

APPENDIX

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Appendix A

**UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

No. 10-3164

**United States of America, Plaintiff - Appellee,
v.
Delroy Fischer, Defendant - Appellant.**

641 F.3d 1006; 2011 U.S. App. LEXIS 12239

**May 10, 2011, Submitted
June 17, 2011, Filed**

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the
District of Nebraska.

*United States v. Fischer, 2009 U.S. Dist. LEXIS
116302 (D. Neb., Dec. 14, 2009)*

COUNSEL: For United States of America, Plaintiff -
Appellee: Sandra Denton, Assistant U.S. Attorney,
U.S. ATTORNEY'S OFFICE, District of Nebraska,
Omaha, NE.

Delroy Fischer, Defendant - Appellant, Pro se,
Kearney, NE.

For Delroy Fischer, Defendant - Appellant: Carlos A.
Monzon, Lincoln, NE.

JUDGES: Before MURPHY, BEAM, and COLLOTON, Circuit Judges. COLLOTON, Circuit Judge, concurring.

OPINION BY: MURPHY

OPINION

[*1007] MURPHY, Circuit Judge.

Delroy Fischer was charged with possession of a firearm after having been convicted of a misdemeanor crime of domestic violence in violation of *18 U.S.C. § 922(g)(9)*. Fischer pled guilty but reserved the right to appeal a decision of the district court¹ to deny his motion to dismiss the indictment. We affirm.

¹ The Honorable Joseph F. Bataillon, Chief Judge, United States District Court for the District of Nebraska.

In January 2006, Fischer was charged in Nebraska state court with third degree domestic assault under *Neb. Rev. Stat. § 28-323*. The arrest warrant and supporting affidavit alleged that Fischer had yelled at, struck, and bit the nose of his former girlfriend, who was also the mother of his children. Fischer pled no **[**2]** contest to an amended charge of attempted assault in the third degree under *Neb. Rev. Stat. § 28-310*. At his state court plea hearing, Fischer stipulated that the court would take judicial notice of the factual allegations in the arrest warrant and affidavit, and the court accepted those allegations as the "factual basis" of Fischer's plea.

More than two years later, Fischer's girlfriend reported to the police a domestic disturbance involving

Fischer. By Fischer's own admission he had gotten angry and fired a shotgun. He was charged with possession of a firearm after conviction for a misdemeanor crime of domestic violence under *18 U.S.C. § 922(g)(9)*.

Fischer moved to dismiss the indictment, arguing that his Nebraska conviction was not a "misdemeanor crime of domestic violence" as defined in *18 U.S.C. § 921(a)(33)(A)* because it did not have "as an element, the use or attempted use of physical force." Relying on the arrest warrant and supporting affidavit which described Fischer's violent conduct, the district court concluded that Fischer's prior conviction did fit the definition and denied his motion to dismiss.

Fischer moved to dismiss the indictment a second time after obtaining a nunc *****3** pro tunc order from the Nebraska court stating that:

1. [Fischer] pled to, and was convicted of, violating *Neb. Rev. Stat. § 28-310*, which does not require a finding of assault or attempted assault on an "intimate partner";
2. That the conviction in this case did not involve any factual findings that any domestic assault or attempted domestic assault occurred;
3. That insofar as the record in this case may involve allegations of domestic assault or attempted domestic assault, any and all allegations are hereby stricken from the record.

The district court found that the state court order did not change its analysis and again denied Fischer's motion.

In response to a later motion in limine filed by the government, Fischer also raised a due process objection, contending that the state court had not adequately advised him that his conviction could serve as the predicate offense for a federal firearms violation. The district court rejected this argument, concluding that the state court had no duty to give such advice.

Fischer subsequently entered a conditional guilty plea, reserving the right to appeal the district court's decision to deny **[*1008]** his second motion to dismiss the indictment. Because **[**4]** Fischer's conditional plea reserved an appeal only of the denial of his second motion to dismiss, Fischer waived his due process claim, which was raised months after that ruling. See *United States v. Limley*, 510 F.3d 825, 827 (8th Cir. 2007) (conditional plea must "identify precisely" the pretrial issues preserved for appellate review).² The only question properly before this court is whether Fischer's state court conviction of attempted assault in the third degree qualifies as a predicate "misdemeanor crime of domestic violence."

² Though we need not reach Fischer's due process claim, it is nonetheless unpersuasive. See *United States v. Amerson*, 599 F.3d 854, 855 (8th Cir. 2010) (per curiam) ("Courts do not have a general duty to inform defendants of specific, detailed consequences of their pleas.").

