal because his trial counsel led him to believe that if he did not take the deal, he would do more time in prison on the federal charges (which the U.S. Attorney agreed not to pursue under the deal). R. 132: 6; see also R. 132: 11 (“I thought it was the best deal for me because of what my lawyer told me; that if I didn’t plead to the deal, that I was gonna do more time than I was supposed to do”). He explained, however, that since his plea, an attorney at the prison told him that he would not do more time on the federal charges. R. 132: 6-7. He explained that after seeking this advice, he “change[d] [his] mind” about the deal. R. 132: 11. The court denied defendant’s motion and proceeded to sentencing. R. 132: 15.

⁴ The letter referenced in defendant’s motion also claimed that the shooting was an accident—that while the gun was pointed down, Lindsey kicked it up and “the impact of her kicks caused the gun to go off.” R. 78. However, the letter was originally filed in anticipation of sentencing and requested concurrent sentences. R. 80. In the letter, defendant acknowledged that he pulled the gun out and that he was holding it during the altercation. R. 78-79. He also stated in the letter that he “know[s] he did wrong by having the gun” during the altercation. R. 79.

The foregoing did not put the trial court on notice of the alleged rule 11 and due process violations. Indeed, defendant never suggested that he was entitled to withdraw his plea based on an alleged failure to strictly comply with rule 11 or because the plea colloquy or plea affidavit omitted, in reciting the elements, the mens rea element for depraved indifference murder. Thus, contrary to defendant's argument on appeal, Aplt. Brf. at 23-25, 34, defendant's rule 11 and due process claims were not preserved below. Because defendant did not preserve his claims below, he must show plain error on appeal. *See State v. Dean*, 2004 UT 63, ¶¶ 13-14, 95 P.3d 276 (holding that because defendant did not adequately raise his rule 11 claim in his motion to withdraw, he must show plain error).

B. Defendant has not shown that the trial court plainly erred in denying his motion to withdraw his guilty plea.

"To demonstrate plain error, a defendant must establish that '(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.'" *Id.* at ¶ 15 (quoting *State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346). Defendant has failed to meet this burden.

1. The trial court did not clearly err in finding that defendant understood the nature and elements of depraved indifference murder.

The Utah Supreme Court has described the trial court's rule 11 duty "as a duty of 'strict' compliance." *State v. Visser*, 2000 UT 88, ¶ 11, 22 P.3d 1242 (citations

omitted). The rule of strict compliance arose from the “good cause” requirement of Utah Code Ann. § 77-13-6(2)(a) (1999), which provided that “[a] plea of guilty or no contest may be withdrawn only upon *good cause shown* and with leave of the court.” (emphasis added). *See State v. Brocksmith*, 888 P.2d 703, 704 n.1 (Utah App. 1994) (recognizing that failure to strictly comply with rule 11 establishes good cause for withdrawal of plea as a matter of law). However, the statute was amended in 2003 and now provides that “[a] plea of guilty or no contest may be withdrawn only upon leave of the court and *a showing that it was not knowingly and voluntarily made.*” Utah Code Ann. § 77-13-6 (West 2004) (emphasis added). The purpose of rule 11 remains the same: “to ensure that defendants know of their rights and thereby understand the basic consequences of their decision to plead guilty.” *Visser*, 2000 UT 88, ¶ 11. However, strict compliance is no longer the rule. The question is simply whether the plea was “knowingly and voluntarily made.” *Id.* A review of the record here reveals that it was.

Defendant was advised and acknowledged an understanding that the State was required to prove beyond a reasonable doubt that defendant “engaged in conduct which created a grave risk of death to another person.” R. 130: 6-7, 9; *see also* R. 395: 67-69. As noted, defendant was not expressly advised of the “superimposed” element that he *knew* his conduct created a grave risk of death. This, however, is not the end of the inquiry. In making its finding, the trial court

was not limited to its recitation of the elements. The court was also permitted to “tak[e] into account other record factors in making its findings.” *Visser*, 2000 UT 88, ¶ 12. In this case, the Court need look no further than the factual basis for the plea as support for the trial court’s finding that defendant had a “conceptual understanding” of the nature and elements of the offense. *See State v. Corwell*, 2005 UT 28, ¶ 18, 114 P.3d 569.

