Can Solicitation Become Attempt?

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That in effect was the question presented in the recent N.C. Supreme Court decision in State v. Melton (Dec. 7, 2018), where the court vacated an attempted murder conviction in a murder-for-hire case. Before getting into the case, let's review the elements of solicitation and attempt.

Solicitation is the counseling, enticing, or inducing of another to commit a crime with intent that the person solicited will complete the crime. *State v. Davis*, 110 N.C. App. 272 (1993). The crime is complete with the solicitation; it matters not whether the person asked agrees to commit the crime or whether the crime is actually committed. *State v. Keen,* 25 N.C. App. 567 (1975). Attempt, on the other hand, requires the specific intent to commit the crime and the performance of an overt act that goes beyond mere preparation but fails to accomplish the intended crime. *State v. Miller*, 344 N.C. 658 (1996). Regarding the requirement of an overt act, the *Miller* court noted:

> In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. . . . It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. *Id.* at 668.

State v. Clemmons, 100 N.C. App. 286 (1990), indicates a defendant may be charged and convicted of both attempt and solicitation of the same crime where the evidence supports each offense. And that's exactly what happened in *Melton*—the defendant was convicted of both attempted first-degree murder and solicitation to commit first-degree murder. The defendant contested the sufficiency of the overt act to support the attempt charge and moved to dismiss the attempted murder charge at the close of the State's evidence, which was denied by the trial judge. Back in June of this year, a unanimous panel of the Court of Appeals affirmed that ruling in an unpublished decision, finding the evidence sufficient to support attempt (here). The N.C. Supreme Court granted discretionary review and reversed in a divided opinion earlier this month.

Facts. The defendant was involved in ongoing child custody litigation in Transylvania County with his ex-wife and sought out a "hitman" to ensure he would receive sole custody of his daughter and that there be "no chance of any more court cases." That would-be hitman was in fact an undercover SBI agent. The defendant met the undercover agent and provided his wife's name, photo, address, phone number, and a description of her car, as well as information about his daughter's school and the school drop-off schedule. The defendant and undercover agreed that the killing would occur the following Thursday. At the conclusion of their meeting, the defendant paid the agent $10,000.00 cash. Police promptly arrested the defendant and charged him with attempted first-degree murder and solicitation of first-degree murder. He was convicted at trial and received consecutive active sentences.

Court of Appeals. The Court of Appeals found no error. According to the court, the steps taken by the defendant in hiring the "hitman" constituted substantial evidence of overt acts sufficient for the attempted murder charge to go to the jury. The would-be killer was provided all the necessary details to accomplish the killing by the defendant, and the

defendant paid the fee. The court observed:

> At that point, Melton had taken every step necessary to complete this contract killing. All that remained was for the hitman (had he not been an undercover agent) to kill Melton's ex-wife. . . . In short, Melton took a key 'step in a direct movement towards the commission of the offense.'" *State v. Melton*, ___ N.C. App. ___, 801 S.E.2d 392, 2017 WL 2644445, at *2 (unpublished) (internal citations omitted).

The court recognized that "mere solicitation is insufficient to constitute attempt," but found that the acts here of meeting the hitman, hiring him and providing him the details needed to effectuate the killing went beyond mere preparation and constituted sufficient overt acts for attempt. *Id*. at *3. In support, the court pointed to case law from several other jurisdictions imposing attempt liability on similar facts.

The Supreme Court. Not so fast, said a majority of the Supreme Court. The majority first distinguished the cases from other jurisdictions cited by the Court of Appeals, finding them inapplicable. The various jurisdictions outside of North Carolina have adopted various statutory schemes in defining attempt liability, all of which are broader than the North Carolina definition. North Carolina's defines an overt act from the common law, which "requires a defendant to commit an act that 'in the ordinary *and likely* course of things *would result in the commission [of the intended crime]*." Slip op. at 16 (internal citations omitted) (emphasis in original). Because the rules regarding attempt liability in those other jurisdictions "derive[ ] from a statutory framework materially different than our own," the Court of Appeals erred in relying on them.

As to the application of North Carolina's attempt definition here, the Supreme Court found that while there was plenty of evidence to support the solicitation conviction (indeed, the court noted that the defendant's conduct went well beyond what is "minimally necessary" to support a solicitation conviction), the evidence failed to demonstrate overt acts necessary to sustain the attempted murder conviction. The Court noted the difference between acts in preparation of the attempt and an actual attempt itself:

> The preparations consist[ ] in devising or arranging the means or measures necessary for the commission of the offense. [T]he attempt is the direct movement towards the commission after the preparations are made. Slip op. at 17 (internal citations omitted).