We review de novo the district court's denial of Fischer's motion to dismiss the indictment. *Amerson*, 599 F.3d at 855. Under 18 U.S.C. § 922(g)(9) anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" is prohibited from possessing a firearm. A "misdemeanor crime of domestic violence" is defined as a "misdemeanor under Federal, State, or Tribal law" that [**5] has, "as an element,"

the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. § 921(a)(33)(A). Fischer does not dispute that he had a domestic relationship with the victim in the incident which gave rise to his state court conviction. It is not required that such a relationship be an element of the predicate offense, so long as it is proven beyond a reasonable doubt. *United States v. Hayes*, 555 U.S. 415, 129 S. Ct. 1079, 1087, 172 L. Ed. 2d 816 (2009). The only question here is whether the crime for which Fischer was convicted "has, as an element, the use or attempted use of physical force" or "the threatened use of a deadly weapon."

The statute under which Fischer was convicted provides:

(1) A person commits the offense of assault in the third degree if he:

(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

(b) Threatens another *****6** in a menacing manner.

Neb. Rev. Stat. § 28-310(1). This court ordinarily looks "only to the predicate offense rather than to the defendant's underlying acts to determine whether the required elements are present," *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999), but when, as here, a criminal statute reaches a "broad range of conduct," an expanded inquiry is warranted, *Amerson*, 599 F.3d at 855. That inquiry "may include the written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented." *Id.* (quoting *United States v. Howell*, 531 F.3d 621, 623 (8th Cir. 2008)).

Fischer argues that the district court erred in concluding that his conviction was an adequate predicate offense because it is impossible to tell whether he was convicted under § 28-310(1)(a) or (b). That argument is belied by the record of his state court conviction. The state court explicitly stated that it accepted the allegations contained in the arrest warrant and supporting ***1009** affidavit as the "factual basis" of Fischer's plea. Those documents indicate that Fischer physically assaulted the victim,

striking her face and biting her nose. Fischer **[**7]** did not object to those facts, and he stipulated to the court's taking judicial notice of them. As there is little question that the biting of a victim's nose is an intentional act causing bodily harm and not merely a threatening act, it is clear that Fischer was convicted under § 28-310(1)(a). See *Smith*, 171 F.3d at 620-21 (an expanded inquiry is appropriate to determine under which portion of a statute a defendant was convicted).

Fischer further contends that even if § 28-310(1)(a) applies, it does not contain the requisite force element because a hypothetical defendant could cause bodily injury to another person without using physical force. In this respect, the present case is indistinguishable from *Amerson*. The statute at issue there, *Neb. Rev. Stat. § 28-323(1)(a)*, contains nearly the same language as § 28-310(1)(a). Both statutes prohibit conduct that "causes bodily injury" to another person and therefore encompass a broad range of conduct. 599 F.3d at 855. Like Fischer, the defendant in *Amerson* did not object to a state court's recitation of the facts establishing his use of physical force at his guilty plea hearing. *Id.* In doing so, he "assented to factual findings that satisfy **[**8]** the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *Id.* Because *Amerson* controls here, the district court did not err in concluding that Fischer's previous conviction qualified as a misdemeanor crime of domestic violence.

The district court correctly determined that the state court's nunc pro tunc order did not change this analysis. That order only clarified that Fischer's previous conviction under *Neb. Rev. Stat. § 28-310* did

not contain an element requiring that Fischer's victim was an "intimate partner" or that his assault was "domestic" in nature. Such an element is not required for characterization as misdemeanor crime of domestic violence. See *Hayes*, 129 S. Ct. at 1087.

Because Fischer's state court conviction satisfied the force requirement and there was no question that he had a domestic relationship with the victim, that conviction served as a predicate misdemeanor crime of domestic violence for criminal liability under 18 U.S.C. § 922(g)(9). We conclude that the district court did not err in denying Fischer's motion to dismiss, and affirm its judgment.

CONCUR BY: COLLOTON

CONCUR

COLLOTON, Circuit Judge, concurring.

I see no material distinction between this case and *United States v. Amerson*, 599 F.3d 854 (8th Cir. 2010) **[**9]** (per curiam), and I therefore agree that this panel must affirm Delroy Fischer's conviction based on circuit precedent. *Amerson* is probably wrong, however, and Fischer is likely entitled to dismissal of the indictment under the governing statutes.