As a factual basis for the depraved indifference plea, the prosecutor stated that “defendant used a sawed-off shotgun and *aimed it at the victim*, Lindsey Fawson, *pulled the trigger*, and it caused her death.” R. 130: 8 (emphases added). When the court asked defendant if he agreed with the proffered facts, he responded in the affirmative. *See* R. 130: 8-9.⁵ Defendant thus admitted to facts that not only supported a knowing mental state, but an intentional mental state as well. Based on this factual basis, the trial court could infer that the defendant understood that the State would be required to prove, at least, that he knew his conduct created a grave risk of death to Lindsey. *See State v. Gardner*, 844 P.2d 293, 295 (Utah 1992) (pre-*Gibbons* case relying in part on defendant’s agreement with prosecutor’s factual

⁵ The court asked defendant, “[D]o you disagree with any parts of the proffer, or are you willing to accept that as an accurate description of the facts in this case? Mr Diaz?” R. 130: 8-9. Apparently responding to the first part of the question—whether he disagreed with the proffer—defendant answered, “No, your Honor.” R. 130: 9. To clarify, the court asked, “You would agree with that?” R. 130: 9. Defendant responded, “Yes.” R. 130: 9.

basis for the plea in upholding trial court's finding that defendant knowingly engaged in conduct that created a grave risk of death).

Defendant argues that the prosecutor's proffer that he aimed the gun at Lindsey and pulled the trigger "does not inescapably imply volition or conscious choice." Aplt. Brf. at 16. To the contrary, to "aim" means to "direct or point (as a weapon or missile) at or so as to hit an object" or "the pointing of a weapon (as a gun) at an object intended to be hit (to take ~ at the target)," or simply, "to have as a purpose." *Webster's Third New Int'l Dictionary*, 45 (1993). Therefore, the facts proffered by the State not only implied knowledge that defendant's conduct created a grave risk of death, but also implied the greater mental state that he intended to cause Ms. Fawson's death. Having agreed with the prosecutor's facts supporting an intentional murder, defendant cannot plausibly claim that he did not understand that the State was required to prove that he knew his conduct created a grave risk of death to another. This is especially true where defendant also admitted to police that he was holding the gun with both hands and pointing it at Lindsey when it fired. R. 129: 103-04.

Moreover, while in his sentencing letter defendant claimed the shooting was an accident, he acknowledged that he pulled out the shotgun, that he "kn[e]w [he] did wrong by having the gun," and that he was therefore "taking full responsibility for [his] actions." R. 79. This letter is evidence that counsel made him aware of the

mens rea element of depraved indifference murder and that his conduct was sufficient to support a conviction for depraved indifference murder. It follows that for this reason, defendant pled guilty to the depraved indifference alternative rather than the other two alternatives, which both require intentional conduct. *See* Utah Code Ann. § 76-5-203(2)(a)-(b) (West 2004).

2. Any error was not obvious.

Because defendant agreed with the State's proffer that he aimed the shotgun at Lindsey and pulled the trigger, it cannot be said that the trial court obviously erred in failing to expressly advise him that the State would be required to prove that he knew he was creating a grave risk of death to another. One cannot aim a loaded weapon at another and pull the trigger without knowing that such conduct creates a grave risk of death.