The defendant here undertook "ample and horrifying acts of solicitation. . . . Nonetheless, evidence of these preparatory acts, calculating as they are, [do] not amount to proof of overt acts amounting to attempt under our law." *Id*. at 19. The defendant unquestionably planned the killing, but "had not begun to execute the criminal design he helped concoct." *Id*. Further, pointing to the language in *State v. Miller* quoted at the beginning of the post, the court observed "the act of killing and making an initial payment to the hired killer, would not, without additional conduct, inexorably result in the commission of the offense 'in the ordinary and likely course of things.'" *Id*. at 19-20. In support, the court noted there was no proof that the defendant had a weapon or specific plan beyond hiring someone to commit the crime, the victim's location was unknown to the parties at the time of the planning, and the "hitman" was an undercover officer and not an actual assassin. Something more was required to constitute a "direct movement" towards the commission of the crime that would "likely" lead towards its commission. The acts of the defendant in hiring the "hitman" and planning some details of the killing were "all part of the solicitation, not the execution, of the crime solicited," and the motion to dismiss the attempt charge should have been granted. *Id*. at 24. The conviction for attempted murder was therefore vacated.

The dissent. Three Justices dissented and would have affirmed the Court of Appeals. According to the dissent, all of the acts taken by the defendant—finding a "hitman", providing the "hitman" the information needed to carry out the killing, providing the money, and agreeing to a specific date for the killing—were sufficient overt acts. It was for the jury to decide whether the defendant's acts constituted attempted murder, and the defendant should not benefit from the

lack of specifics in the plan about exactly when, where, and how the killing would take place.

Double Jeopardy. *Melton* also presented a double jeopardy issue—whether it violated double jeopardy for the defendant to be punished for both attempt and solicitation based on the same conduct. The Court of Appeals found no double jeopardy violation, applying the different-elements test of *Blockburger v. U.S.,* 284 U.S. 299 (1932). Attempt and solicitation have different elements and thus do not implicate double jeopardy concerns, according to the Court of Appeals. The Supreme Court did not consider the issue since it ruled for the defendant on sufficiency of the attempted murder conviction. The court therefore did not consider the viability of the holding the *Clemmons* case, mentioned above, that a person may be convicted of both solicitation and attempt of the same crime on the right facts.

Takeaways. Here at least, the solicitation here did not rise to the level of an attempt too. Based on the court's reasoning, though, the result might be different where the defendant also provided a weapon or poison, or where the (attempted) crime was further facilitated by the defendant beyond the act of solicitation. *Melton* indicates that acts to accomplish a solicitation of the underlying crime, standing alone, do not easily suffice to constitute "overt acts" to also support an attempt prosecution (even when those acts of solicitation are "ample and horrifying"). The case also reinforces the distinction between mere preparatory acts and those that that are "apparently adapted to produce the result intended." *Id*. at 18. Where the act at issue isn't likely to achieve the completed crime in the "ordinary and likely course of things", it likely doesn't rise to the level of an overt act to sustain an attempt conviction. Where the alleged overt acts show steps towards execution of the crime, as opposed to mere planning or solicitation, the argument for attempt liability is stronger.

Further reading. For any readers interested in more on this issue, below is a non-exhaustive list of some cases I collected in researching this post.

Cases Finding Sufficient Overt Acts for Attempt

State v. Parker, 224 N.C. 524 (1944) – Acts went beyond mere preparation to show attempted receiving stolen property where defendants bought the molasses below market value, went to pick up the property at night, and were in the process of rolling the barrel into their truck when law enforcement intervened.

State v. Price, 280 N.C. 154 (1971) – Acts went beyond mere preparation to show attempted robbery where the defendant entered the store with intent to commit robbery and hit the victim in the head with a blunt object.

State v. Miller, 344 N.C. 658 (1996) – Acts went beyond preparation for attempted armed robbery where defendant snuck up on victim, attempted to fire his gun, and ultimately fired his gun twice (killing the victim), but fled before completing the robbery.

State v. Evans, 228 N.C. App. 454 (2013)—Acts went beyond mere preparation for armed robbery where defendant planned the robbery, waited for messages concerning the location of the victim, entered the victim's apartment, and waved his gun.

Cases Finding Insufficient Overt Acts for Attempt

State v. Parker, 66 N.C. App 355 (1984) – Evidence of overt act to support attempted armed robbery insufficient where the defendant put his gun in his jacket, parked his bicycle down the street, watched the store from the bushes, and was seen near the store entrance.

State v. Evans, 279 N.C. 447 (1971) – Evidence of overt act to support attempted robbery insufficient where defendants entered the store, one defendant stated "This is a hold up", store employees didn't appear to take the statement seriously, and the defendants left the store without attempting to take any property.

State v. Graham, 224 N.C. 347 (1944) – Insufficient evidence of overt act to support attempted manufacture of whiskey where defendant purchased whiskey once and indicated an interest in setting up a whiskey still, even though a whiskey still was later constructed where the defendant indicated.