To prosecute Fischer for a violation of 18 U.S.C. § 922(g)(9), the government must show that he was previously convicted of a "misdemeanor crime of domestic violence." This crime is defined as an offense that, among other characteristics, "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii).

The difficulty with *Amerson* is the court's holding that "the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)" was satisfied by "factual findings" in the defendant's prior state court proceedings that the defendant used force against his girlfriend. 599 F.3d at 855. The dispositive question under § 921(a)(33)(A)(ii) is not whether the defendant *actually used force* in committing a misdemeanor offense, but whether the offense of conviction "*has, as [*1010] an element, the use or attempted use of physical force.*" The federal court should use the judicial record of the defendant's **[**10]** prior conviction in state court only to determine *which offense* under state law was the offense of conviction. See *United States v. Howell*, 531 F.3d 621, 622-23 (8th Cir. 2008) ("If the predicate statute reaches a broad range of conduct, this court may expand the inquiry to review the charging papers and jury instructions, but *only* to determine which part of the statute the defendant violated."). Once the offense of conviction is identified, the court's analysis must focus on the elements of that offense. See *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004) (explaining that the comparable language of 18 U.S.C. § 16(a) "requires us to look to the elements . . . of the offense of conviction, rather than to the particular facts relating to petitioner's crime").

In this case, Fischer was convicted of attempted assault in the third degree under *Neb. Rev. Stat. §§ 28-201 and 28-310(1)(a)*. The judicial record shows that he was convicted for intentionally and knowingly attempting to "cause[] bodily injury to another person." *Neb. Rev. Stat. § 28-310(1)(a)*; R. Doc. 26, at 3-14. The offense of attempting to cause bodily injury to another

person does not appear to have, *as an element*, the use or attempted **[**11]** use of physical force, because the State can establish that the offense was committed without proving a use or attempted use of force. At oral argument, counsel gave the example of a defendant intentionally signaling to the driver of a vehicle that a roadway is clear while knowing that the driver is likely to cause an accident and suffer injury by proceeding. Judicial decisions concerning comparable statutes provide similar analysis. See *United States v. Villegas-Hernandez*, 468 F.3d 874, 880-81 (5th Cir. 2006) ("[I]t seems an individual could be convicted of intentional assault in the third degree for injury caused not by physical force, but by guile, deception, or even deliberate omission.") (internal quotation omitted); *United States v. Perez-Vargas*, 414 F.3d 1282, 1286-87 (10th Cir. 2005) (citing examples of causing bodily injury by intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) ("[H]uman experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital **[**12]** medicine from a sick patient."); cf. *United States v. Vinton*, 631 F.3d 476, 485-86 (8th Cir. 2011) (holding that a Missouri assault statute has as an element the use or attempted use of physical force, where a person commits the crime if he "[a]ttempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument") (quoting *Mo. Rev. Stat. § 565.060.1(2)*) (emphasis added); *United States v. Malloy*, 614 F.3d 852, 859-60 (8th Cir. 2010) (holding that an Iowa

statute requiring that the defendant "inflict[] bodily injury" while resisting or obstructing a peace officer has, as an element, the use, attempted use, or threatened use of physical force against the person of another, because it was "difficult, if not impossible, to imagine how the charged conduct could be carried out without actually using physical force against the person of another") (internal quotation omitted); *United States v. Smith*, 171 F.3d 617, 620-21 & n.2 (8th Cir. 1999) (holding that defendant pleaded guilty to "an offense with an element of physical force within the meaning of 18 U.S.C. § 921(a)(33)(A)(ii)," where the offense of conviction required proof of an "act **[**13]** which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another," Iowa Code § 708.1(1) **[*1011]** (emphasis added), and "such physical contact, by necessity, requires physical force to complete").

Unlike the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii), under which an offense can qualify as a "violent felony" if it presents a serious potential risk of physical injury to another person in the "ordinary case," *James v. United States*, 550 U.S. 192, 208, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007), the rule of § 921(a)(33)(A)(ii) is that a qualifying offense must have the use or attempted use of physical force "as an element," which by definition means that proof of that fact is required in every case. *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (en banc); but cf. *United States v. Salean*, 583 F.3d 1059, 1060 (8th Cir. 2009). For better or worse, the decision of Congress to define the scope of § 922(g)(9) by reference to elements rather than underlying facts means that

some persons may actually use force while committing a misdemeanor offense against a spouse or intimate partner, yet remain outside that provision's criminal prohibition. ****14]** The courts, of course, must apply the statutes as written, and it appears to me that Fischer is not a prohibited person under the governing definitions.