3. Defendant has not demonstrated that any error was prejudicial.

Even assuming arguendo that the trial court committed obvious error, defendant's claim fails because he has not demonstrated that any such error was harmful. "Under the plain error doctrine, a defendant must not only demonstrate that the error was obvious, but also that it was harmful or 'of such a magnitude that there is a reasonable likelihood of a more favorable outcome for defendant.'" *Dean*, 2004 UT 63, ¶ 22 (quoting *State v. Evans*, 2001 UT 22, ¶ 16, 20 P.3d 888). In *Dean*, the Utah Supreme Court explained that "[t]his harmfulness test is equivalent to the

prejudice test applied in assessing claims of ineffective assistance of counsel.” *Id.* Defendant must therefore “show a ‘reasonable probability that, but for counsel’s errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.’” *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (brackets supplied in *Dean*) (other quotations and citations omitted). In other words, defendant must “show that any error by the court actually ‘affected the outcome of the plea process.’” *Id.* at ¶ 23. Defendant has failed to meet this burden.

Defendant points only to his motion to withdraw as evidence of prejudice, observing that he “sought to withdraw his plea precisely because he intended no harm; the shooting was an accident.” *Aplt. Brf.* at 27, 35; *R.* 132: 7. But as discussed above, depraved indifference murder does not require a showing of intent to harm. It simply requires a showing that defendant knew his conduct created a grave risk of death to another. *See Fontana*, 680 P.2d at 1046-47; *Standiford*, 769 P.2d at 263-64. The motion, therefore, does nothing to suggest that defendant would not have pled guilty had he been expressly advised that depraved indifference requires a showing that defendant knew his conduct created a grave risk of death.

The record, in fact, demonstrates that a reading of the mens rea element by the court would *not* have influenced defendant’s decision to plead guilty. Defendant’s argument on his motion to withdraw the guilty plea reveals that his decision to plead guilty was not the product of any misunderstanding of the law,

but of defendant's desire to avoid additional prison time on federal charges, which the U.S. Attorney's Office agreed not to pursue if he pled guilty. Only when an attorney at the prison advised him that he would not face more prison time on a conviction for the federal charges (a position contrary to his trial counsel's advice), did defendant seek to withdraw his guilty plea. R. 132: 6-7. Defendant explained:

[A]t the time that I pled to this deal, at the time I thought that it was the best thing for me. But like I told you, I was seeking legal advice and that's how—that's what made me change my mind.

* * *

I thought it was the best deal for me because of what my lawyer told me; that if I didn't plead to the deal, that I was gonna do more time than I was supposed to do.

R. 132: 11.

Defendant's decision to plead guilty was undoubtedly also influenced by the strength of the State's case against him. It was overwhelming. The preliminary hearing testimony established that defendant crawled into the trunk of Lindsey's car with a loaded, sawed-off shotgun while Lindsey was visiting a friend in Murray. *See* R. 129: 21, 99, 101-02. After Lindsey left the Murray residence, drove to another friend's house in Draper, and opened the trunk, defendant jumped out of the trunk and pointed his shotgun at Lindsey, demanding the return of his car. R. 129: 19-21, 36-37. Lindsey fled, but returned after defendant got into the car. R. 129: 22-23, 29, 37-39. After Lindsey managed to pull defendant out of the car and get back in,

defendant held the gun with both hands, aimed it at Lindsey, and said he was “going to f—ing kill her” if she did not give him back his car, but she refused. R. 129: 24, 49, 52-53. Lindsey’s sister, who had turned her head, then heard Lindsey cry, “No, Blue,” and immediately thereafter heard a shotgun blast. R. 129: 25. Lindsey died almost immediately from the shotgun blast to her face. R. 129: 55-58. Defendant then fired at Lindsey’s sister twice, but fortunately missed. R. 129: 25-26, 43-44. The evidence, therefore, overwhelmingly established not simply depraved indifference murder, but intentional murder. *See* Utah Code Ann. § 76-5-203(2)(a) (West 2004).