Appendix B

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA**

8:08CR471

UNITED STATES OF AMERICA, Plaintiff,

v.

DELROY FISCHER, Defendant.

2009 U.S. Dist. LEXIS 116302

December 14, 2009, Decided

December 14, 2009, Filed

SUBSEQUENT HISTORY: Motion granted by *United States v. Fischer, 2010 U.S. Dist. LEXIS 47778 (D. Neb., May 14, 2010)*

Affirmed by *United States v. Fischer, 2011 U.S. App. LEXIS 12239 (8th Cir. Neb., June 17, 2011)*

PRIOR HISTORY: *United States v. Fischer, 2009 U.S. Dist. LEXIS 42110 (D. Neb., May 14, 2009)*

COUNSEL: [*1] For Delroy Fischer, Defendant (1): Carlos A. Monzon, MONZON LAW FIRM, Lincoln, NE.

For USA, Plaintiff: Sandra L. Denton, U.S. ATTORNEY - OMAHA, Omaha, NE.

JUDGES: Joseph F. Bataillon, Chief District Judge.

OPINION BY: Joseph F. Bataillon

OPINION

MEMORANDUM AND ORDER

This matter is before the court on the defendant's objections, Filing No. 70, to the report and recommendation ("R&R") of the magistrate judge, Filing Nos. 65 and 69, denying the defendant's motion to dismiss, Filing No. 61. The defendant is charged in Count I of the Superseding Indictment with being a felon in possession of a firearm, having previously committed "a misdemeanor crime of domestic violence, to wit: Attempted Assault in the Third Degree, a violation of § 28-310 and § 28-323 of the Revised Statutes of Nebraska," in violation of 18 U.S.C. § 922(g)(9) and 924(a)(2), and in Count II with forfeiture of the weapon referred to in Count I in violation of 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c). Filing No. 29, Superseding Indictment. This Court previously ruled on a similar motion to dismiss, Filing No. 23, denied defendant's motion to dismiss, and adopted the report and recommendation of the magistrate judge, Filing Nos. 37 and 40. Filing No. [*2] 42 Thereafter, defendant obtained new counsel. Defendant has now filed this second motion to dismiss basically on the identical grounds as the first motion to dismiss.

Under 28 U.S.C. § 636(b)(1), the court makes a de novo determination of those portions of the report and recommendation to which the parties object. *United States v. Lothridge*, 324 F.3d 599, 600-01 (8th Cir. 2003). The court has conducted a de novo review of the record, including the transcript of the hearing which includes the findings and conclusions of the magistrate

judge, the new exhibits and the relevant law. The court agrees with the magistrate judge's conclusions and incorporates the facts set forth in this Court's previous memorandum and order, Filing No. 42. The court overrules the defendant's objections to the R&R, denies defendant's motion to dismiss, and adopts the report and recommendation of the magistrate judge in its entirety.

Specifically, defendant now objects to the findings of the magistrate judge that the motion to dismiss be denied. Defendant contends that the government cannot prove the prior misdemeanor conviction is a "misdemeanor crime of domestic violence", and therefore, it cannot be used as **[*3]** a predicate conviction for the possession of a firearm allegation pursuant to *18 U.S.C. § § 922 (g)(9) and 924(a)(2)*.¹

[T]he term "misdemeanor crime of domestic violence" means an offense that --

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A). Defendant again makes the same argument as in his previous motion to dismiss, namely, that *Neb. Rev. Stat. § 28-310* allows a person to be guilty under two theories: (1) causing bodily injury, or (2) threatening the victim in a menacing manner. The defendant, however, now has in his possession a copy of an order nunc pro tunc, decided after this Court's memorandum and order, Filing No. 42, wherein the state district court judge filed an order indicating that:

1. The defendant in this case pled [*4] to, and was convicted of, violating *Neb. Rev. Stat. § 28-310*, which does not require a finding of assault or attempted assault on an "intimate partner";

2. That the conviction in this case did not involve any factual findings that any domestic assault or attempted domestic assault occurred;

3. That insofar as the record in this case may involve allegations of domestic assault or attempted domestic assault, any and all allegations are hereby stricken from the record.

Filing No. 66, Exhibit 101, Court Order Nunc Pro Tunc, dated July 27, 2009.

¹ Defendant specifically states that this motion has nothing to do with the existence or non-existence of a domestic relationship. The only

argument presented by the defendant is whether the government can prove beyond a reasonable doubt the prior conviction constitutes a crime of domestic violence under *18 U.S.C. § 921(a)(33)(A)*. Filing No. 71, defendant's brief, at 3.

The Court previously addressed the issue of whether there existed a sufficient factual basis for finding domestic violence and determined that the affidavit used as the factual basis for the plea was sufficient. Defense counsel specifically stipulated that the court could take notice of [*5] the arrest warrant affidavit as the factual basis for the plea. Filing No. 66, Ex. 102, 9:6-13. The affidavit clearly states that there is evidence that defendant struck the victim twice and bit her on the nose.

The magistrate heard the second motion to dismiss and again recommended that this Court deny it. Filing Nos. 65 and 69. The Court agrees with the magistrate judge. The Court may look at the written plea agreement, the plea colloquy, or factual findings made by the trial judge to which a defendant has agreed. *United States v. Howell*, 531 F.3d 621, 623 (8th Cir. 2008). In this particular case defense counsel referred to the affidavit as the factual basis and the court relied on the affidavit as the factual basis. Defendant did not request any limitations on the acceptance of those facts. The factual basis clearly included acts of violence. The court also agrees with Magistrate Judge Thalken that the newly offered Buffalo County Court Order does not change the analysis used by this Court to review the predicate conviction. *See United States v. Hayes*, ___ U.S. ___, 129 S.Ct. 1079, 1087-88, 172 L. Ed.

2d 816 (2009) (excluding generic use of force statutes which don't designate domestic relationships [*6] as an element would defeat the purpose of *18 U.S.C. §§ 922(g)(9)*).

Accordingly, the court finds that for purposes of the motion to dismiss, this offense contained an element of physical force as required under *18 U.S.C. § 921(a)(33)(A)(ii)*. Accordingly, the court will deny defendant's motion to dismiss, and the burden will be on the government to prove its case beyond a reasonable doubt at trial.

THEREFORE, IT IS ORDERED:

1. Defendant's motion to dismiss, Filing No. 61, is denied.
2. Defendant's objections, Filing No. 70, are overruled.
3. The report and recommendation of the magistrate judge, Filing Nos. 65 and 69, is adopted in its entirety.

DATED this 14th day of December, 2009.

BY THE COURT:

/s/ Joseph F. Bataillon

Chief District Judge

19a

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No: 10-3164

United States of America
Appellee

v.

Delroy Fischer
Appellant

Appeal from U.S. District Court for the District of
Nebraska - Omaha
(8:08-cr-00471-JFB-1)

ORDER

The petition for rehearing en banc is denied.
The petition for panel rehearing is also denied.

Judges Bye, Colloton, Gruender and Benton
would grant the petition for rehearing en banc.

August 29, 2011

Order Entered at the Direct of the Court:
Clerk, U.S. Court of Appeals, Eight Circuit

/s/Michael E. Gans

Appendix D

1. **18 U.S.C. § 921(a)(33)** provides:

(33) (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--

(i) is a misdemeanor under Federal, State, or Tribal [tribal] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B) (i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this

chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. **18 U.S.C. § 922(g)(9)** provides:

(g) It shall be unlawful for any person—

* * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. **Neb. Rev. Stat. § 28.101** provides:

(1) A person shall be guilty of an attempt to commit a crime if he or she:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

(4) Criminal attempt is:

(a) A Class II felony when the crime attempted is a Class I, IA, IB, IC, or ID felony;

(b) A Class III felony when the crime attempted is a Class II felony;

(c) A Class IIIA felony when the crime attempted is sexual assault in the second degree under section 28-320, a violation of subdivision (2)(b) of section 28-416, incest under section 28-703, child abuse under subsection (5) of section 28-707, or assault by a confined person with a deadly or dangerous weapon under section 28-932;

(d) A Class IV felony when the crime attempted is a Class III felony not listed in subdivision (4)(c) of this section;

(e) A Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony;

(f) A Class II misdemeanor when the crime attempted is a Class I misdemeanor; and

(g) A Class III misdemeanor when the crime attempted is a Class II misdemeanor.

4. **Neb. Rev. Stat. § 28-310(1)** provides:

(1) A person commits the offense of assault in the third degree if he:

- (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
- (b) Threatens another in a menacing manner.