In sum, defendant pled guilty to depraved indifference murder to avoid additional incarceration in federal prison *and* to appease his claim that he did not intend to kill Lindsey. Given these aims and the overwhelming evidence supporting the murder charge, nothing in the record suggests that defendant would not have pled guilty had the court expressly stated that depraved indifference murder required a showing that defendant knew his conduct created a grave risk of death to another. Indeed, defendant as much as admitted that he knew he created a grave risk of death to Lindsey in his sentencing letter and when he confessed to police that he aimed the shotgun at Lindsey before it fired.

C. Harmless error analysis also applies to preserved claims of rule 11 violations.

Even assuming *arguendo* that defendant had preserved his rule 11 claim below and that a rule 11 violation by itself constituted error, he would still be required to show that the error was harmful, i.e., “absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” *Dean*, 2004 UT 63, ¶ 15 (quotations and citation omitted).

In 2005, a harmless error provision was added to rule 11, providing that “[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.” Utah R. Crim. P. 11(k). Contrary to defendant’s argument, subsection (k) was not added to “clarif[y] what constitutes strict compliance with rule 11(e).” *Aplt. Brf.* at 20-22. The rule tracks the language of rule 30, which also provides that “[a]ny . . . variance which does not affect the substantial rights of a party shall be disregarded.” Utah R. Crim. P. 30(a). Utah courts have universally interpreted rule 30 in the same way the Utah Supreme Court in *Dean* interpreted the harmless error rule for plain error: the error is harmless if it “is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings.” *State v. Devey*, 2006 UT App 219, ¶ 19, 138 P.3d 90

(Utah App. 2006) (quoting *State v. Evans*, 2001 UT 22, ¶ 20, 20 P.3d 888). Rule 11(k) should likewise be so interpreted.⁶

This interpretation of rule 11 is consistent with that given by several federal circuit courts of appeal to its federal counterpart. *See, e.g., United States v. Gonzalez*, 420 F.3d 111, 131-33 (2nd Cir. 2005) (rule 11 error will not permit a defendant to withdraw his plea if it “can be deemed harmless because it would not have affected the defendant’s decision to plead guilty”); *United States v. Suarez*, 155 F.3d 521, 524 (5th Cir. 1998) (a defendant may withdraw his plea if a rule 11 variance affects a “substantial right[],” in that “the defendant’s knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty”) (citation omitted); *United States v. Richardson*, 121 F.3d 1051, 1059 (7th Cir. 1997) (“[t]he harmlessness inquiry focuses on ‘whether the defendant’s knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty’”) (citation omitted.).

The same reason for requiring a defendant to prove prejudice in ineffective-assistance and plain error challenges to a plea applies to preserved challenges to a plea. A defendant has suffered no infringement of his rights when the plea court

⁶ In *State v. Mora*, 2003 UT App 117, ¶ 22, 69 P.3d 838, this Court held that it will presume harm when a trial court fails to inform a defendant of his constitutional rights under rule 11, but that decision was effectively overruled by *Dean*.

omits or misstates them during the plea process if the omission or misstatement did not cause the defendant to plead guilty when he otherwise would not have. Presuming prejudice does nothing to prevent infringing defendants' rights; it merely grants a windfall to defendants suffering from nothing more than "buyer's remorse." Moreover, plea errors are not the kind of errors that warrant presuming prejudice. In the context of constitutional errors, the United States Supreme Court has presumed prejudice when the "consequences [of the error] are necessarily unquantifiable and indeterminate" *United States v. Gonzales-Lopez*, 126 S. Ct. 2557, 2564 (2006) (citation omitted).

In this case, the effect of the alleged plea errors on defendant's decision to waive his trial rights and plead guilty can be quantified: none. As detailed in point B.3 above, defendant's decision to plead guilty had nothing to do with the plea errors that he alleges. The record does not support concluding that any of the alleged errors caused defendant to plead guilty when he otherwise would not have.

CONCLUSION

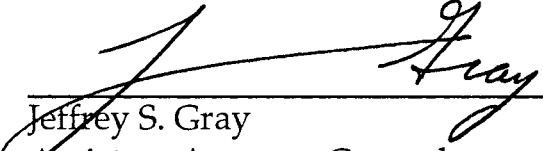
For the foregoing reasons, the State respectfully requests the Court to affirm the trial court's denial of defendant's motion to withdraw his guilty pleas.

ORAL ARGUMENT

The State requests oral argument. “[O]ral argument is a tool for assisting the appellate court in its decision making process,” *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and “the only opportunity for a dialogue between the litigant and the bench.” *Moles v. Regents of Univ. of Cal.*, 654 P.2d 740, 743 (Cal. 1982). In the case at bar, the decisional process would “be significantly aided by oral argument.” Utah R. App. P. 29(a)(3).

Respectfully submitted May 21, 2007.

Mark L. Shurtleff
Utah Attorney General

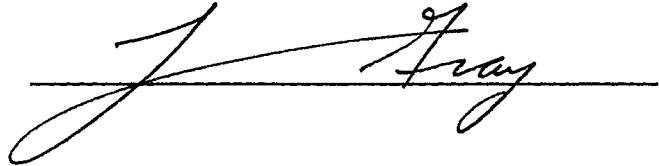


Jeffrey S. Gray
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2007, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Juan Carlos Diaz-Arevalo, by causing them to be delivered by ^{mail} ~~hand~~ to his counsel of record as follows:

John Pace
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "John Pace", is written over a horizontal line.

5/21/2007 11:19 PM

ADDENDUM A

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DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT

STATE OF UTAH,	:	MOTION TO WITHDRAW
	:	GUILTY PLEA
Plaintiff,	:	
	:	
vs.	:	
	:	
JUAN CARLOS DIAZ-AREVALO,	:	Case No. 051903158FS
	:	
Defendant.	:	JUDGE ROBIN REESE

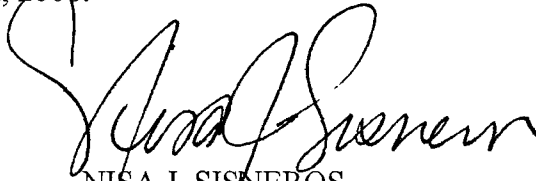
Counsel, NISA J. SISNEROS, on the request of Defendant Juan Diaz-Arevalo, hereby moves this Court to allow Defendant to withdraw of his plea of guilty pursuant to §77-13-6, Utah Code Annotated.

Mr. Diaz-Arevalo was charged with Criminal Homicide, a First Degree Felony; Possession of a Firearm by Restricted Person, a Second Degree Felony; Commission of Domestic Violence in the Presence of a Child, a Third Degree Felony; and Unlawful Possession of a Controlled Substance, a Third Degree Felony. On May 15, 2006, Mr. Diaz-Arevalo pled guilty to Criminal Homicide; Possession of a Firearm by a Restricted Person; and Commission of Domestic Violence in the Presence of a Child. At that time two pending cases were also dismissed in their entirety. When a guilty plea is entered, the defendant must be "fully informed of his rights prior to

pleading guilty" in order for the plea to be knowing and voluntary. State v. Hittle, 47 P.3d 101 (Utah Ct. App. 2002). Mr. Diaz-Arevalo believes that his interest^s have not been adequately represented by counsel throughout the proceedings. He does not feel as though counsel has substantially represented his position. Hence, Defendant believes his plea was not "knowingly" made. Mr. Diaz-Arevalo has further expressed his concerns in a letter filed with the court. He would also like the opportunity to address his issues at the hearing in this matter.

Therefore, Mr. Diaz-Arevalo moves this court to withdraw his guilty plea in this case.

DATED this 8th day of August, 2006.


NISA J. SISNEROS
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to Patricia Parkinson, the Office of the District Attorney, 111 East Broadway, Salt Lake City, Utah 84111 this 8 day of August, 2006.

